

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 29751
Docket No. MW-29958
93-3-91-3-350

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 Employees
(
(Union Pacific Railroad Company (former
(Missouri Pacific Railroad Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the
Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned an outside contractor (Young Contracting) with one (1) backhoe to remove crossties, rail, old ballast, insert new ballast and track panel on the main line and passing track at Mile Post 529.7 and to replace ties and ballast on a private crossing at Mile Post 499.8 on February 27, 28 and March 1, 1990 (Carrier's File 900254 MPR).
- (2) The Agreement was further violated when the Carrier failed and refused to furnish the General Chairman with advance written notice of its intention to contract out said work as required by Article IV and the December 11, 1981 Letter of Agreement.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Omaha Division Machine Operator J. L. Hardenberger shall be allowed eight (8) hours per day at the straight time rate of pay and any overtime for February 27, 28 and March 1, 1990 for the work performed by the contractor in Part (1) above."

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 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 perform cross tie and ballast work at two locations. 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 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: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 20th day of September 1993.