

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30796
Docket No. MW-30574
95-3-92-3-329

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 (Neosho Contracting) to overhaul engines, change oil and filters, paint machines and perform other necessary repairs to Maintenance of Way equipment including BR-28, UC-09M and TMT-138JSL in a former Carrier owned engine shop at Parsons, Kansas (Carrier's File 910313 MPR).
- (2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Work Equipment Mechanics J. M. Johnson, A.D. Hadock, R.M. Chambliss, D.P. Handke, K.D. McDermid, R.R. Ray, R.A. Vopata Jr., C.D. Chester and C.A. Clinton shall be allowed pay for '...(8) hours per day at the straight time rate of pay and any overtime per Claimant, and is against all work being performed by contractor forces in the shops at Parsons, Kansas. Claim is to begin January 1, 1991 and continue until such time as Claimants are allowed the opportunity to resume work in the Mechanics classification on the Western District.'"

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.

In this case, the Carrier contracted out the overhauling of engines, changing oil and filters, painting machines and other necessary repair work on specified equipment (BR-28, UC-09M and TMT-138JSL) to Neosho Contracting in the former Carrier-owned engine shop at Parsons, Kansas, on or about January 1, 1991, rather than having the repair work performed by Claimant Work Equipment Mechanics on the Western District in either Kansas City, North Little Rock or Forth Worth repair shops. No advance notice under Article IV of the May 17, 1968 National Agreement was provided to the General Chairman with respect to the disputed work.

The record developed on the property establishes that the Organization satisfied its burden of showing that the repair work in question has customarily and historically been performed by the employees at its aforementioned repair shops. The Carrier failed to offer any evidence in support of its contention that it has contracted out repair work of this nature in the past. In the absence of showing the existence of a mixed practice of contracting and assigning the work to Maintenance of Way employees, the Carrier has failed to meet its burden of showing that it had any "existing rights" in connection with contracting out the disputed repair work which would be protected by the language of Article IV. Thus, its contracting out is in violation of the Scope clause of the Agreement, unless it can be shown that the specific work involved has already been determined by prior Awards of this Board on this property to be of the type and nature that the Carrier may contract out, with prior notice.

No prior Awards were cited by the parties as being determinative of the question of the Carrier's right to contract out the disputed repair work. The only Award cited dealing with the contracting out of equipment repair on this property (Third Division Award 29567) similarly found that the Carrier asserted but

provided no proof that the work was not customarily performed by Maintenance of Way employees in the normal course of their assignments. Hence, the Carrier has failed to show any past practice on its part of contracting out the disputed repair work, and the claim must be sustained both on its merits, and on the failure of the Carrier to give the requisite advance notice.

With respect to the issue of the appropriate remedy, the Organization claims that the Claimants were furloughed at the time in question, and that even if they were working, monetary relief would be appropriate due to the bad faith exhibited by the Carrier's failure to give notice of the contracting herein until two months after the claim was filed. While not contesting its failure to give advance notice, the Carrier presented evidence that the Claimants were employed in some capacity during the period from January 1 to June 14, 1991. A decided body of cases on this property reveals that a monetary remedy is normally only given to claimants who suffer a lost work opportunity, even in situations where no prior notice of the contracting was given. See Third Division Awards 30281, 29677, 29033. Thus, no monetary relief is granted to Claimants working in the same or higher-rated job classifications on the relevant dates. Claimants, if any, on furlough shall be entitled to be made whole. Claimants, if any, working in lower-rated job classifications on the relevant dates, are entitled to receive the difference between what they earned and the straight time rate of the Work Equipment Mechanic classification.

Since there is a dispute in this record concerning whether the named Claimants were working or furloughed during the relevant time period when the BR-28, UC-09M and TMT-138JSL equipment was repaired by Neosho Contracting at Parsons, Kansas on or about January 1, 1991, and the specific dates on which the work in question took place, this Board shall remand the dispute to the property for a determination of which, if any, of the Claimants are entitled to monetary relief under this Award, and in what amounts. This remedy is limited to repair work performed on the three noted pieces of equipment, as they were the only ones the Organization was able to specify throughout the processing of this claim on the property.

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 6th day of April 1995.