

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30205
Docket No. MW-28526
94-3-88-3-350

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein 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 Carrier violated the Agreement when it assigned outside forces to install switch ties on the DeQuincy Division in Orange, Texas beginning February 18, 1987 (Carrier's File 870235).
- (2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it did not give the General Chairman advance written notice of its intention to contract said work.
- (3) As a consequence of Parts (1) and/or (2) above, furloughed Trackman P. Williams shall be allowed pay for eight (8) hours each workday, including any holidays falling therein and any overtime pay worked by the contractor, beginning February 19, 1987 and continuing until such time as the violation is contracted."

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 employes 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.

Beginning February 18, 1987, Carrier assigned an outside contractor to perform work installing switch ties on the DeQuincy Division at Orange, Texas. The outside concern used a backhoe to tear out old switch track materials and install new ties. The Organization contends that the work in question is contractually reserved to its employees and that such work has customarily and historically been performed by these employees. The Organization also argues that Carrier failed to give the General Chairman advance written notice of its intent to contract out, in violation of Article IV.

Carrier acknowledges that it did fail to notify the Organization of its intent to subcontract, but argues that (1) the work at issue was not exclusively that of the unit employees in question; (2) a well-established practice has existed for a number of years for using an outside force to perform this type of work; (3) Claimant did not possess the necessary expertise to utilize the backhoe required for the job; (4) Trackman Williams was not the proper Claimant.

Whatever the merits of Carrier's position on the right to subcontract under the circumstances present in this case, the Carrier cannot excuse the lack of prior notice. As noted in Third Division Award 23354, "For Carrier to ignore this requirement and move ahead with a subcontract because it either thinks that the work to be performed by the outside is not work exclusively reserved to covered employees or claims it does not have the proper equipment is unacceptable." Also see Third Division Awards 23578, 26174 and 27011. The lack of notice foreclosed the Organization from exercising its option to request a meeting to discuss the propriety of contracting out the disputed work. The Claim must be sustained on that basis.

However, this Board is of the view that a monetary remedy in damages is inappropriate given the unique facts of this case. The Board takes note that the Organization during the handling of this dispute on the property frankly acknowledged, as did the numerous employees who provided statements regarding the work at issue, that Carrier has contracted out this work over the past four or five years, without objection by the Organization. We find that in light of the long period of time during which the Organization has acquiesced in the practice of contracting out the disputed work, it cannot now claim a notice violation without first putting Carrier on notice that advance notification would hereinafter be required. Accordingly, it is our judgment that the Board is limited to directing Carrier to provide notice in the future when it intends to contract out the work at issue.

AWARD

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Linda Woods
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 8th day of June 1994.