

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33645
Docket No. MW-32424
99-3-95-3-312**

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier used outside forces (Schmidt Lein Excavating) to perform roadway equipment operator's work [operated two (2) front end loaders and one (1) crawler backhoe] in connection with the installation of 1100 feet of drainage culvert at approximately Mile Post 67.75 near Topeka, Kansas beginning December 20 through 30, 1993 (System File C-17/940221)**
- (2) The Agreement was further violated when the Carrier failed to notify/confer with the General Chairman as required by Rule 52.**
- (3) As a consequence of the violations referred to in Parts (1) and (2) and/or (2) above, Eastern District Roadway Equipment Operators P.L. Joseph, W.W. Bartels and Kansas Division Group 3 Carpenters R.L. Hull, M.C. Woodyard and J.P. Clark shall each be allowed an equal proportionate share of the total number of man-hours expended by the outside forces performing the above-described work at their respective straight time and overtime rates of pay.”**

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.

Pursuant to complaints filed with the State of Kansas the Carrier was cited by the Kansas State Corporation Board with respect to a drainage problem at its Topeka yard. As a result, the Carrier was forced to remedy the problem or face fines of up to \$5,000 per day. The Carrier then notified the General Chairman of the Organization, by letter dated October 4, 1993, that within 15 days it intended to solicit bids for contract work at the yard, more specifically to furnish and install CSP and catch basins for a sewer line. The Carrier also asserted in its notice that the work in question was "customarily and traditionally" performed by contractors and that it had neither the skilled manpower nor proper equipment to perform the work in question. The Carrier concluded its notice by inviting the General Chairman to contact its Labor Relations Department in the event that the Organization wished to discuss the matter.

The General Chairman accepted the Organization's invitation and a conference was held on October 7, 1993. However, the parties were unable to reach any accommodation and the contractor commenced work on December 20, 1993, completing it approximately ten days later. In so doing it utilized six employees for approximately 432 manhours. The work in question was track and roadbed work including grading, excavation and culvert installation.

The Organization contends that the Carrier violated the parties' Agreement in one or two ways. First, it contends that the Carrier violated its obligation under Rule 52 to give notice to the Organization of the contract and that when it discussed the matter with the Organization at conference it did so in bad faith. Alternatively, it asserts that the contracting out of the work in question, with or without regard to the notice and discussion, also violated Rule 52.

We disagree on both points. First, with regard to the process followed by the Carrier before the contractor commenced the work in question, there can be no question that the Carrier did in fact give notice to the Organization. Thus, the only flaw with respect to

notice could be if it were inadequate. However, the Organization made no such claim. Moreover, we note that the inspection by the State of Kansas was initiated, at least in part, by the Organization. Thus, it certainly had notice in addition to that provided by the Carrier with regard to the problem and the possible remedies. On the second point, whether the Carrier conducted good faith discussions with the Organization on the issue, the only evidence is the General Chairman's letter following the conference in which he set forth the Organization's position and asserted that the Carrier representative "...indicated that (it did) not agree with my contentions and explained that while the Carrier would have liked to reach an understanding concerning said contracting, it appeared that none was forthcoming." Such an assertion, standing alone, does not compel a conclusion that the Carrier acted in bad faith. In fact, the record in this case, as supported by the extensive history between these parties on the issue of contracting out and notice thereof, leads the Board to the conclusion that both the Organization and the Carrier have taken hard and fast positions and behaviors that would not and have not lead to problem-solving discussions. Therefore, we cannot find that the Carrier intentionally acted in some fashion to thwart a bilateral solution.

On the merits, the overwhelming weight of arbitral authority on the Third Division is that the Carrier has the right under Rule 52(b) and (d) to contract out work where there is a mixed practice of contracting out work similar to that involved in the dispute. The record in this case more than amply demonstrates such a mixed practice on this property, such that the work in question has been performed by members subject to the Agreement, but also by those working for outside contractors. Thus, the Carrier did not violate the Agreement when it contracted out the work in question.

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 16th day of November 1999.