

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35388
Docket No. MW-34804
01-3-98-3-515**

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

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railway (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned an outside contractor (Tamper, Inc.) to install concrete crossties on Seniority District No. 23 near Pasco, Washington beginning July 22, 1993 and continuing (System File S-P-510-O/MWB 93-12-17C BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance written notice of its plans to contract out said work as required by the Note to Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants K. K. Kite, T. F. Simpson, M. F. Benson, L. S. Sanchez, J. D. Gonzales, F. Daum, Jr., P. A. Loera, J. A. White, R. C. Clark, Jr., M. A. Leyva, P. M. Contreras, G. C. Vela, H. M. Henne, D. E. Grimes, Y. Ybrarra, Jr. and J. M. Munoz, Jr. shall each be allowed eight (8) hours' pay at their straight time rates and all overtime for each day worked by the outside contractor until the violation ceases.”**

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.

While much in this record is disputed, and each party presented new argument in their Submissions which the Board is obligated to ignore, certain facts are not disputed. The Carrier contracted out the work of performing installation and replacement of concrete ties. The work involved the utilization of the P811-S track laying machine. The work was performed on Seniority District 23 by Tamper Corporation beginning July 22, 1993.

The Organization alleged that the outside contractor operated the P811-S to perform work customarily performed by the employees. The contracting out was without notice. It was done in clear violation of the Scope Rule and numerous other Rules that protect the employees from outsiders performing work that is protected by Agreement. The Organization points out that there were no special skills required to operate this machine; which the Carrier had assigned, working and being operated by employees prior to this claim in the Wyoming Seniority District.

The Organization alleges that this work was improperly assigned and contracted out without notice in clear violation of the Agreement. It maintains that since the work customarily been performed and is clearly work of the employees, failure to provide notice settles the claim in favor of the Organization. It further points out that the equipment is advertised for lease without indication of needed special skills. It argues strongly that there was no good faith attempt to reduce contracting; the employees were fully capable of utilizing the P811-S and that proof of a Rule violation was clearly presented on the property.

The Carrier denied all elements of the Organization's claim. Central to its position is that this is an already settled issue that requires no notice to the Organization, as it is not Scope covered work. The Carrier referred the Organization on the property to Award 11 of Public Law Board No. 4431. It argued that the Award settled the issue that "the work of operating the P811S is not within the scope of the agreement."

We carefully studied all elements of this claim and the Awards submitted by the parties hereto. Public Law Board No. 4431, Award 11 is on point. It deals with the same equipment over the same territory. It concludes that the Carrier properly notified the General Chairman, bargained in good faith and thereafter permitted Tamper Corporation to subcontract the same work herein disputed. Because the Award maintained the work did not belong to the employees, the notice provisions now lack applicability in this instance. There is no record of evidence that the employees on this Seniority District have ever operated the P811-S. There is substantial evidence from Award 11 and the record on the property to find that this specific work does not belong to the employees and that none are qualified (as per discussions to bring District 10 employees onto District 23 to use the P811-S machine).

The Board finds the case decided by prior Award 11 of Public Law Board No. 4431. The Board is aware of the differences between this instant case and that of Award 11, including the fact that the Carrier provided advance notice in Award 11 and did not herein. Other employees on other Seniority Districts do not prove that these employees on this seniority District are qualified or have customarily performed the work. There is no evidence to prove they did. The Board considers all the facts to support a decision of res judicata. The Board finds that this is the same issue, same territory, same machine and same factual base as decided by Public Law Board No. 4431, Award 11. Accordingly, the claim must be denied.

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 March, 2001.