

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30683
Docket No. MW-30087
95-3-91-3-516

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 Employes
(
(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 to perform the '. . . cutting, and loading the ribbon rail onto a rail train, . . . knocking off rail anchors, bagging rail anchors, straight railing switches, and general clean up.* * *' from May 8 to May 31, 1990 and 'In conjunction with this project Marlatt Contracting has provided the Carrier with two (2) 580 back hoes, and two (2) employees for the purpose of digging trenches along side each crossing where this rail is to be laid on the Omaha Division main line. Trenches were dug between MP 419 to 411 on May 14, 15, and 16, on May 21, MP 415 to 406, and May 31, MP 406 to 399.38.' (Carrier's File 900575 MPR).
- (2) The below listed Claimants* shall each be allowed at their respective rates of pay eight (8) hours per day at the straight time rate, and four (4) hours per day at the punitive rate for May 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29, 30, 31 and twelve (12) hours per day at the punitive rate for May 12, 19 and 26, 1990.

*S. R. Schaefer	J. B. Van Nortwick	D. B. Wilson
K. E. Handke	G. H. Hill	C. L. Hollis
K. S. Williams	J. W. Moeck	M. F. Petesch
F. L. Mueseler	J. S. Horton	M. H. Hennigh
M. W. Wilburn	M. T. White	R. L. Shorb
W. E. Juilfs	E. D. Bonebrake	H. D. Gibbs"
S. M. Thomas		

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.

By letter dated March 15, 1990, the Carrier notified the Organization as follows:

"This is to advise you of the Carrier's intent to solicit bids to cover the removal of track and all appurtenances between M.P. 337.6 (Norkan Jct., Kansas) and M.P. 403.8 (Vliets, Kansas) on the former portion of the Concordia Branch.

This is the type of work that has customarily and traditionally been performed by outside contractor's forces. The Carrier has neither the skilled manpower nor the proper equipment to safely and competently undertake and complete this project in a timely manner. . . ."

Following performance of indicated track removal, etc., the Organization challenged the Carrier's right to contract such work. While the work is of a nature frequently performed by Carrier forces, the record also shows a practice of contracting such work over many years. In these circumstances, many Awards have supported the Carrier's right to contract the work (although in most instances not relying on the Carrier's "exclusivity" argument). Third Division Award 29714 stated:

"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."

Third Division Award 29792 is to similar effect, citing four other previous Awards. Award 29792 sustained the Claim solely in reference to the Carrier's failure to provide advance notice.

The Organization contends that the advance notice (quoted above) failed to mention "trench digging", which was part of the work in reference to removing rails. This Board does not find this sufficient, by itself, to reach a conclusion that the Agreement was violated.

Beyond this, many previous Awards have supported a carrier's contracting of work where the equipment and/or property is no longer involved in railroad operations (as here) and when material is sold on an "as is, where is" basis.

There is, however, one final aspect which requires review. In this instance, the record is clear that the agreement between the Carrier and the outside contractor calls for the Carriers' retention of a substantial portion of the track and related equipment for transportation to and use in Carrier operations elsewhere. The Carrier has provided no convincing argument that the work of salvaging Carrier property for use elsewhere should not or could not be readily performed by Carrier forces as part of their regular and customary work assignments. Defenses as to past practice, abandonment, sale of property simply are not convincing as to this portion of the work.

Third Division Award 29873, although involving a different carrier, discusses the difference between work on abandoned track and the carrier's retention of portions of the track and equipment.

The parties are therefore directed to meet and agree on a reasonable proportion of the hours expended by contractor forces which are applicable to such salvage work (sorting, loading, etc.). The Claim will then be sustained to this portion of the claimed hours. In this instance, the Board concludes that monetary remedy is required for lost work, despite the fact that Claimants were actively on duty at the time.

AWARD

Claim sustained in accordance with the Findings.

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O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of January 1995.

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