

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30688
Docket No. MW-30098
95-3-91-3-528

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 to cut brush along the right of way between Mile Posts 380 state line to 370 Hiawatha, Kansas, and Mile Posts 331 Atchison to 298 Wolcott, Kansas from July 2 through July 15, 1990 (Carrier's File 900609 MPR).

(2) The Carrier also violated Article IV of the May 27, 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 the violations referred to in Parts (1) and/or (2) above, Foreman R. D. Underwood and Trackmen J. W. Moeck, M. F. Petesch, R. D. Smith, and K. E. Handke shall each be allowed pay at their respective rates of pay eight (8) hours per day at the straight time rate and six (6) hours per day at the punitive rate for July 2, 3, 5, 6, 9, 10, 11, 12, and 13, and fourteen (14) hours per day at the punitive rate for July 4, 7, 8, 14, and 15, 1990."

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 May 11, 1989, the Carrier notified the Organization of its intention "to solicit bids to cover the cutting of brush and trees along with the chemical application of all stumps within the cutting area" between points in Kansas and Nebraska. Following conference, which had been requested by the Organization, no accord was reached. The Carrier subsequently proceeded to contract this work to an outside firm. This resulted in the Organization's claim that the work should have been assigned to Maintenance of Way forces.

This is one of a great many instances involving this Carrier and the Organization in dispute as to the assignment of work to outside forces. The Board does not question that Maintenance of Way forces have performed this work in many prior instances. However, the Carrier also provided evidence that the work in question had been contracted to outside firms frequently over many years. Third Division Award 29007, one of many recent Awards involving contracting by the Carrier, has reasoning which is applicable to the facts and circumstances herein. That Award concluded as follows:

"The Organization has the burden of proving by a preponderance of the evidence that the disputed work is of a character customarily and historically performed by the employees it represents. While, as described earlier, we do not find this burden to require a showing of exclusive performance, it does require proof of more than a shared or mixed practice."

Here, the record shows there is a "shared or mixed practice" over the years as to brush cutting and closely related work. On this basis and having met the requirement of notice and conference, the Carrier's action cannot be found in violation of the Agreement.

AWARD

Claim denied.

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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) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

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