

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31149
Docket No. MW-30316
95-3-92-3-42

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Southern Pacific Transportation Company
((Western Lines)

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

(1) The Carrier violated the Agreement when it assigned outside forces (Dobas Construction) to remove soil from Mile Post 89, Stockton Yard, Stockton, California on September 4 through October 9, 1990 (Carrier's File MofW 152-1147 SPW).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman fifteen (15) days' advance written notice of its intent to contract out the work in Part (1) above as required by Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, ' . . . Claimants Frank San Marcos III, Rick D. Robinson and John C. Schindehette be paid for one hundred and four (104) hours of additional compensation at the straight time rate of pay for the class of Traveling Water Service Repairmen, Water Service Mechanic, and that Claimant Jerry E. Thomas be paid for one hundred and four (104) hours at the straight time rate of pay for the class of End Loader/Backhoe Operator because of the Carrier having allowed an outside contractor to do Water Service Subdepartment work of removing contaminated soil.'"

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.

From September 4 through October 9, 1990, the Carrier undertook removal of contaminated soil by milepost 89 within Stockton Yard as a part of the installation of a locomotive diesel oil containment system. To this end, the Carrier engaged the services of an outside firm, using equipment to remove the contaminated soil. The record fails to show proof that more than one employee of the outside contractor was used for this purpose.

The Organization argues that the Carrier failed to give the requisite notice under Article IV of the May 17, 1968 National Agreement and further denied Carrier forces the opportunity to do work which they claim to regularly perform.

Of direct interest here is that three of the four Claimants were directly involved in assisting with the outside contractor's work in the contaminated soil removal, while the fourth Claimant was fully occupied elsewhere.

The Carrier defends its action by asserting the work "was not exclusive" to maintenance of way employees and that the work performed "was not for the benefit of the Carrier but in compliance with state environmental agencies' regulations." Exclusivity is not a test which must be met to determine whether work should be performed by a craft or classification claiming the work rather than by an outside contractor. Nor are these reasons sufficient to negate the requirement that the Carrier comply with Article IV as to advance notice, which it failed to do here.

Thus, the Carrier is in violation of its fundamental obligation to provide advance notice of subcontracting. Where the work involved is at least arguably of a nature which has been and can be performed by the Claimants, a monetary remedy is frequently in order. Here, however, the Board must take note that at least three of the Claimants were actively at work with the employee of the subcontractor. It thus must be concluded that there was no loss of work opportunity on their part, and no way their part of the work could have been deferred to another time. In this instance, additional wage payment would not be appropriate.

The Board sustains Sections (1) and (2) and denies Section (3) of the claim.

AWARD

Claim sustained in accordance with the Findings.

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 September 1995.