

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32938
Docket No. MW-32146
98-3-94-3-401**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(CSX Transportation, Inc. (former Louisville and
(Nashville 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 to perform Maintenance of Way work (load and sort ties) behind SPG 6XT1 forces working on the Memphis Subdivision beginning May 10 and continuing [System File 14 (41) (93)/12(93-0971) LNR].**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out said work in accordance with Article IV of the May 17, 1968 National Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. R. Morgan, R. A. Foster, D. W. England, C. R. Parker, R. K. Allen and J. W. Madden shall each be allowed eight (8) hours' pay at their respective rates for each day expended by the outside forces in the performance of the work in question."**

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 involves Carrier's action in contracting the work of picking up crossties along the right-of-way behind the T&S Gang. The original claim, filed on July 14, 1993, alleges that no advance written notice was given to the Organization of the Carrier's intent to contract this work that had been traditionally performed by employees. Carrier's September 7, 1993 response alleges a past practice of contracting this work, and references a file number where it contends that notice was given and no objection raised. The Organization's appeal of September 22, 1993 notes that some of the ties are being loaded into Carrier's gondolas and others left along the right-of-way for reuse, and again states that Carrier failed to give proper notice and avers that notice was not received by the General Chairman. There is no further mention of the notice throughout the balance of the correspondence on the property, and a copy of the notice was not made a part of the record.

The Organization argues that the work was historically performed by employees and that it was entitled to advance written notice of contracting pursuant to Article IV of the May 17, 1968 National Agreement. It relies upon the following on-property Awards to support its contention that the failure to provide such notice warrants an award of damages: Third Division Awards 30977, 31479, 31597, 31619, 31777, 32096, 32160, 32312 and 32446.

Carrier contends that the Organization failed to sustain its burden of proving that no notice was sent and that the work was scope-covered, citing Third Division Awards 20573, 30224 and 30716. It argues that the Board cannot resolve conflicting facts and should dismiss the claim on that basis, citing Third Division Awards 20408, 27853, 27857, 28790 and 28794. Carrier also alleges that the Organization failed to prove that it exclusively performed the work, and asserts a past practice of contracting.

A careful review of the record convinces the Board that this case turns on whether the Carrier gave notice of its intention to contract out the work in issue. Despite Carrier's assertion, the Organization need not prove exclusivity of performance in order for the notice obligation of Article IV to be applicable. Carrier's own correspondence admits that its employees have performed this work as well as contractors, making this a colorable scope claim requiring notice.

The record contains contrary assertions concerning whether the appropriate notice was sent by Carrier. There is no doubt that Carrier could have included a copy of the alleged notice with its response on the property and failed to do so. However, it did identify a particular file number within which the notice was to be found and the signatory to said notice. Thereafter, the Organization merely asserted again that it had received no such notice. It made no reference to the file in question or claimed that such file did not exist or contained no such notice. Neither did the Organization specifically request Carrier to produce a copy of said notice. Because the Organization bears the burden of proof in a case of this sort, and did not follow up on Carrier's identification of the location of the notice, the Board concludes that it failed to sustain its burden of proving that Carrier violated Article IV of the 1968 National Agreement. This case is limited to its facts, and is distinguishable from those cases in which the Organization specifically requests that it be furnished with a copy of a critical document during the handling of the dispute on the property, and the Carrier fails to produce it. See, e.g., Third Division Award 31619.

Because Carrier's assertion of a mixed practice concerning tie removal was not contested by the Organization on the property, there is no basis upon which to find the contracting in issue violative of the Agreement. Accordingly, the claim must be 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 23rd day of November 1998.