Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36517
Docket No. MW-35890
03-3-99-3-907

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company [former Southern Pacific
(Transportation Company (Western Lines)]

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Tucson Fuel Supply Company) to perform Water Service Sub-department work (unload fuel from trucks into Carrier fuel tanks) at Tucson, Arizona on May 29 through June 2, 1998 (Carrier's File 1162227 SPW).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance written notice of its intent to contract out the work in Part (1) above in accordance with Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S.C. Heinz and P. L. Christy shall each ' . . . be compensated twelve (12) hours at the pro rata rate (straight time) and each be paid twenty-two (22) hours at the time and one-half rate (overtime), which should be in addition to any compensation Claimants may have already received on the date of the violation."

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 Organization in the instant claim alleges that the Carrier violated the Agreement when the Tucson Fuel Supply Company unloaded fuel purchased by the Carrier from the supplier's trucks to the Carrier's fuel supply tanks in Tucson, Arizona, on May 29 through June 2, 1998. The thrust of the Organization's claim is that this is scope-covered work reserved to employees in the Water Service Sub-department. The claim also contends that the Carrier violated Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding by not providing advance notice to the Organization prior to contracting out the work.

In response, the Carrier argues that the work in question is outside the scope of the Agreement in that it involved the delivery of commodities not recognized as Maintenance of Way work.

The threshold question before the Board is whether the Carrier violated the notice provisions of Article IV of the May 17, 1968 National Agreement when it failed to notify the General Chairman before the work was performed. We find that there was an Agreement violation.

The record developed on the property indicates that employees assigned to the Water Service Subdepartment have previously performed the disputed work. It may be true, as a statement provided by a Carrier supervisor suggests, that others, including employees of other crafts, have also done some of this work. Even so, exclusivity is not the test for determining whether notice is required. It is sufficient to show, as the Organization has done here, that there is a colorable claim to the work under the Scope Rule by virtue of historical practice. See, Third Division Awards 31599, 31777 and 32862.

In its argument before the Board, the Carrier objected that the statements provided by the Organization came too late and should not be considered. However, the record shows that they were submitted before the Organization's Notice of Intent was filed with the Board. As noted in Third Division Award 34228, "the Board has recognized . . . that all matters raised prior to the date of the Notice of Intent to this Board are proper matters for the Board's consideration."

The Carrier also defended against the claim on the property by arguing that the vendor's employee had control of the fuel until it actually passed into the possession of the Carrier. In Third Division Award 16506, cited by the Carrier in support of this proposition, the Organization claimed that fuel oil delivered by tank trucks should have been unloaded from the trucks by Maintenance of Way personnel. The Board rejected the claim, and stated in pertinent part:

> ". . . Obviously the vendor had the right to operate its equipment until the actual delivery of the fuel oil was accomplished. This right extended to the operation of the truck's pump and hose. A different result might have been obtained if the truck driver utilized the storage tank pump valves and hose, over which the fuel foreman would appear to have jurisdiction, but that did not occur. It is difficult to justify the Carrier's assignment of its own personnel, such as the fuel oil foreman, to operate equipment owned by an outside Company, and over which it has no legal authority or control before the material therein comes under Carrier's ownership." (Emphasis added.)

In the matter at hand, the Claimants do not seek to operate the vendor's equipment. They protest the operation of the pump house by an outside vendor. Statements provided by the Organization indicate that the three pumps at the Tucson pump house each have their own controls, valves and flow switches. Management acknowledged that the outside vendor was required to manipulate the valves in order to deliver fuel to the fuel tank. This was arguably scope-covered work.

By failing to provide advance notice, the Organization was foreclosed from exercising its contractual right to discuss this matter with the Carrier before outside forces were used. The claim therefore will be sustained. However, the Organization has not made out a case for paying two employees for the work that was performed by one outside vendor employee, nor does the record make clear how much time was actually

expended by the outside vendor employee performing work colorably within the scope of the Agreement. The matter is remanded to the parties to determine the number of hours of work performed by the outside vendor attributable to scope-covered work. The Claimants are to be paid, at their respective rates of pay, an equal proportionate share of the total number of man-hours of scope-covered work performed by the contractor's employee.

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 April 2003.