

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41640
Docket No. MW-41468
13-3-NRAB-00003-110029**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Missouri
(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 (Clayton Construction Company) to perform Maintenance of Way Department work (bridge construction and related work) on the Pine Bluff Subdivision at Mile Post 295.04 beginning on June 11, 2009 and continuing through July 31, 2009 (System File UP750SN09/1524147 MPR).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance notice of its intent to contract out said work or make a good-faith effort to reach an understanding and reduce the amount of contracting as required in Rule 9 and the December 11, 1981 Letter of Understanding.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants B. Jackson, J. Anderson, M. Creggett, C. Brown, E. Ribbing, J. Hayden, D. Watkins, O. Cranford, D. Cox, C. Reed, D. Ginn, Jr. and S. Kerperien shall now each be compensated at their respective and applicable rates of pay for a**

proportionate share to the total straight time and overtime man-hours expended by the outside forces in the performance of the aforesaid work beginning on June 11, 2009 and continuing through July 31, 2009.”

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.

This dispute involves bridge construction services at Mile Post 294.96 and 375.21 on the Pine Bluff Subdivision. The Carrier served notice of its intention to contract for this work on March 11, 2009. The Organization objected to the vagueness of the notice and requested a conference, which was held on March 25, 2009. The parties fully discussed their respective positions. Having been unable to resolve this matter, and over the Organization's continued objection, the Carrier subcontracted the work, which was performed in June and July 2009.

The Organization argues that the Carrier's failure to specify its reasons for contracting negates the validity of the notice. It also contends that bridge building and repair work is scope-covered and reserved to the Claimants by both Agreement Rules and traditional and customary performance, and that the Claimants were available and possessed the skill and ability to perform the work. It provided statements from seven of the Claimants to the effect that they had performed this type of work repeatedly over the course of their employment. The Organization takes issue with the reliability and applicability of the evidence of past practice presented by the Carrier, and argues that the Carrier violated both Rules 9 and 20

of the Agreement, as well as its commitment to make good faith efforts to reduce the incidence of contracting as set forth in the December 11, 1981 Letter of Agreement (LOA). It requests monetary relief for the loss of work opportunity suffered by the Claimants, relying on Third Division Award 39139; Public Law Board No. 7101, Award 9; Public Law Board No. 7096, Award 14; and Public Law Board No. 7099, Award 14.

The Carrier contends that because the Scope Rule is general in nature, and does not reserve the work to Agreement-covered employees, and because it has established a past practice of contracting similar work, it is permitted to do so under the "prior and existing rights" provision in Rule 9(c). It notes that the mixed practice of contracting out bridge construction work on this property has been found to exist in numerous prior cases, citing Third Division Awards 28654, 29007, 29019, 29750, 29982 and 30280. The Carrier urges that such precedent should be determinative of the issue in this case under the principle of stare decisis, relying on Third Division Awards 39006 and 39294. The Carrier asserts that once it establishes a mixed practice under a general Scope Rule, it is permitted to contract out the work as long as it meets the notice and conference requirements of Rule 9(a) and (b) which it did in this case. It also points out that similar notices have been upheld by the Board, and found not to be vague, as asserted by the Organization, citing Third Division Awards 30869, 31170 and 32333. Finally, the Carrier contends that the requested relief is excessive, because there has been no proof of any loss of earnings due to the fact the Claimants were fully employed during the claim period.

A careful review of this extensive record convinces the Board that the timely notice given by the Carrier was not vague. On the contrary, it was sufficient to inform the Organization of the work contemplated for contracting and to form the basis for a full and informed conference, which took place months before the contracting commenced. Thus, we find that the Carrier complied with its Rule 9(a) and (b) notice and conferencing obligations. See, Third Division Award 31170.

Under the circumstances of this case, we conclude that the Organization failed to meet its burden of proving a violation of the Agreement. On numerous occasions the Board has held that the parties' Scope Rule (1) is general in nature (2) does not specifically reserve work to BMWE-represented employees, and (3) the

Carrier has the right to contract out work, where it has met its notice and conferencing obligations, when it establishes a mixed practice of contracting out similar work. See, e.g. Third Division Awards 29019, 30262, 30282 and 31170. Both the record and precedent on this property, establish that the Carrier has historically contracted out bridge construction work of the type in dispute herein. Third Division Awards 29305, 29981 and 29982, as well as the treatment of mixed practices for contracting out disputes governs on this property. See, Special Board of Adjustment No. 1130, Award 18. This is true despite the fact that bridge construction work might be within the capabilities of the Claimants. See, Third Division Awards 28654 and 29981. Given the practice established on this property for the kind of contracting out involved in this case, there is no basis for determining that these Awards are palpably erroneous, and, in the interest of stability, we shall follow their holdings. See, Third Division Award 32333.

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 24th day of April 2013.