

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

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Carrier violated the Agreement when it assigned an outside contractor (Marlatt Construction) to install crossties, rail and perform grading work south of the tower in the St. Joseph Terminal on May 11, 12 and 13, 1990 (Carrier's File 900532 MPR).**
- (2) The Agreement was further violated when the Carrier failed and refused to furnish the General Chairman with advance written notice of its intention to contract out said work as required by Article IV and the December 11, 1981 Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, St. Joseph Terminal Machine Operators K. D. Eichelberger and M. R. Kinney shall each be allowed eight (8) hours at their respective straight time rates of pay for May 11, 1990, two (2) hours each at their respective overtime rates of pay for May 11, 1990 and eight (8) hours each day at their respective overtime rates of pay for May 12 and 13, 1990 for the work performed by the contractor in Part (1) above."**

## 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 were given due notice of hearing thereon.

On April 3, 1990, Carrier notified the Organization of its intent to solicit bids from contractors "to assist gangs unloading and laying track panel at St. Joseph, Missouri." During an April 16, 1990 conference with regard to the subcontracting, General Chairman Borden asserted that the work under discussion "belonged" to Maintenance of Way employees since they "had performed such work in the past" and were "sufficiently skilled to do this." Further, the General Chairman urged Carrier to rent "the modern, sophisticated equipment needed for the job." Finally, the General Chairman objected that Carrier's notice "did not contain a specific location where the work was to be done, nor the equipment necessary to perform the work."

On April 18, 1990, Carrier sent the following correspondence to the Organization:

"As a matter of accepted past practice and consistent with the Labor Contract, there is no impropriety whatsoever in the Company contracting this work. In each of these instances of contracting you have been given a reasonable, complete and accurate description of the work being contracted by the Company. None of the contracting which you have protested involves Scope covered work."

In that connection, Carrier submitted a list of 20 "recent instances in which the Organization had sent letters to Carrier protesting notices of Carrier's intent to subcontract work."

On August 2, 1990, the Organization submitted a claim on behalf of Machine Operators Eichelberger and Kinney, alleging violations of Article IV of the 1968 National Agreement, the Berge-Hopkins letter of December 11, 1981, claiming lack of adequate good faith advance notice and violation of the Scope Rule. With respect to damages, the

Organization noted that Claimant Eichelberger was working "a lower rated position", and Claimant Kinney "remained furloughed" on the claim dates.

The Organization premised its claim upon two issues; (1) Carrier did not serve proper notice with respect to the work being subcontracted and, (2) Carrier contracted out Scope covered work "belonging" to the MofW employees. In our considered judgement, neither of those positions is sustainable on this record.

On April 3, 1990, Carrier notified the Organization that it intended to solicit bids for the specific task of: "assist gangs unloading and laying track panel in yards" at St. Joseph, Missouri. We find no deficiency or inadequacy in that notice and we note that it was the basis for a pre-contracting discussion between Carrier and the Organization. Regarding the claimed Scope Rule violation, it was incumbent upon the Organization to prove, by a preponderance of record evidence, that the work at issue "belongs" to MofW employees by virtue of a custom, practice or tradition of routine performance. Evidence sufficient to carry that burden of persuasion is lacking in this record. Aside from bare assertions, the Organization did not offer any probative evidence which support a conclusion that Carrier violated the Scope Rule of the Agreement when it subcontracted the work in dispute. Based on the foregoing, this claim is denied.

### 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.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Third Division**

Dated at Chicago, Illinois, this 6th day of May 1997.