

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32703
Docket No. MW-32315
98-3-95-3-148**

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

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and 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 (A. L. Baker, also known as Key Associates) to perform recognized Maintenance of Way work (cleaned small amounts of coal and snow from the Carrier's coal cars and closed doors on all cars handled on the south end of No. 3 East Yard Track) at Mile Post 204.3, Latta (Jasonville), Indiana on January 8, 11, 12 and 13, 1993 and continuing (System File C-30-93-CO80-02/8-00124 CMP).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out the work described in Part (1) above, as required by Rule 1.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. P. Richards, F. D. Caddell and J. L. Borders shall each be allowed eight (8) hours' pay at their respective rates for each day worked by the outside forces in the performance of the work described in Part (1) above beginning January 8, 1993 and continuing throughout the period the outside forces performed the subject work."**

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 claim contends that Carrier violated the Agreement when it engaged three employees of the A. L. Baker Construction Company on the above dates to remove small amounts of coal and snow from Carrier's coal cars and close car doors at Latta, Indiana, work the Organization maintains is contractually reserved to its members. Claimants were all Section Laborers on the Latta Section at the time.

Although arising out of a somewhat different fact pattern, the substantive issues presented by this grievance are identical to those addressed in Third Division Award 32704 involving the same parties. The Board in that case concluded that the Organization had failed to show that the work in dispute was reserved to its members by Agreement Rule or otherwise, and that, accordingly, there was no violation of Rule 1 - Scope. For the reasons recited at greater length in that Award, we reach the same conclusion in this instance.

In Award 32704, the Board concluded that Carrier's failure to provide formal notification of its subcontracting plans was a violation of Appendix I of the Agreement. Here, as in that case, it is undisputed that the Carrier made no effort to discuss the contracting out with the General Chairman before contracts were let. The subcontracting at issue in Award 32704, however, occurred several months after Third Division Award 29547 had pointedly directed Carrier to serve notice to the Organization in the future before subcontracting as mandated by Appendix I to afford it an opportunity to make its case for preserving the work, without prejudice to the position of either party as to who Carrier might ultimately determine should perform it. In

recognition of Carrier's non-compliance with Award 29547, the Board in Award 32704 sustained the claim for backpay as incentive to future compliance.

The facts giving rise to the claim presented here, however, arose approximately two months prior to the date Award 29547 was rendered, and non-compliance is not a factor. Under the circumstances presented, the Board concludes it is thus appropriate to sustain the claim without compensation, but to again direct that Carrier serve notice to the Organization in the future prior to subcontracting in keeping with the commands of Appendix I.

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 August 1998.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 32703, DOCKET MW-32315
(Referee Conway)

The Board correctly found that the Agreement was violated when the Carrier failed to issue notice of its intention to contract out the work at issue and a limited concurrence is in order. However, the Organization must dissent to the erroneous findings concerning the monetary claim because the Majority simply ignored the evidence that was presented by the Organization during the on-property handling. The Majority held:

"This claim contends that Carrier violated the Agreement when it engaged three employees of the A. L. Baker Construction Company on the above dates to remove small amounts of coal and snow from Carrier's coal cars and close car doors at Latta, Indiana, work the Organization maintains is contractually reserved to its members. Claimants were all Section Laborers on the Latta Section at the time.

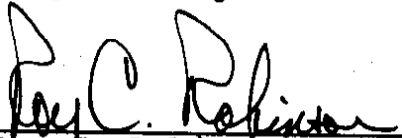
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There are two (2) errors in the Majority's statement cited above. First, the issue of the work not being reserved to the Maintenance of Way employees is patently wrong. If the Majority would have taken the time to read the Organization's submission and reviewed the supporting evidence presented therewith, it would have been hard to miss the fact that the General Chairman presented ample evidence during the handling of this dispute on the property, that such work had been performed by Maintenance of Way employees for at least fifty (50) years. The Organization's presentation of such evidence was never disputed by the Carrier during the handling of this dispute on the property. This Board has consistently held that in the face of a general Scope Rule, the test for Scope coverage is customary and traditional performance. In this case, the evidence is unrefuted that the Maintenance of Way employees have performed this exact work throughout the Carrier's system for half a century. Hence, the Majority's conclusion that the work was not Scope covered is simply wrong.

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Second, the Majority held that no compensation was due the Claimants because this case predated Award 29547 by some two (2) months. This bald assertion flies in the face of Awards 24280, 31386 and 31388, which were provided to the Board in this case, involving these parties and the Carrier's failure to provide advance written notice prior to contracting out Maintenance of Way work. Inasmuch as the Board has already tolled the Carrier's time limit concerning its alleged ignorance as to providing notice, this award should have been sustained for the monetary claim based on the merits as well as the Carrier's failure to comply with the notice provisions of the Agreement. The Majority's decision here not to award monetary relief in this case is not grounded on sound reasoning and is worthless as precedent. Therefore, I respectfully dissent.

Respectfully submitted,



Roy C. Robinson
Labor Member