

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31272
Docket No. MW-28439
95-3-88-3-227

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 Carrier violated the Agreement when it assigned outside forces to perform switch and grade crossing maintenance work from Kinder, Louisiana to Lawtell Louisiana, on the DeQuincy Division beginning August 25, 1986 (Carrier's File 870146).
- (2) The Carrier also violated Article IV of the May 17, 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 aforesaid violations, furloughed Trackmen R. Williams, N. Chapman, A. Jones and Machine Operators S. J. Mallett and R. Burrell shall each be allowed:

'... eight (8) hours each work day, Mondays through Fridays, beginning August 25, 1986, including any holidays and any overtime falling this work project, continuing so long as outside concern performs work on grade crossings and installing switches from Kinder, Louisiana to Lawtell, Louisiana on the DeQuincy Division.' "

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.

Without prior notice to the Organization, the Carrier contracted out switch and grade crossing maintenance work beginning August 25, 1986, from Kinder to Lawtell, Louisiana, and on the DeQuincy Division. The work performed by the contractor (Kent Emergency Railroad Service) utilized backhoes and trucks working on the grade crossing renewals tearing out crossings, replacing the crossings, performing clean up work, hauling boards and other materials.

The Carrier contends that it customarily and traditionally utilized contractors to perform the type of work involved in this case. Because specific examples of such contracting out alluded to by the Carrier in its Submission were not raised on the property, we are unable to now consider those examples to support the Carrier's arguments. However, while the Organization contends that the work in dispute in this case has been customarily performed by the Carrier's employees, on the property in its February 11, 1987 appeal, the Organization conceded that "... in the immediate past four or five years ... Carrier has used Contractors to perform such work." Employee statements referred to in the record further demonstrate the Carrier's past use of contractors ("Since the U.P. took over right here they have contractors from Oklahoma and I don't know where else putting in the crossings. ... [d]uring the years 1980 thru 1986, all the work has been done by contractors."). The record therefore ultimately supports the Carrier's contention that in the past contractors have been used by the Carrier without protest from the Organization. Thus, although the work fell within the scope of the Agreement, the Organization's acquiescence in the Carrier's practice of utilizing contractors precludes a finding that the Carrier was contractually prohibited from contracting out the work.

However, with respect to the Carrier's failure to give advance notice to the Organization of its intent to contract out the work, the Organization's arguments have merit. The parties both refer to the notice provisions of Article IV of the 1968 National Agreement. That provision requires that "[i]n the event a Carrier plans to contract work within the scope of the applicable agreement, the Carrier shall notify the General Chairman of the Organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto." This Board cannot change that mandatory language ("shall notify").

As found, the work involved in this matter fell within "the scope of the applicable agreement". The Carrier was therefore obligated to notify the Organization of its intent to contract out the work. The Carrier did not do so. The function of the notice is to allow the Organization the opportunity to convince the Carrier to not contract out the work. That opportunity was prevented by the Carrier's failure to give notice. The claim will therefore be sustained, but only for those Claimants in furlough status at the time the contractor performed the work. The matter is remanded to the parties for a joint check of the Carrier's records to determine which Claimants were on furlough, the length of any such furloughs and whether those furloughs overlapped the time the contractor performed the work in dispute. Those furloughed Claimants shall be made whole.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 19th day of January 1996.