

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31385
Docket No. MW-30313
96-3-92-3-38

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
(
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and 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 (Knox Kershaw, Inc.) to perform track maintenance work (track and turnout undercutting) on the main line between LaCrosse and Milwaukee, Wisconsin from August 29 through October 2, 1990 (System File C #36-90/8-00020 CMP).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out said work as required by the Scope Rule.
- (3) As a consequence of the violations in Parts (1) and/or (2) above, Special Machine Operators D. V. Dickman, R. F. Zeisse and Laborers D. F. Kuklinski, M.D. Diaz, D. R. Christian, E. F. Drenckhahn and G. M. Ellingson shall each be compensated, at their respective rate of pay, for an equal proportionate share of the one thousand three hundred fifty-eight (1,358) hours worked by the outside forces during the period of August 29 through October 2, 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 claim concerns the utilization of an outside contractor by the Carrier to perform track and turnout undercutting on the main line between LaCrosse and Milwaukee, Wisconsin. The Organization argues that the Carrier violated the Agreement by failing to provide advance notice to the General Chairman and by assigning to other forces work normally performed by Carrier Maintenance of Way employees.

This claim is similar to the circumstances reviewed in Third Division Award 31386. In that instance, (1) the same parties were involved; (2) a question of timely response by the Carrier to the claim was raised; (3) and the Carrier argued that the Organization had not demonstrated that the work was performed exclusively by Maintenance of Way forces.

As in Award 31386, the Board finds that the Organization's argument concerning an untimely response is not of sufficient weight to prevent review of the claim on its merits and that the Carrier is again erroneously relying on an exclusivity argument in a matter involving the contracting of work.

Here, however, the record shows that the Carrier consistently made use of a contractor's heavy equipment for undercutting, which equipment is more efficient than that in the Carrier's possession, and that the Organization provided no showing that it had objected to this in the past. Some undercutting is, however, performed as appropriate by Carrier forces with Carrier equipment.

Given these circumstances, the Board concludes the Carrier had a right to assume that use of this heavy equipment was known to the Organization and that there was no objection to its use. Because the Organization apparently slept on its rights, there is no basis for a monetary remedy in this instance. What is involved, however, is contracting of a type of work which arguably has been and is performed by Carrier Maintenance of Way forces. Thus, advance notice to the General Chairman is required, particularly now that objection has been raised through this claim. In reaching this conclusion, the Board puts the Carrier on notice as to the necessity of (at minimum) advance notice and discussion, if requested, in future instances involving this work.

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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 29th day of February 1996.