

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31015
Docket No. MW-30741
95-3-92-3-546

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 Employees
(
(Union Pacific Railroad Company (former
(Oklahoma, Kansas & Texas Railroad Company)

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

- (1) The Agreement was violated when the Carrier assigned an outside contractor (Woods Dirt Construction Company) to operate a backhoe tractor to take out and install ties and rail and clean up the right of way between Mile Posts 338 and 341 from March 25 through May 3, 1991 (System File MW-91-36-OKT/910513 OKT).
- (2) The Agreement was further violated from May 6 through May 31, 1991 when the Carrier assigned an outside contractor (Woods Dirt Construction Company) to operate a backhoe tractor to clean up the right of way, insert ties, lay rail in crossings and haul Company material for the system tie gang between Mile Posts 338 and 300 (System File MW-91-39-OKT/910525).
- (3) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with a proper advance written notice of its intention to contract out the work described in Part (1) above and failed to afford a conference as contemplated by said Agreement.
- (4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Machine Operator R. D. Burley shall be allowed two hundred forty (240) hours' pay at his straight time rate and sixty (60) hours' pay at his respective time and one-half rate.

- (5) As a consequence of the violation referred to in Part (2) above, Machine Operator R. D. Burley shall be allowed one hundred sixty (160) hours' pay at his respective straight time rate and forty (40) hours' pay at his respective time and one-half rate."

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.

This case involves two separate claims for money made on behalf of Claimant, an OKT Machine Operator, for the operation of a backhoe tractor to take out and install ties and rail and clean up the right of way between Mile Posts 338 and 341 from March 25 to May 3, 1991, and between Mile Posts 300 and 338 from May 6 to May 31, 1991 performed by Woods Dirt Construction Company. The Carrier failed to serve written notice of its intent to contract out the initial work, but did serve written notice concerning the latter work. Despite claiming its practice of contracting out similar work, the Carrier did not bring forth any evidence of its past practice of doing so. The Organization established that it has historically and traditionally performed work of the type contracted in this case.

The Carrier defended against the initial claim by stating that the number of hours worked by the contractor were less than those claimed, the Claimant was fully employed and would only be entitled to the actual wage loss, if any, at straight time rates. The evidence establishes that this work is Scope-covered, and there was nothing presented concerning a practice of contracting similar work in the past. Thus, the Carrier's failure to serve written notice of its intent to contract out and the resulting contracting violates Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Agreement applicable to this dispute.

With respect to the appropriate remedy, this case represents not only a notice violation, but also a violation of the merits of the subcontracting provision of the Agreement. Unlike the situation in Third Division Award 29033, the Carrier did not introduce any evidence of past practice in support of its decision to contract out the work. As a result of the Carrier's violation, the Organization was deprived of the ability to sit down and discuss alternatives to contracting and a bargaining unit employee was deprived of the ability to perform the work. Under such circumstances, this claim cannot be defeated by the fact that the Claimant was fully employed during the time period in issue. We conclude that this case represents a lost work opportunity requiring compensation at the straight time rate. Third Division Award 29567.

The record on the property establishes that, with regard to paragraph (2) of the claim, the Carrier served written notice of its intent to solicit bids to cover the unloading, pickup and disposal of ties between Mile Posts 300 and 320 on February 4, 1991. By letter dated February 11, 1991, the Organization requested a conference on this notice. On February 27, 1991, the Carrier acknowledged receipt of such request in writing, and asked the Organization to arrange to include this item on the agenda at the next regularly scheduled conference or to contact its designated representatives in the event the Organization desired to discuss the matter prior thereto. No further contact was made by the Organization, and the matter was not conferenced.

The Carrier contends that the burden to assure that a conference is held rests with the Organization, and its failure to follow through in this case precludes it from complaining about the subsequent contracting out. The Organization notes that the notice only related to work to be performed between Mile Posts 300 and 320, when the work actually continued to Mile Post 338. The Board concludes that the February 4, 1991 notice sufficiently identified the work to be performed, its general location, and the reasons for the contracting in compliance with the terms of the December 11, 1981 Letter of Agreement. The notice provisions of Article IV are mandatory, and provide the framework for open communication and an opportunity for the Organization to convince the Carrier that outside forces are not necessary. In this case, the Carrier did not deny or refuse the Organization's request for a conference, but indicated a willingness to meet to discuss the matter at a time prior to the anticipated commencement of the work in question.

The Organization's failure to follow through and assure that a conference was held, foreclosed the opportunity for meeting and discussion, a prerequisite for contesting contracting out under the Agreement, and limits this Board's ability to consider further the merits of the eventual contracting out. Third Division Awards 24888 and 28337. Accordingly, paragraphs (2) and (5) of the claim are denied.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that 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.