

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30218
Docket No. MW-29547
94-3-90-3-491

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr., 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 Agreement was violated when the Carrier assigned outside forces (Garrett Excavation and Milam Construction Company) to perform track repair and maintenance work and right of way cleaning work at various locations in and around El Dorado Yards on February 17, 28, March 1, 2, 3, 7, 8, 9, 10, 20, 21, 22, 23 and April 7, 1989 (Carrier's File 89-0517 MPR).
- (2) The Agreement was further violated when the Carrier failed and refused to furnish the General Chairman with advance written notice of the 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, Trackman A. Miller shall be allowed pay at the time and one-half trackman's rate for the one hundred ten (110) manhours expended by the outside forces performing the work 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.

This is one further instance, following many others, in which the Organization alleges that the Carrier improperly contracted work to outside forces (in this instance, track maintenance and repair work) and, additionally, failed to give advance notice to the General Chairman. The Carrier, in part of its response, refers to 227 instances of contracting similar work in the past.

Arguments raised by both parties have been thoroughly reviewed in previous Awards. Here, the Board finds no significant distinction in the work involved to require a different result from other denial Awards covering similar situations. One example of the conclusion reached by previous Awards is found in Third Division Award 29034, which involved a different type of work (concrete bridge repair) but, as here, the Carrier presented myriad instances of previously contracting such work. Award 29034 stated:

"The Organization has the burden of proving by a preponderance of the evidence that the disputed work has been customarily and historically performed by the employees. While . . . we do not find this burden to require proof of exclusive past performance, it does, in our judgment require a showing of more than a shared or mixed practice. After close review of the considerations bearing on this issue, we conclude, on the instant record, that the Organization's evidence falls short of demonstrating such regularity, consistency and predominance in the performance of the disputed work to warrant a finding that it has customarily and historically performed the work. Accordingly, we find that the Organization has not, on these facts, satisfied its burden of proof that the disputed work was reserved to the employees."

As with other similar Awards, Award 29034 found fault with the Carrier's failure to provide advance notice to the General Chairman. The Board takes arbitral notice that the Carrier has remedied this failure, as evidenced by more recent disputes reaching the Board for resolution.

AWARD

Claim denied.

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.