

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 29783  
Docket No. MW-29066  
93-3-89-3-498

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(The Kansas City Southern Railway Company

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

- (1) The Agreement was violated when the Carrier assigned outside forces (Art Hathaway Company) to cut brush and trees and repair the grade crossing at Mile Post 36.9 on May 26, 1987 [Carrier's File 013.31-320(227)].
- (2) The Agreement was also violated when the Carrier failed to give the General Chairman advance written notice of its intention to contract out said work as require by Addendum No. 9 (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, Messrs. L. Favoroso, M. Herman, C. Esteban, J. Buchanan, H. Swinney, B. Wilkins, L. Darity, A. Cezar and J. Brewer shall each be allowed pay at their respective straight time and overtime rates for an equal proportionate share of the sixteen (16) straight time and eight (8) overtime man-hours expended by the contractor performing the work mentioned 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 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.

On July 7, 1987, the Organization filed a claim on behalf of the Claimants in this case contending that the Carrier violated Scope Rule 1, Rule 2 and Addendum No. 9 of the Agreement when it contracted out to repair road crossing and clearing brush and trees at Mile Post 36.9.

The Carrier denied the claim contending that claim was without merit. The Carrier further stated that Claimants Favoroso, Herman, and Esteban at the time of the repair work were assigned to Section 002 and performed said repairs for which this claim was filed. Claimants Buchanan, Swinney, Wilkins, Darity, Cezar, and Brewer were assigned to Extra Gang 494 and worked their regularly assigned respective shifts and have no responsibility in connection with repair work or clearing brush and trees. Carrier further contended that these latter Claimants are, therefore, not proper claimants. With reference to the outside contractor, the Carrier contended that since they do not own such equipment as a backhoe or bulldozer, it had no choice but to hire such equipment to provide assistance to Claimants Favoroso, Herman, and Esteban.

After numerous appeals by the Organization, the Carrier finally contended that the Organization has furnished no proof that the work in question was performed exclusively by members of its Organization and therefore, the claim was denied.

The parties being unable to resolve the issues raised by the claim, this matter came before this Board.

This Board has thoroughly reviewed the extensive record in this case and we find that the Organization has met its burden of proof that the Carrier violated the Agreement when it assigned outside forces to cut the brush and trees and repair the grade crossings involved in this case. Therefore, the claim must be sustained.

The record is clear that the type of work that was performed by the outside forces is customarily and traditionally assigned to and performed by the Carrier's track subdepartment forces. Previous to the time of the subcontracting, the Carrier had reduced the Maintenance of Way department by over 240 employees.

In addition, the supplemental Agreement requires in Article IV that if the Carrier plans to contract out work within the scope of

the Agreement, the Carrier must notify the General Chairman of the Organization involved in writing in advance of the date of the subcontracting but in no event less than 15 days prior thereto. In this case, the record is clear that such notice was not given to the General Chairman as is required by the Agreement. Article IV is intended to promote cooperation between the parties prior to any occasion of subcontracting. The Carrier is required to give the Organization notice. Once the Carrier gives the Organization notice, the parties can engage in a good faith discussion and attempt to identify alternatives through the use of the outside forces.

This Board has held on numerous occasions in the past that a Carrier's failure to comply with the notice provisions of Article IV requires that a claim be sustained. See Third Division Awards 23928, 24173, and 24621. This Board agrees that the only way to make sure that a Carrier abides by the notice provisions is to sustain a claim when the Carrier fails to do so.

With respect to the relief, the parties are in agreement that this case involves only 13 man-hours. Consequently, this Board hereby orders that the claim shall be sustained and the 13 man-hours of pay shall be divided among the eligible Claimants.

A W A R D

Claim sustained in accordance with the Findings.

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.