

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32321
Docket No. MW-31651
97-3-93-3-661**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(Brotherhood of Maintenance of Way Employees)
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company (Eastern Lines))

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned an outside concern (Massman Construction Company) to perform Maintenance of Way work (drive pilings, tying rebar, building concrete forms and pouring concrete) in connection with the building of a pier at the Liberty River Bridge, Liberty, Texas beginning July 1, 1992 and continuing (System File MW-92-135/MofW 92-195 SPE).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman proper advance written notice of its intention to contract out the work in question in accordance with Article 36.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. G. F. Majefski, Jr., J. Rodriguez, Jr., G. L. Salazar, G. C. Pina, R. Callihan and L. T. Lane shall each be compensated for nine hundred twenty-six (926) hours' pay at their respective straight time rates of pay and three hundred eighty (380) hours's pay at their respective time and one-half rates of pay and continuing."**

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.

Beginning July 1, 1992, and continuing, the Carrier hired an outside contractor to drive pilings, tie rebar, build concrete forms, pour concrete and perform other work related thereto in connection with the building of a pier at the Liberty River Bridge in Liberty, Texas. The contractor also assigned six of its employees, who hold no seniority in the Maintenance of Way and Structures Department, to perform the work in question.

The Organization filed the instant claim contending that the Carrier violated the Agreement when it hired the outside contractor to perform work that has customarily and historically been performed by BMW employees. Furthermore, the Organization argues that the Carrier made no attempt to notify the General Chairman of its intent to hire an outside concern, nor did it attempt to rent the needed equipment to perform the work, if it truly did not have the necessary equipment.

The Carrier denied the Claim contending that in order for it to build the pier at the Liberty River Bridge, it had to use a barge and an aerial crane. Carrier contends that since it does not own either piece of equipment, it was forced to hire an outside contractor to perform the work. The Carrier pointed out that its Bridge and Building Department employees assisted the outside contractor in the building of the pier and the only work performed by the contractor related to the work performed with the barge and aerial crane.

The parties being unable to resolve the issues at hand, this matter came before this Board.

This Board has reviewed the record in this case and we find that the Carrier clearly violated the notice requirements set forth in Article 36. As we have stated in numerous awards in the past, the purpose of the notice requirement is to allow the Organization an opportunity to meet with the Carrier to discuss the planned subcontracting so that the Organization can then possibly make suggestions as to how some or all of the Carrier employees can be utilized to perform the planned work that is planned to be subcontracted by the Carrier. If the Carrier makes no attempt to notify the General Chairman and hold a good faith conference as envisioned by Article 36, the Organization does not have the contractually protected ability to participate as is obviously contemplated by the Agreement.

In the case at hand, despite the fact that the Carrier takes the position that the work is not Maintenance of Way work, the extensive record shows otherwise. The Organization has presented sufficient proof that its members have performed work such as this on many occasions in the past. It is true that the Carrier had to utilize some pieces of equipment that it did not own and would have had to subcontract some of the work so that it had enough skilled people to operate the cranes and other equipment that the Carrier normally does not use as part of its regular work. However, without the ability to discuss the matter with the Carrier in an Article 36 conference, the Organization was without its only tool to utilize in an effort to participate in some of the work being contemplated by the Carrier in this case.

Consequently, this Board has no choice but to sustain the claim in part. With respect to the remedy sought by the Organization, it appears that since the Carrier did not make available the records that were necessary for the Organization to determine how much of the work should have been performed by its employees, the Organization has requested an extensive amount of money to be paid to several Claimants. This Board cannot base its award merely on the supposition of the Organization. Therefore, we remand this issue to the parties for an analysis of the time records in an effort to determine how many employees should be compensated for the work that was wrongfully subcontracted because of the Carrier's failure to issue a notice to the Organization.

The Carrier violated the Agreement by not notifying the Organization of the planned subcontracting and then did not meet with the Organization to discuss it before

it began. However, before damages can be awarded, the Carrier must make available to the Organization the number of hours that were spent on this job by the subcontractor so that an appropriate award can be made.

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 13th day of November 1997.