

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31276
Docket No. MW-30177
95-3-91-3-622

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 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 (Saginaw Contracting) to pick up trash, by hand, along the right of way, in the vicinity of 18th Street, in the Kansas City Terminal on July 13, 14 and 15, 1990 (Carrier's File 910001 MPR).
- (2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with 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, Foreman T. T. Aguilar, Trackmen F. B. Armenta, R. Villanueva and A. B. Butler shall each be compensated eight (8) hours of pay at their respective straight time rate and sixteen (16) hours of pay at their respective overtime rate."

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.

The dispute in this case centers around the Carrier's contracting out what has been identified by the Organization in its August 31, 1990 claim as "... picking up trash, by hand, along the right of way in the vicinity of 18th Street in the Kansas City Terminal." According to the Organization, "[t]his Contractor provided the Carrier with four (4) employees, and four (4) plastic trash bags for this project."

The Organization asserts that notice was not given. The record is in conflict concerning that allegation. Because of that conflict and because the burden rests with the Organization to demonstrate all the elements of its claim, we cannot find that the Organization has made the necessary showing.

With respect to the merits, this case is different because the clearing of debris involved in this case was alleged by the Organization to be "picking up trash, by hand" as opposed to the use of the usual machinery utilized by Maintenance of Way forces to perform debris clearing work. The question is whether the record establishes that there was a practice of employees performing that work and/or a practice by the Carrier of contracting out that work.

We are sufficiently satisfied that such a mixed practice exists. For the purpose of discussion and to give the Organization the benefit of the doubt, we shall assume that the employees have performed this kind of work and that this work is encompassed by the scope rule. However, examination of the Carrier's evidence shows that in the past it has contracted out debris clean up work sufficiently similar in kind to encompass "picking up trash, by hand". "Picking up trash, by hand" falls within the general clearing of debris, which has been contracted out in the past. Any differences are only in degree. Given the existence of the past practice, the Organization cannot prevail in this case.

AWARD

Claim denied.

ORDER

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

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By Order of Third Division

Dated at Chicago, Illinois, this 19th day of January 1996.