

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31599
Docket No. MW-30818
96-3-92-3-654**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employees**
(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (CW&W Construction) to perform crossing renovation work at Mile Post T-82.2 on October 23, 1990 and at Mile Posts T-80.3 and T-81.4 on October 24, 1990 [Carrier's File 013.31-320(442)].

(2) The Agreement was violated when the Carrier assigned outside forces (CW&W Construction) to perform crossing renovation work (removal of wooden crossing panels, old rail and crossties and the replacement of ballast and asphalt) at Mile Post T-5.9, Shipp Road Crossing, Highway LA 169 on November 15, 1990 [Carrier's File 013.31-320(443)].

(3) The Agreement was violated when the Carrier assigned outside forces (CW&W Construction) to perform track work (digging out road crossing) at Mile Post 675, Crossing in Barrett Pass on December 12, 1990 [Carrier's File 013.31-320(450)].

(4) The Carrier also violated Addendum No. 9, Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding when it failed to furnish the General Chairman with an advance written notice of its intention to contract out said work and the reasons therefor.

(5) As a consequence of the violations referred to in Parts (1) and/or (4) above, Section Foreman R. Oney and Laborers M. Bradshaw, A. J. Ray and G. Duffey, Jr. shall each be allowed pay at their respective rates of pay for an equal proportionate share of the forty-four (44) man-hours expended by the outside forces.

(6) As a consequence of the violations referred to in Parts (2) and/or (4) above, Welder Helper D. A. Daily and Laborers C. W. Archield and E. L. Black shall each be allowed eleven (11) hours' pay at their respective straight time rates of pay for the thirty-three (33) man-hours expended by the outside forces.

(7) As a consequence of the violations referred to in Parts (3) and/or (4) above, Machine Operator D. J. Everett shall be allowed ten (10) hours' pay at the machine operator's straight time rate of pay for the ten (10) man-hours expended by the outside forces."

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 these consolidated claims, the Organization alleges dual violations of the Rule 1, the Scope Rule in the Agreement and of the notice and conferencing requirements of Article IV of the May 17, 1968 Agreement, as augmented by the Berg-Hopkins Letter of December 11, 1981. On the basis of careful consideration of the record evidence, we find that the claims are in most respects well founded.

In each claim, the work at issue is the digging out and replacement of wooden crossing panels, asphalt, crossties, ballast and rail in connection with road crossing renovation at various crossing sites on Carrier's property. It is evident beyond cavil that such work is "Scope-covered", as the record amply demonstrates that it has been performed by Organization-represented track forces for decades by hand and /or utilizing Carrier-owned Pettibones and plows. Third Division Award 26084.

The record persuasively establishes that on each of the claim dates, except for October 24, 1990, an outside construction company provided a backhoe and two employees, under subcontract by Carrier, to assist Claimants in the performance of that work. (With respect to October 24, 1990, Carrier flatly denied in claims handling that any outside contractor forces had worked that day. The conflict in this material fact is not resolved on the record and requires dismissal of that aspect of the claims. See Third Division Award 31606. The balance of the claims are perfected in this record and must be sustained.

It is not disputed that Carrier failed altogether to provide the Organization with notice and opportunity to conference mandated by Article IV of the May 17, 1968 National Agreement and reinforced by the Berg-Hopkins Letter of December 11, 1981, prior to subcontracting for the backhoe and employees of the outside contractor. The requirement for such advance notice and, if requested, good faith consultation with the Organization, is not defeated by invocation of the so-called "exclusivity doctrine". The inadequacy of that defense in a case of blatant violation of the requirements for notice and conferral prior to the subcontracting to outsiders of Scope-covered work should by now be so well established that an elaborate string citation should not be necessary. See Third Division Awards 18305, 18687, 18999, 19578, 19631, 19899, 23203, 23354, 23578, 24173, 24236, 24289, 26016, 26212, 26174, 27012, 27185, 28513, 28692; Public Law Board No. 4306, Award 5 and Public Law Board No. 4768, Award 1.

We are persuaded that each of the claimed violations of the notice and conference provisions of Article IV of the May 17, 1968 National Agreement and the Berg-Hopkins Letter of December 11, 1981, save that for October 24, 1990, must be sustained. There is ample precedent for monetary damages in such cases, to remedy the violation, to recompense the loss of work opportunity and, as importantly, to induce future compliance with these good faith obligations. See Third Division Awards 24280, 24383, 25402 and 27614; see especially 24621 and 28513 involving these same Parties.

AWARD

Claims 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 29th day of August 1996.