

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29718
Docket No. MW-29966
93-3-91-3-357

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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 (Gilliam Railroad Services) to recover crossties from the right of way between Mile Posts 537.4 (Vian, Oklahoma) and 546.5 (Gore, Oklahoma) and between Mile Posts 557.5 (Braggs, Oklahoma) and 567.9 (Ft. Gibson, Oklahoma) on the Van Buren Subdivision on March 9, 10, 11, 30, 31 and April 1, 1990 (Carrier's File 900400 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Track Foreman D. G. Neuner, Machine Operators K. D. Eichelberger, P. N. West, K. A. Porter and A. L. Walker shall each be allowed forty-eight (48) hours of pay at their respective time and one-half rates for the loss of rest day work opportunities suffered."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

After first serving notice on the Organization of its intent to subcontract, the Carrier proceeded to utilize an outside contractor to work behind a Carrier tie gang to pick up discarded railroad ties. The Organization contends that this work has been customarily and traditionally assigned to and performed by its members, and that the Carrier violated Article IV of the National Agreement of May 17, 1968, when it contracted out the work.

Article IV of the National Agreement is pertinent to a resolution of this dispute, and reads as follows:

"ARTICLE IV - CONTRACTING OUT

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting but if no understanding is reached the Company may nevertheless proceed with said contracting and the Organization may file and progress claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith."

The issue presented in this dispute has been addressed by the Board on numerous occasions. For example, in Third Division Award 29037, the Board concluded:

"The Scope Rule is a general Rule and the on-property record is conclusive that the work has not been 'customarily' performed by employees. The letters submitted by B&B Painters do not refute the Carrier's evidence that it utilized outside forces for decades to perform work which included painting. The Organization's rebuttal on the property of the sixty-four year record, including the point that the Omaha headquarters was painted by outside contractors only three times in that period, is not on point. It is central to this dispute that proof has been presented by the Carrier that outside forces historically painted buildings, including the Headquarters Building. This probative evidence removes this work from that which the Carrier is restricted from contracting out and is required to give advance notice."

Numerous decisions of the Board have held that the Carrier has the right under Article IV to contract out work where advance notice is given and the Carrier has established a mixed past practice of contracting out work similar to that involved in the dispute. The record in this case demonstrates a mixed practice on this property with respect to the work in question. It has been performed by members subject to the Agreement in the past but has also been contracted out by the Carrier in the past. We thus conclude that the Carrier did not violate the Agreement when it contracted out the work.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever
Nancy J. Dever - Secretary to the Board

Dated at Chicago, Illinois, this 12th day of August 1993.