

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 29979
Docket No. MW-28836
93-3-89-3-234

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 Employees
(
(Southern Pacific Transportation Company
((Eastern Lines)

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

- (1) The Carrier violated the Agreement when it assigned outside forces to perform roadbed stabilization and dirt work in connection with constructing two (2) yard tracks at Harlingen, Texas from March 7, through 25, 1988 (System File MW-88-96/471-88-A).
- (2) The Carrier also violated Article 36 when it failed to properly and timely notify and confer with the General Chairman concerning its intention to contract out said work.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operators J. J. Flores, G. R. Gonzales, E. Hernandez, P. P. Reyes and B. J. Tatro shall each be allowed one hundred twenty (120) hours of pay at their respective straight time rates."

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.

Claimants were all machine operators employed by the Carrier and on furlough at the time this dispute arose.

On November 5, 1987, the Organization received notice from the Carrier of its intention to use an outside contractor to perform grading, stabilization and dirt work on a track construction project at Harlingen, Texas. The Organization requested a conference which was held December 9, 1987.

The Organization filed a claim on behalf of the Claimants contending that the Carrier violated Article 36 because it did not notify the Organization in advance of its plan and began its work two days prior to their scheduled conference.

The Carrier denied the claim for several reasons. First, the Carrier contends that it fully complied with Article 36 and in no way violated said Article. Second, the Carrier contends that notifying the Organization of its intent to contract does not constitute an admission by the Carrier that this work belongs exclusively to employees represented by the Organization. Third, the Carrier contends that the Organization has not met its burden of proof of establishing that this work was performed historically and exclusively by its employees. And, finally, the Carrier contends it did not violate any of the Rules of the Agreement because "none of these rules explicitly defines and/or assigns work to be performed" by its employees.

The Board has reviewed the record in this case and we find that the Organization has presented sufficient evidence that the Carrier violated the Agreement when it failed to properly and timely notify and confer with the Organization concerning its intention to subcontract out work. Therefore, the claim must be sustained.

The Agreement between the parties on subcontracting is very clear; no subcontracting will take place until the parties have had an opportunity to discuss it. Article 36 states:

"In the event this 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 carrier shall promptly meet with him for that purpose. Carrier and organization representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith."

In addition, the Letter of Agreement on subcontracting signed by Charles I. Hopkins, Jr. states:

"The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor."

The record in this case indicates that the Carrier did not notify the Organization in advance nor did not the Carrier meet with the Organization representative as required. A conference was scheduled to be held in December, but the work had begun two days before the conference. That action on the part of the Carrier is not in keeping with the clear language of the Agreements between the Organization and the Carrier.

With respect to the exclusivity argument raised by the Carrier, that was one of the issues that should have been discussed by the Carrier at the time of the conference which should have taken place before the subcontracting began. The whole purpose of that conference is to resolve the issues; this Board is not the appropriate place to do that.

Form 1
Page 4

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For all of the above reasons, the claim will be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of December 1993.