

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36571
Docket No. MW-35875
03-3-99-3-885

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Kershaw, Inc.) to perform Maintenance of Way and Structures Department work (track undercutting) between Mile Posts 80 and 96 on the Watertown Subdivision beginning August 13 and continuing through September 24, 1997 (System File C-38-97-C080-08/8-00228-018 CMP).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract said work as required by Rule 1 and failed to make a good-faith effort to reduce the use of contractors and increase the use of Maintenance of Way forces as set forth in Appendix I.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. V. Dickman and D. D. Sauer shall each be compensated for two hundred twenty-three (223) hours' pay at their applicable time and one-half 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.

Claimants D. V. Dickman and D. D. Sauer established and held seniority in the Maintenance of Way and Structures Department, Track Subdepartment, Seniority District No. 2, as Special Machine Operator and Laborer, respectively. On the claim dates, the Claimants were working their regular assignments.

Beginning on August 13, 1997, the Carrier engaged Kershaw Inc., a contractor, to perform track and turnout undercutting on the Carrier's main line between MP 80 and MP 96 on the Watertown Subdivision. On August 26, 1997, the Organization received the Carrier's notice of its intent to subcontract "the undercutting on the Watertown Subdivision between MP. 80-96 which should take approximately six weeks." The letter offered the Organization an opportunity to further discuss the matter at a mutually satisfactory date and time.

By a letter dated September 5, 1997, the Organization informed the Carrier that the contracting notice was untimely. The Organization stated that the Carrier was in violation of the Note to Rule 1 and the December 11, 1981 Letter of Understanding (Appendix I) because it had launched the bid process, awarded the contract and begun the work before serving the Organization with any notice of its contracting plans. In response to the Carrier's offer to meet and discuss the contracting, the Organization expressed to the Carrier that, because the notice was belatedly served, "... there is no way I am able to discuss, let alone try and convince and persuade you that BMWWE can do the work. . . ."

The Organization asserted that the undercutting work performed by the contractor is contractually reserved to the Claimants and has been "historically, customarily and traditionally" performed by Maintenance of Way forces pursuant to Rules 1, 4 and 46. The Organization also argued that the Claimants were qualified, available, willing and possessed the requisite seniority to perform the work, and

therefore, should have been given an opportunity to bid and be awarded that work according to Rules 2, 3, 5, and 8. In support of its position that the disputed work was scope-covered, the Organization submitted copies of several Maintenance of Way Department bulletins for undercutting extra gangs scheduled to work at various locations on the Carrier's system. The Organization also furnished the accompanying awards to those bulletins identifying the Carrier's Machine Operators, Foremen and Laborers who successfully bid the undercutting gang vacancies.

The Organization argued that the Carrier's failure to provide a timely notice of its intent to subcontract for undercutting work prevented the parties from entering into good-faith discussions for the purpose of reaching an understanding concerning the Carrier's desire to contract out the work. The Organization emphasized that, in the past, the Carrier had failed to serve notice before contracting out undercutting work. The Organization cited Third Division Award 31385 in support of its position that undercutting work on the Carrier's property is scope-covered and that the Carrier is required to serve proper advance notice.

The Carrier admitted that the notice was "belated," but contended that the notice did not violate the Agreement because the Organization had not shown that the undercutting work in dispute belonged to employees represented by the BMW by "custom, practice or tradition." However, the Carrier conceded a "mixed practice" of Maintenance of Way Department employees and contractors performing undercutting work on the Soo Line. The Carrier emphasized that the undercutters and "gophers" it owns were not of sufficient capacity to accomplish the work in dispute. The Carrier stated that Third Division Award 31385 recognized that, in the past, the Carrier had consistently accomplished undercutting work through the use of the more efficient equipment owned by Kershaw, Inc., and that in accordance with that Award, the Carrier did serve notice in this case.

In support of its position that the subject work was not purely within the scope of the Agreement, and that the payment of any compensation is not warranted, the Carrier cited Awards 28754, 28786, 30115, 31889 and 32351. The Carrier also argued that if the Board finds that a violation occurred, a dispute regarding the number of hours worked by the contractor should be remanded to the parties for resolution before any compensation is paid. Finally, the Carrier emphasized that the Organization's demand for compensation at the overtime rate should be rejected based on Third Division Awards 35378 and 36255.

The Board reviewed the record in this case and finds that the facts and circumstances are similar to those in Third Division Awards 36541 and 36575 involving ditching and excavation work on this property. Like those cases, the Board finds here that the Organization met its burden of proving that the disputed work had been performed by Maintenance of Way Department forces in the past using various types of equipment. Therefore, the Board finds that the Carrier must submit proper advance notice to the Organization before it proceeds with any subcontracting involving an undercutter. While the Board does not disagree with the Carrier's conclusion that Award 31385 acknowledged the Carrier's mixed practice of using both contractors and employees to perform undercutting work, the Board's finding regarding the Organization's entitlement to receive advance written notice before such undercutting work is subcontracted must be underscored. As the Board stated:

“ . . . What is involved, however, is contracting of a type of work which arguably has been and is performed by Carrier Maintenance of Way forces. Thus, advance notice to the General Chairman is required, particularly now that objection has been raised through this claim. In reaching this conclusion, the Board puts the Carrier on notice as to the necessity of (at minimum) advance notice and discussion, if requested, in future instances involving this work.”

Moreover, in Third Division Award 32861, issued on this property, the Board held that, “ . . . in order to be entitled to notice as required by the Rule, the Organization does not have to demonstrate that the covered employees performed the work on an exclusive basis.”

Regarding the appropriateness of the notice served by the Carrier in this case, the Board finds that the Carrier violated the notice provisions specified in the Note to Rule 1 and Appendix I when it sent the Organization a late notice. The December 11, 1981 Letter of Understanding states that advance notice requirements will “be strictly adhered to.” Moreover, by failing to serve the requisite advance notice, the Carrier prevented the Organization from exercising its option to meet and confer on the subcontracting issue. Because the Carrier issued a late notice regarding the subcontracting, the claim must be partially sustained. See Third Division Award 29979.

Finally, regarding the applicability of the Awards cited by the Carrier, the Board holds, as it did in Third Division 36541, that Third Division Awards 28754, 28786,

30115, 31889, and 32351 involve facts and circumstances that are distinctly different from this case. As a result, they do not support the Carrier's position in the instant case.

Regarding the monetary damages to be awarded in this case, given the findings set forth in on-property Third Division Awards 31385 and 32861 the Board finds that the awarding of damages is appropriate. The Organization's documentation shows the total number of hours worked by the contractor's employees. The record does not seem to reflect that the Carrier took objection to those hours during the on-property handling of the case. However, because the Carrier raised a question regarding the number of contractor hours worked the parties should jointly review the records. Both Claimants are entitled to their respective shares (which appear to be 223 hours each) at the applicable straight-time rates of pay. In support of this Award for straight-time damages, see Third Division Awards 35378, 36225, 36227, 36541 and 36575.

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 16th day of June 2003.