

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 36964  
Docket No. MW-35901  
04-3-99-3-917**

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(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 (Charles Jones) to install rubber pads for a crossing at Mile Post 186.2 (Troy) on the Truckee District on July 16, 1998 (Carrier's File 1162228 SPW).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance written notice of its intent to contract out the work described 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, Track Subdepartment Foreman R. C. Canchola, Machine Operator J. H. Martinez and Curve Lube Maintainer M. T. Graham shall each be allowed eight (8) hours' pay at their respective rates.”**

**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.

A seasonal road leading to the property of Charles Jones, a landowner-rancher near Troy, California, crosses two Carrier tracks at Mile Post 186.2. For many years, the Jones crossing was constructed of wooden planks placed between the rails. Apparently, the planking was converted to heavy-duty rubber pads in 1997. Like many private crossings on the Truckee District, the crossing protection signals and between-rail materials on Charles Jones' road are installed in the spring and dismantled and stored for winter. The instant Article IV notice and Scope Rule claim involves the seasonal work of removing the crossing pads on the Jones crossing on or about July 16, 1998, in anticipation of the 1998 winter snow season. It is not disputed that the Carrier did not notify the Organization before this crossing dismantling work at MP 186.2 was performed in mid-July 1998 by three employees of Charles Jones.

The claim filed on September 14, 1998 by the Organization asserts violations of the notice/consultation provisions of Article IV of the May 17, 1968 National Agreement, the December 11, 1981 Berge-Hopkins Letter of Understanding and the Scope Rule. In denying the claim, the Carrier asserted "exclusivity," "dominion and control," and "full employment" defenses on the Scope Rule merits. Moreover, it represented that no notice was required because of an alleged long-standing past practice whereby the Jones crossing was installed and removed by Charles Jones' employees for many years. Specifically, the Carrier asserted:

"Charles Jones places and removes this private crossing once a year due to the weather conditions and his need with regard to the agreement with him as the owner. This is not the first time that he and his people have worked on his crossing. This contributes to a past practice that allows for him to protect his own interest by installing the rubber pads that he owns and stores when not in use as he sees fit. The Carrier does not and has not ever performed the

work of installing his rubber pads and this past practice has occurred for the last seven years without a claim being filed.”

These unsupported past practice assertions by the Carrier were challenged by the Organization and effectively countered in handling on the property, under mutually extended time limits, by unrefuted signed written statements from each of the three named Claimants and one other employee. Those uncontradicted statements establish that, prior to the July 1998 claim date, the Claimants had in fact removed and installed the seasonal protection pads at the Jones crossing annually, before and after the 1997 conversion from wooden planking to rubber pads.

In a recent decision involving virtually identical threshold notice issues between these same Parties, Third Division Award 36516 held, in pertinent part, that “exclusivity is not the proper test in determining whether advance notice is required under Article IV of the May 17, 1968 National Agreement. See Third Division Awards 29912, 29979, 30944, 31599, 31777, and 32862. If the Organization has established that BMWE-represented employees have, at times, performed the disputed work, then advance notice is required even if Organization forces have not performed the work to the exclusion of other crafts or contractors.”

We sustain Part 2 of this claim based on the proven violation of the notice/consultation provisions, without reaching or deciding the Part 1 merits defenses the Carrier might have raised in good-faith discussions with the General Chairman, as contemplated by Article IV and the December 11, 1981 Letter of Understanding. As for the appropriate remedy for the proven notice/consultation violation in this case, we concur with the views eloquently expressed in Third Division Award 32862, reaffirming Award 32338 and distinguishing Award 31835.

### AWARD

Claim sustained.

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**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 21st day of April 2004.