

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30976
Docket No. MW-30073
95-3-91-3-490

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company
((Eastern Lines)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier used an outside concern (Houston Waterproofing Company, Inc.) to perform roof repair work at the P&M Building at Houston, Texas beginning on July 18, 1990 (System File MW-90-108/495-60-A SPE).
- (2) The Agreement was further violated when the Carrier entered into the above-described contracting transaction without giving the General Chairman at least fifteen (15) days' advance written notice of its plan to do so as set forth in Article 36.
- (3) As a consequence of the violation referred to in either part (1) and/or Part (2) hereof, B&B Foreman M. E. Hoffman, Assistant B&B Foreman A. W. Law, B&B Carpenters C. A. Bush, D. M. Dempsey and D. D. Dry shall be allowed one hundred four (104) hours each at their respective straight time rates of pay and twenty-six (26) hours each at their respective time and one-half overtime rates of pay."

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.

Claimants M. Hoffman and A. Law have established and hold seniority as Bridge and Building (B&B) Foreman and Assistant Foreman, respectively. Claimants C. Bush, D. Dempsey and D. Dry have established and hold seniority as B&B Carpenters. Claimants were regularly assigned and working as such when this dispute arose.

On June 27, 1990, the roof on the P&M Building at Carrier's Houston, Texas, location sustained damage during the course of a storm. Parts of the roof, including rafters, nailing runners and tin roofing were damaged. Some three weeks later, on July 17, 1990, Carrier sent the Organization Notice No. 9 which stated:

"Please accept this as Carrier's notice pursuant to Article 36 of the BMW Agreement of our intent to contract the following work: Replacing wooden rafters, wooden runners and tin roofing at P&M building. At the present time all B&B forces are working on other projects and are not available to perform this work. It will be necessary to start this work prior to the expiration of fifteen days as this is an emergency situation. An employee was injured by tin roofing when the roof was blown off during a recent storm. On July 13 another employee was injured by roofing blown off by high winds."

The Organization replied to Carrier's Notice asserting:

"Carrier's B&B employees are not engaged in emergency work on other projects, therefore they could be used to perform this routine B&B work. It is our position that if in fact this was emergency work the Carrier B&B employees could have been performing this work since the date of the so called storm. Please be advised that we cannot agree to outside contractors performing this routine MofW work and if the Carrier allows contractors to perform this work claims will be filed. We will not waive the fifteen day time limit as it is our position this is not emergency work."

On the same day it sent the General Chairman the notice informing the Organization of its intent to contract out the work at issue, Carrier signed a contract with Houston Waterproofing Company, Inc. to perform the repairs at Houston. On the next day, July 18, 1990, the outside contractor commenced the work.

On August 10, 1990 the Organization submitted a claim on behalf of Messrs. Hoffman, Law, Bush, Dempsey and Dry alleging violation of the aforementioned Agreement Rules, Article 36 of the Agreement and the December 11, 1981 Letter of Agreement. Carrier denied the claim maintaining that the work which the contractor performed is "not reserved exclusively to the B&B Department," and that contractors had been used for this type of work in the past. Carrier further maintained that Claimants did not suffer "any loss of earnings as a result of the work performed by the contractor."

Article 36 stipulates that Carrier will give the General Chairman "as far in advance as is practicable and in any event not less than fifteen (15) days advance written notice" of any plan to contract out scope covered work. The notice given in this case falls far short of the good faith standard required under Article IV and reiterated in the December 11, 1981 Letter Agreement. Carrier not only neglected to afford the Organization proper notice and discussion, it signed a contract with Houston Waterproofing Co. Inc. on the very day it sent the purported notice. The work at issue commenced the day after notice was served, supporting the conclusion that the subcontracting was a fait accompli and the notice was merely cosmetic.

Carrier defended its actions on grounds that the roof damage and necessary repairs constituted an "emergency situation." The three week lapse of time between the date of the storm and Carrier's simultaneous subcontracting and notice to the Organization on July 17, 1990, undermines Carrier's "emergency" defense. Due to the blatant and unjustified violation of Article 36 and the December 11, 1981 Letter, Parts 1 and 2 of the claim must be sustained. The rationale in Third Division Award 29912 relative to damages in such cases applies with equal force here and leads us to sustain Part 3 of the claim as well.

AWARD

Claim sustained.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of July 1995.