

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 31386  
Docket No. MW-30314  
96-3-92-3-39

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 Employes  
(  
(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 other than Bridge and Building Subdepartment forces [two (2) West Side Salvage employes and Clerk Charlie Ross] to perform Bridge and Building Subdepartment work (dismantle lockers at Savanna, Illinois, transport to and re-assemble the lockers at Nahant, Iowa) on July 30, 1990 (System File C #34-90/8-00021 CMP).
- (2) The Agreement was further violated when Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out the work mentioned in Part (1) as required by Rule 1.
- (3) As a consequence of the violations in Parts (1) and (2) above, Messrs. S. R. Schneider, G. A. Brinkmeier, F. M. Gilmore, J. W. Gelwicks, R. E. Bowers and R. H. Mennenga shall each be compensated, at their respective straight time rate of pay, for an equal proportionate share of the twenty-four (24) hours worked by the outside forces on July 30, 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.

The Transportation Communications International Union, as a possible Third Party at Interest, was notified of the pendency of the dispute, but chose not to become involved.

The Carrier engaged the services of a large truck operated by an outside contractor, together with outside employees, for the purpose of moving and loading metal lockers, transporting them, and then reassembling them at another location.

The Organization protested the operation, claiming that no advance notice of the contracting had been provided to the General Chairman and also stating this was work customarily performed by Maintenance of Way forces.

The Carrier contends that, for this particular move, it did not have large enough trucking equipment. The Carrier also emphasized that it had made similar moves in the past through the use of outside contractors, and thus the Organization could not claim that it performed such work "exclusively." The Carrier also notes that nothing in the Scope Rule covers this particular type of operation.

As to the Claimants, the Carrier contends they were all gainfully employed at the time of the truck movement and thus lost no pay and should not be entitled to receive additional payment.

The Carrier suggests that it has been undertaking this type of contracting for an extended period in the past, without Organization protest, and thus it should not be penalized for the Organization's current position. The difficulty with this argument is that this is not supported by demonstrated factual information which might show that such work has been regularly performed by outside forces without notice to or protest from the Organization.

The Organization contends that Maintenance of Way employees have regularly performed this type of task in the past, and the Carrier concedes that its employees have indeed been involved in such work. The Carrier repeatedly emphasizes that, to support its position, the Organization must demonstrate that it has performed the work "exclusively." The Organization does not claim such exclusivity, but notes that this is not required in reference to the contracting of work to outside employees.

The Board fully concurs that the Carrier is in error in insisting that the Organization must demonstrate exclusivity. A myriad of Awards have concluded that, while exclusivity may be an appropriate test as to division of work among various crafts and classes of the Carrier's employees, it is not an appropriate requirement under the Agreement provisions concerning contracting of work. The sustaining Award herein is, in part, to support this well established principle.

While the argument that affected employees were fully employed at the time may well be appropriate to defeat the awarding of pay, it is by no means applicable at all times. Here, the work was lost to Carrier employees, and a claim for pay is not inappropriate. This is particularly relevant here in view of the Carrier's admitted failure to advise the General Chairman in advance. If such had been done, it is certainly conceivable that either a solution to use Carrier employees may have been devised or the Organization may have been convinced of the necessity of contracting the work.

The Organization contends that the Carrier failed to make a timely response to the September 24, 1990 claim. The Carrier notes that the Organization modified its claim to request pay for two instead of six employees, and that this constitutes a "new" claim, which would have been untimely. The Board does not find that this change sufficiently altered the claim to make it improper for disposition on its merits, nor does the Board find sufficient validity in the Organization's contention of an alleged late response to require allowing the claim as presented solely on this basis.

The required advance notice was not provided. The Organization is not required to prove that it performs this work exclusively. The Carrier has not demonstrated any convincing practice or acceptance thereof as to its "practice" of consistently contracting the work.

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 29th day of February 1996.