

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31280
Docket No. MW-30312
95-3-92-3-46

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 an outside contractor (Marlatt Contracting) to perform Maintenance of Way work involving the removal of planks, crossties and old ballast and replacing same along with asphaltting the highway crossing at Mile Post 608.30 in the vicinity of Densmore, Kansas (Carrier's File 910181 MPR).
- (2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Omaha Division Machine Operator J. L. Hardenberger shall be compensated eight (8) hours' pay at the straight time rate of pay for October 29, 1990."

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 dispute involves the Carrier's contracting out grade crossing renewal work.

With respect to the ability of the Carrier to contract out such work, Awards addressing the Carrier's ability to do so have denied similar claims. See e.g., Third Division Award 29560 and citations therein. The conclusion concerning the Carrier's ability to contract out this kind of work is not palpably erroneous and shall be followed.

With respect to the question of notice, the record initially appears in conflict concerning whether the Carrier gave the Organization advance notice of its intent to contract out this particular project. The Organization contends no notice was given. The Carrier asserts the opposite.

While the record discloses a notice dated October 3, 1990, that notice states the following:

"Specific Work: Renew crossing at Densmore, Kansas,
MP 610.0, on the Lenora Subdivision"

The work here was at MP 608.30 - almost two miles away from the project specified in the October 3, 1990 notice.

We are not satisfied that the notice of October 3, 1990 covers the work in dispute. For this Board to conclude the contrary would amount to speculation that the Carrier intended the notice to cover the work in question. That would not be appropriate particularly given that the Carrier stated in the October 3, 1990 notice that the "Specific Work" was at MP 610.0. The work involved in this dispute was almost two miles away. We can therefore only conclude that the October 3, 1990 notice and any conference held thereon was for a different project. It is not for this Board to assume broader geographical boundaries on the Carrier's notices than the Carrier specifies.

The function of the notice is to allow the Organization the opportunity to convince the Carrier to not contract out the work. Therefore, that opportunity to convince the Carrier to not contract out the work was prevented by the Carrier's failure to give notice. The claim will be sustained, but only for those Claimants in furlough status at the time the contractor performed the work.

From the record, it appears that the matter may be moot in that Claimant may have been employed on the date the contractor performed the work. But, in order to be certain, the matter is remanded to the parties for a joint check of the Carrier's records to determine whether Claimant was on furlough at the time the contractor performed the work in dispute. If so furloughed, Claimant shall be made whole.

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 19th day of January 1996.