

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36292
Docket No. MW-35683
02-3-99-3-620**

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (formerly The Denver
(Rio Grande Western 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 (Johnson Excavating) to perform Maintenance of Way work (operate a backhoe to clean a culvert) at Mile Post 173.8 in the vicinity of Oak Creek, Colorado on April 20, 1998 to the exclusion of Work Equipment Operator J. I. Matlock (System File D-98-27C/1150733 DRG).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice regarding its intent to contract out the work in Part (1) above as required by Appendix D of the Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant J. I. Matlock shall now be compensated for eight (8) hours' pay at his respective rate of pay.”**

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.

The Carrier engaged a contractor, Johnson Excavating, to clean a blocked culvert at Mile Post 173.8 near Oak Creek, Colorado. It contends that this was necessary to "keep the culvert from washing out the tracks." The contractor did the work with its own employee and equipment, a backhoe, for eight hours on April 20, 1998. No notice of this contracting out was given to the General Chairman. The Carrier insists that the lack of notice was justified by "the fact that the work was performed under an emergency situation and needed to be executed before a 15-day notice could be served."

Appendix D, Article IV (Contracting Out) of the May 1968 National Agreement dealt with this subject as follows:

"In the event a Carrier plans to contract out work within the scope of the applicable schedule agreement, the Carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier shall promptly meet with him for that purpose. Said Carrier and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Carrier may nevertheless proceed with said contracting, and the Organization may file . . . claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding. . . .”

This notice requirement was reaffirmed in a December 11, 1981 letter which also added the following commitment:

“The Carriers assure . . . that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by Carrier employees.”

The Claimant, Matlock, is a Work Equipment Operator. He says he could have cleaned the culvert in question with leased equipment, or perhaps Carrier equipment.

The Organization argues first that operation of a backhoe to clean a culvert is “work . . . clearly reserved to Carrier forces” under Rules 1 through 4 and that contracting out such work is hence a violation of the Agreement. It argues further that the failure to provide the General Chairman with notice of the contracting out was a violation of Appendix D and denied the General Chairman of the opportunity to persuade the Carrier to have the work done by its employees.

There is no need to address the first argument because the second has merit. The Carrier concedes it failed to provide the required notice, but urges that its failure was justified by an “emergency” situation. However, it has provided no meaningful evidence with respect to the alleged “emergency.” True, it stated that the culvert was blocked and that the contractor cleared the blockage on April 20, 1998. But there is nothing else to show that a real “emergency” existed. We do not know when the culvert problem was discovered, how much time the Carrier had to correct the problem before the tracks would be endangered, when exactly the Carrier engaged the contractor, how long it took for the contractor to act, why some notice could not have been provided before the contractor was engaged, and so on. All that is before the Board is the bare assertion of an “emergency.” The Carrier has the burden of establishing that there was indeed an “emergency.” It failed to meet that burden. Its lack of notice to the General Chairman was a violation of Appendix D. Given the record made in this case, it cannot

be said that the General Chairman could not possibly have persuaded the Carrier to use a Carrier employee to perform the disputed work.

AWARD

Claim sustained.

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 28th day of October 2002.