

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39344
Docket No. MW-37477
08-3-NRAB-00003-020525
(02-3-525)

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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 (Sundt Company) to perform Maintenance of Way work (construct new bridges, install culverts and retire bridges) at Dagoon, MP 1054; Cochise, MP 1062; Razo, MP 1081 and Luzenn, MP 1088 beginning March 12, 2001 and continuing (Carrier’s File 1277354 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 referenced in Part (1) above or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces in accordance with Article IV of the May 17, 1968 National Agreement and December 11, 1981 Letter of Understanding.
- (3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants Patricio Matrecito, Lorenzo G. Fuentes, Daniel Newell, Sr., Evaristo D. Duarte, Michael A. Cummings, Benito E. Guerrero and Sammy F. Overby shall now ‘. . . be paid their proportionate share of all straight time and overtime hours

associated with the above referenced work at their respective rate of pay. Compensation for this violation shall be in addition to any compensation Claimants may have already received for the period of time in dispute.”

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.

It is the Organization’s position that the Carrier failed to give proper notice to the General Chairman as specified in Article IV – Contracting Out of the parties’ Agreement. It also contends that the work at issue is Maintenance of Way work and has customarily been performed by Maintenance of Way employees. It notes that the Claimants were qualified to do the work, and it should, therefore have been assigned to them. The Organization also contends that the former Southern Pacific Transportation Company (now merged with the Union Pacific Railroad) did not contract out this type of work.

The Carrier contends that it gave adequate notice of all work at issue to the General Chairman by its letter of October 27, 2000. It also insists that the work at issue has been routinely contracted out. The Carrier also disputes the Organization’s claim that the Claimants had the skills to perform the work at issue. In addition, the Carrier emphasizes that the Scope Rule is general in nature, and that there has been a mixed practice of assigning this work – i.e., it has not uniformly been assigned to BMW-represented employees.

A review of the documentary evidence presented does not support the Organization's contention that the work at issue has uniformly and customarily been performed by BMW-represented employees. On the contrary, it is apparent that there has been a "mixed practice" under the Scope Rule. Further, we find the notice given to the Organization was comprehensive and specific with respect to the work at issue.

Accordingly, the Board concurs with the findings in Third Division Award 35822 wherein it was held that, because of the general nature of the Scope Rule, absent a showing of reservation of the disputed work by "custom, practice or tradition" and/or a defect in notification to the General Chairman, the claim must be denied. See also, Third Division Award 32333 involving a similar project and nearly identical fact pattern.

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 29th day of September 2008.