

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31016
Docket No. MW-30759
95-3-92-3-561

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
(Oklahoma, Kansas & Texas Railroad Company)

STATEMENT OF CLAIM: "Claim of the System Committee of
the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned an outside contractor (L. G. Byrcus) and a Missouri Pacific B&B foreman to perform Maintenance of Way work (drive a bridge, remove about fifty foot on each end of the bridge and lay the foot walk and runners) of the bridge at Mile Post 433.3 at Pond Creek beginning March 25, 1991 and continuing (System File MW-91-35-OKT/910512 OKT).
- (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 the work described in Part (1) above and failed to afford a conference as contemplated by said Agreement.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman P. Ragan, Lead Mechanic F. Gagliardo, Mechanics D. Pipkin and J. R. Anderson and Machine Operator T. T. Finnigan shall each be allowed pay at their respective straight time and time and one-half rates of pay for an equal proportionate share of the total number of man-hours, beginning March 25, 1991 and continuing, spent by the outside forces and the Missouri Pacific B&B foreman performing the aforesaid work."

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.

This dispute involves the use of a contractor and a Missouri Pacific B&B foreman to perform work involved with replacing an approach and installing a footwalk and handrail on a bridge at Mile Post 320.29 on the Enid Subdivision. Aside from the propriety of the subcontracting, this case raises the issue of the effect of the parties' failure to hold a conference after proper advance written notice has been given.

The Carrier served written notice on the General Chairman of its intent to solicit bids for the disputed work on January 31, 1991, including its standard disclaimer that the serving of the notice was not to be construed as an admission of the scope coverage of the work. By letter dated February 5, 1991, the General Chairman requested a conference, indicating that the Carrier should advise it of the time, date and place on the O.K.T. property that the conference would be held. Carrier responded by letter dated February 14, 1991, acknowledging receipt of the request, and asking the Organization to arrange to include this item on the agenda for discussion at the next regularly scheduled conference, "or, in the event you want to conference this immediately please give me a call and we can set a date for that purpose."

By letter dated February 22, 1991, the General Chairman objected to the Carrier's failure to grant the Organization a conference, and stated:

"It is our position that we have been deprived of a conference in the above mentioned notices and to meet and discuss Carrier's notices some two or three months after they have been served is not in accordance with the agreement and clearly indicates the Carrier has committed to the contractor prior to serving the Notice."

This letter also advises that claims would be filed.

The Carrier responded by letter of March 8, 1991, denying that it ever refused to meet with the Organization in conference, and stated:

"You are the moving party in the scheduling of conferences, and if there has been any failure at all here it is yours in not setting or coming in for a conference. I simply don't understand how you can lay back on scheduling a conference and then accuse the Company of depriving you of a conference."

By letter dated March 12, 1991, the General Chairman denied any failure on his part to request a conference, indicating that he had been previously informed that Carrier would not be agreeable to him naming the time, date and place of conferences. This letter also states that Carrier failed to reply within the time limits of most notices and that the contractor was working before Carrier acknowledged the Organization's request for a conference. Arrangements for contacting a designated representative of the Carrier to discuss future notices were set forth in this letter. The Carrier responded by letter dated March 21, 1991, taking issue with certain characterizations made in the General Chairman's March 12, 1991 letter. Apparently, no conference was held, and the record reflects that the disputed work commenced on March 25, 1991.

A review of the record on the property reveals that timely notice was given, and that the Carrier responded to the Organization's request for a conference by indicating a willingness to discuss the matter at the next regularly scheduled conference or at an earlier time if notified of the Organization's desire to set an immediate meeting date. The only notification received by the Carrier was the Organization's written claim on February 22, 1991, some three weeks after receipt of the original notice, that it had been denied an opportunity for a timely conference. Since the work did not commence until March 25, 1991, there was still ample time for the Organization to follow through with initiating the scheduling of a timely conference, yet it chose not to do so. Again after being informed that it was the Carrier's position that the Organization was the moving party in scheduling conferences, no affirmative action was taken. Rather, the Organization inaccurately claimed that the work in issue had commenced prior to the Carrier acknowledging the request for a conference.

Under circumstances where the Organization has failed to take advantage of its Agreement right to have a meeting and engage in good faith discussions following the Carrier's indicated willingness to hold a conference, this Board has held that the Organization is precluded from challenging the resulting

contracting. Third Division Awards 24888 and 28337. Any confusion concerning why the matter was not scheduled for conference, and who was responsible for scheduling the conference was clarified prior to any work commencing in this case, and cannot form the basis for overlooking the conference requirements of Article IV and the December 11, 1981 Letter of Agreement and addressing the underlying merits, as was done in Third Division Award 30287.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of July 1995.