

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 32601  
Docket No. MW-31715  
98-3-93-3-737

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

**PARTIES TO DISPUTE:** ( **Brotherhood of Maintenance of Way Employes**  
( **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 (Cherokee Mowing, Inc.) to line track, haul track panels, rocks, ties, tie plates, spikes and drag rails in the Centennial Yard at Fort Worth, Texas beginning July 20, 1992 and continuing (Carrier's File 930004 MPR).**
- (2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with a proper 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, Messrs. K. V. Jackson, M. T. Elder, L. D. Hayes and D. L. Wright shall each be compensated at their respective rates of pay for an equal proportionate share of the total number of man-hours expended by the outside forces beginning July 20, 1992 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.

This dispute concerns the contracting of certain track construction work in conjunction with Carrier forces. The record shows that, contrary to the Organization's claim, notice of the Carrier's intention was sent to the General Chairman by letter dated May 12, 1992; conference was requested and held on May 18, 1992; and the work commenced on July 20, 1992.

The Carrier offers as a principal argument that the Organization has failed to demonstrate its "exclusive" right to perform the work in question. The Board has found in numerous Awards that "exclusivity" alone is not a compelling argument in instances of contracting work to outside forces.

However, this is another instance in which the Carrier has demonstrated its repeated use of a contractor's forces in situations identical to that under review here. Note must be taken of that portion of Article IV of the Agreement of May 17, 1968, stating:

"Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out."

Third Division Award 20934 stated:

"The Organization has the burden of proving by a preponderance of the evidence that the disputed work has been customarily and historically performed by the employees. While . . . we do not find this burden to require proof of exclusive past performance, it does, in our judgment, require a showing of more than a shared or mixed practice. After close review of the considerations bearing on this issue, we conclude, on the instant record, that the Organization's evidence falls short of

demonstrating . . . regularity, consistency and predominance in the performance of the disputed work.”

The Board finds this reasoning fully applicable to the instance here under review.

**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 22nd day of May 1998.