

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 36573  
Docket No. MW-36164  
03-3-00-3-317**

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

**(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Soo Line Railway 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 (Phillips Asphalt Paving, Inc.) to perform Roadway Equipment and Machine Subdepartment work (excavation of old subgrade, grading of new subgrade, removing and replacing crossing surface and disposal of old crossing material) in renewal of the Highway 11 crossing at Mile Post 61.2 at Sturtevant, Wisconsin on October 12, 13 and 14, 1998 (System File C-32-98-C080-09/8-00228-034 CMP).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract said work as required by Rule 1 and failed to enter good-faith discussions 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, Mr. J. O. Jones shall now be compensated for twelve (12) hours' pay at the applicable time and one-half rate 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.

On the claim dates, the Claimant was a regularly assigned section laborer in the Muskego Yard section crew. The Claimant also maintained seniority within the Engineering Services Crane Subdepartment. The Organization alleges that on October 12, 13 and 14, 1998, Phillips Asphalt Paving, Inc., a contractor, was utilized to assist in the renewal of a road crossing located at MP 61.2, at Sturtevant, Wisconsin. The Organization asserts that the outside forces "operated two (2) dump trucks, one (1) front end loader and one (1) backhoe . . . to excavate and remove blacktop, rails, ties, leveling of sub-grade and to haul away dirt and debris from the crossing work site." According to the Carrier, the contractor "only trucked disposable materials from the job site." The Organization contends that the contractor's employees expended a total of 12 hours in the performance of this work (nine hours on October 12, two hours on October 13 and one hour on October 14).

Except for the particular circumstances surrounding this occurrence of subcontracting on this property, the Board finds this case to be identical to the subcontracting events present in Third Division Awards 36541, 36571 and 36575. As a result, the Board's conclusion in this case is the same, and the instant claim must be partially sustained. Here, the Organization demonstrated by sufficient evidence that the work in dispute had been performed with some regularity by Maintenance of Way Department forces and the Carrier acknowledged the existence of a "mixed practice" involving the performance of this work by both employees and contractors.

The Board finds that the contractor in this case performed work that fell within the ambit of "crossing renewal," and reaffirms the findings enunciated in Third Division Award 29547. That Award addressed this Carrier's 1989 decision to subcontract what appears to have been the same work (and using similar equipment) at the Mankato Street crossing in Winona, Minnesota, without serving any advance notice to the Organization, and instructed the Carrier to provide notice in the future. In Third Division Award 32704, the Board found that, in 1993, this Carrier used a contractor to rehabilitate the Fruitridge Avenue crossing in Terre Haute, Indiana, without serving the required notice, and directed that the Claimants be paid at their daily rate for each date on which the contractor worked that they were available.

The record indicates that the Claimant worked eight hours on October 12 and 14, and was paid eight hours on October 13, 1998 for attending a safety meeting. Accordingly, the Board finds that the Claimant is entitled to payment of one hour on both October 12 and 14, and two hours on October 13, 1998, for a total of four hours calculated at the applicable straight-time rate of pay. In support of this Award for straight-time damages, see Third Division Awards 35378, 36225, 36227, 36541, 36571 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.