

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32648
Docket No. MW-32392
98-3-95-3-246**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Southern Pacific Rail Corporation (Eastern Lines)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces (Herzog Construction Company) to perform Maintenance of Way work (unload, transport, dump and spread fines) in the region of Mile Post 36.3, Rosenberg Tower No. 17 at Rosenberg, Texas from January 10 through 14 and January 17 through February 9, 1994 (System File MW-94-139/BMW 94-339 SPE).**
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman proper advance written notice of its intention to contract out the work in question in accordance with Article 36.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Machine Operators W. L. Cunningham, A. Flores, J. E. Jackson, D. W. Stansberry, D. K. Taylor and F. D. Hope shall each be allowed forty (40) hours' pay at their respective straight time rates and credit for ten (10) days to be used as qualifying days for vacation purposes."**

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 were given due notice of hearing thereon.

The pivotal issue in this dispute is whether Carrier provided advance notice of its plans to contract out the disputed work. Carrier asserts it did. The Organization contends it did not.

Article 36 of the Parties' Agreement, which addresses the contracting of work, reads, in pertinent part, as follows:

"In the event this carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith."

It is undisputed that Carrier notified the General Chairman of the following by letter dated December 3, 1992:

"The Carrier intends to use Herzog Car Toppers, system-wide. The Carrier does not have the specialized equipment required to unload cross

ties and O.T.M. This equipment will be used with both rail and tie gangs where Carrier's operators and equipment are not available.

This specialized equipment cannot be leased without an operator.

While this work is not reserved exclusively for employees represented by the Brotherhood of Maintenance of Way employees and does not require notice, you are being furnished this information so that you will have knowledge of the project. As evidence, attached is a copy of said Award 26434, 3rd Division, NRAB."

The Organization, however, contends that this notice is stale and invalid since the work in dispute involved other work that was not performed until more than one year later.

Given the notice issue thus joined, and the nature of the Organization's contentions concerning the notice, it was incumbent upon the Organization to prove its assertion that the December 3, 1992 did not properly cover the work in dispute.

On its face, it can be seen that the December 3, 1992 letter is quite broad. It contains no geographical or functional limitations on the work contemplated nor does it establish a time frame for ending the use of Herzog Construction Company.

Article 36 of the Parties' Agreement provides the General Chairman with the ability to request a meeting to discuss "... matters relating to the said contracting transaction ..." This is the Organization's opportunity to either object to the proposed contracting plan or obtain clarification about the Carrier's plans. Article 36 provides a third alternative as well. The Organization can also do nothing, which amounts to an acquiescence to the Carrier's plans.

On the record before us, there is no evidence the General Chairman ever requested a meeting to protest or seek clarification of either the overly-broad scope of the letter or its open-ended effectiveness. In addition, there is no evidence of any discussions that predate the work in question to show that it was not within the scope of the December 3, 1992 notice. In the absence of such evidence, we have little choice but to conclude that the disputed work was performed pursuant to the notice and without any prior objection by the Organization.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 20th day of July 1998.