

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32743
Docket No. MW-30302
98-3-92-3-30**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces on:**

'June 3, 4, 5, Omaha Tie Yard Inc. worked on tearing out rail, ties, and other OTM on #5, and #451 track in the Terminal. Two (2) flat bed trucks with cranes were used to load the rail and ties, and one (1) caterpillar loader which was utilized to pull a makeshift sled.

June 6, 11, 12, 13, 14, 15, 18, Marlatt Contracting provided the Carrier with one (1) D-3 dozer, one (1) 580 back hoe, one (1) dump truck, and (1) air compressor. Work involved leveling #5 track located in front of yard office, and runs South approximately 2700 feet. Hauling crossing planks and ballast, installing ties, rail, and crossing planks on the Country Curve located East of Lower Lake Road, and Diagonal Road intersection.

June 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, Railroad Salvage and Restoration provided the Carrier with one (1) 580 back hoe. Work involved picking up scrap rail, ties, and OTM at various locations in the Terminal.

June 19, 20, 21, 22, 25, 26, 27, 28, 29, Marlatt Contracting provided the Carrier with one (1) 580 back hoe for the purpose of lining #5 track, and installing rail. Also installing ties, and ballast on the round house track.'

(Carrier's File 900597 MPR).

- (2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with 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, Foreman T. M. Doolan, Machine Operators K. D. Eichelberger, M. L. Fitzgerald and M. R. Kinney and Trackmen L. Jagodzinski and A. E. Brown shall each be compensated at their respective straight time rates of pay, eight (8) hours per day, plus any overtime worked by the contractor's employees on the claim dates listed above."

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.

Without prior notice to the Organization, the Carrier contracted with outside forces to perform the work on dates as described in the claim.

Initially, the Carrier's argument that some of the work involved was removal of material sold by the Carrier and therefore could be removed by outside forces is rejected. See Third Division Award 29016:

"The Carrier's contention is in the nature of an affirmative defense. If proven by substantive evidence, we would agree that the work would cease to be within the scope of the Agreement once title to the material transfers. However, the evidence necessary to substantiate that critical point is lacking. Significantly, the Carrier never furnished any documentation which would indicate a sale took place, . . . Assertions and arguments, it must be remembered, cannot be given probative evidentiary weight."

The status of this record on this issue is similar. The Organization asserted that the work was Scope covered. The Carrier contended that certain work could not be Scope covered because of a sale of material. As an affirmative defense, the burden was on the Carrier to demonstrate the bona fides of that assertion, i.e., that there was, in fact, a sale. Beyond mere assertion, that was not done.

This contracting dispute is similar to the many this Board has faced with these parties concerning contracting of claimed Scope covered work. Under Article IV, exclusivity is not a necessary element to be demonstrated by the Organization in contracting claims. See e.g., Third Division Award 29792 ("As explained more fully in Award 29007, however, a showing of less than 'exclusive' past performance of the disputed work by the employees is sufficient to establish coverage for purposes of Article IV Notice and conference provisions").

Here, under Article IV, we are satisfied that the described work falls "within the scope of the applicable schedule agreement." That Rule further obligates the Carrier to give prior notice of its intent to contract such work, which was not done in this case. The failure to give notice frustrates the process of discussions contemplated by that Rule. See Third Division Award 31280:

"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."

As a result of the Carrier's failure to give notice, a violation of Rule IV has therefore been demonstrated.

With respect to the remedy, we note that this dispute arose in 1990. "The claim will be sustained, but only for those Claimants in furlough status at the time the contractor performed the work." Award 31280, *supra*. Although the Carrier asserts to this Board that no Claimants are entitled to relief because all were working, on the property in the Carrier's September 11, 1990 denial, there is acknowledgment that Claimant Kinney may have suffered monetary harm. See also, the Carrier's December 19, 1990 denial discussing the fact that not all of the Claimants were fully employed on the dates the contractors performed the work. We are therefore not satisfied that the record is clear on the extent of relief, if any, Claimants may be entitled to. The matter is therefore remanded to the parties to determine whether any of the Claimants were in furlough status on the dates the contractors performed the work in dispute. Those furloughed Claimants, if any, 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 23rd day of September 1998.