

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30868
Docket No. MW-30671
95-3-92-3-458

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes)
(
(Union Pacific Railroad Company (former
(Missouri Pacific Railroad Company)

STATEMENT OF CLAIM: "Claim of the System Committee of
the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Marlatt Contracting) equipped with backhoes to clean a derailment site in the Depot Curve (Mile Post 330.07) at Atchison, Kansas on January 12 and 13, 1991 (Carrier's File 910421 MPR).
- (2) The Agreement was violated when the Carrier assigned outside forces (Marlatt Contracting) equipped with two (2) backhoes, one (1) 988 loader, one (1) D3 dozer and one (1) track hoe to clean up a derailment site in the Depot Curve (Mile Post 330.07) at Atchison, Kansas on January 14, 15, 16, 17, 18 and 23, 1991 (Carrier's File 910420).
- (3) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with advance written notice of its intention to contract out said work.
- (4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Machine Operator K.D. Eichelberger shall be allowed compensation for five (5) hours at the time and one-half rate and seven and one-half (7 1/2) hours at the double time rate.
- (5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Machine Operators K.D. Eichelberger, R.Z. Duran, Mike Schmidt, T.D. Clark and Mike Fitzgerald shall be allowed eight (8) hours' pay per day at the straight time rate of pay and any overtime worked by the contractor on January 14, 15, 16, 17, 18 and 23, 1991."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The record on the property reveals that a derailment occurred at the Depot Curve at Atchison, Kansas on the evening of Friday, January 11, 1991. Without prior notice, Carrier assigned outside forces with backhoes to perform machine operating work in connection with the cleanup of the derailment site, and the main line was repaired and back in service that evening; the passing track remained damaged. Over the weekend of January 12 and 13, 1991, contractor employees were seen at the derailment site picking up and loading grain they had purchased as salvage onto trucks. Claimants did not work that weekend. Between January 14-18 and on January 23, 1991, Claimants were employed at the derailment site, and worked along with contractor employees who operated backhoes, a track hoe, loader and dozer to complete the derailment site clean up by installing switch and track panels, spacing and spiking crossties, digging drainage ditches and hauling dirt and other materials.

The Organization argues that the work assigned to contractor employees was scope covered work, they were entitled to notice of the contracting, and that any emergency caused by the derailment was remedied when the main line was placed back in service on January 11, at which time the Carrier should have leased the necessary equipment to be operated by Claimants, who are fully qualified to do so. Carrier argues that the 15 day notice provision has never applied to a derailment situation, which is an emergency requiring immediate action, and that precedent and evidence establishes that it has contracted out similar work in the past, permitting it to do so under Article IV in this instance.

With respect to the allegation that Carrier impermissibly contracted work on January 12 and 13, 1991, the Organization has failed to prove that the contractor worked cleaning up the derailment site on those dates. Since the January 11, 1991 emergency clean up work is not covered by the instant claim,

paragraph 1 of the Claim is denied. With regard to the clean up of the derailment site that occurred between January 14 and 23, 1991, regardless of whether such work can be considered to be an "emergency" as found in Third Division Award 29965, it is clear that the Organization has failed to meet its burden of showing that the machine operator work at issue has been reserved to maintenance of way employees. Under the principles governing disposition of contracting out cases found in precedential decisions by this Board involving identical parties, issues and contract language, there is no independent violation of the Scope rule in cases of "mixed practice" such as this one, and no basis for finding that the Carrier is precluded from contracting out the work in question. See Third Division Awards 30281, 30067, 29825, 29792, 29475.

While there is no dispute that Carrier did not serve notice under Article IV in this case, the Organization has failed to prove that the 15 day advance notice provision has ever been applied to derailment situations where immediacy of action is required and advance notice is not practicable. Even if the clean up work which occurred between January 14 and 23, 1991 is not considered a pure emergency, clearly the speed with which the clean up was accomplished was of the essence, and contractor equipment and operators were only used to supplement the Carrier's work force. It is undisputed that Claimants were fully employed cleaning up the derailment site during the claim period. Under such circumstances, and the fact that the clean up was accomplished within the 15 day notice period, this Board can find no violation of the notice provision of Article IV.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 10th day of May 1995.