

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31285
Docket No. MW-30400
95-3-92-3-142

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 (Shelby Railroad Service) to remove six hundred feet of track, remove and install one turnout, install eight hundred feet of track, install thirty grade ties and surface, line and gauge eight hundred fifty feet of track at Memphis, Tennessee on November 16, 17, 18, 26, 27, 28, 29 and 30, 1990 (Carrier's File 910261 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, the Arkansas Division employees listed below * shall each be allowed pay for all wage loss suffered at their respective time and one-half rates of pay for the dates listed in Part (1) above.

*	L. Jones	E. Chism
	R. Wilson	D. Reaves
	R. J. Smith	L. Lance
	J. L. Jones	C. Tate
	B. Johnson	G. Kinney
	H. N. Jones	J. Ruth"
	R. Parks	

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.

Contractor forces performed the removal and installation of track and ties at Memphis, Tennessee. The Carrier did not provide advance notice to the Organization of an intent to contract out the work.

With respect to the Carrier's contention that it did not own the track involved, that argument was not raised on the property. As persuasive as that argument might be, nevertheless, because the argument was not raised on the property, it cannot now be considered by this Board.

With respect to the Carrier's ability to contract out the type of work involved in this dispute, in light of the practice of contracting out this type of work in the past with the Organization's acquiescence, the Organization cannot now prevail on a contracting out claim.

But, no advance notice was served in this case of the Carrier's intent to contract out the work as is required by Article IV ("In the event a carrier plans to contract out work within the scope of the applicable schedule 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."). "[S]hall notify" is mandatory. This Board has no authority to change that language. While the Carrier, through the Organization's acquiescence, had the ultimate right to contract out the work, nevertheless, the work fell "... within the scope of the applicable schedule agreement". Clearly, the employees have done this work in the past.

The remedy shall flow only to those Claimants who were on furlough at the time the contractor performed the work. According to the Carrier, it may be that all of the named Claimants were working at the time, which would make the remedy moot. However, in order to be certain, the matter is remanded to the parties for a joint check of the Carrier's records to determine the number of hours the contractor performed the work, whether Claimants were on furlough, the length of any such furloughs and whether those furloughs overlapped the time the contractor performed the work in dispute. Only the furloughed Claimants holding seniority at the time the contractor performed the work shall be entitled to relief. Those furloughed Claimants shall be made whole (at their straight time rate) for the number of hours the contractor performed the work.

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.