

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36809
Docket No. MW-36301
03-3-00-3-482

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

(Brotherhood of Maintenance of Way Employes

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company [former Southern
(Pacific Transportation Company (Western Lines)]

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (MJB Pipeline Construction Company) to perform routine Water Service Subdepartment work [tap and install a two inch (2") water line and related work to a waste treatment plant and a car wash] between Mile Posts 4.5 and 5.0 in the Oakland Yard at Oakland, California commencing in March 1999 and continuing through April 1999 (Carrier's File 1196032 SPW).
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance written notice of its intent to contract out the work referenced in Part (1) above or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces, in accordance with Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant E. D. Freemen shall now be compensated at his respective rate of pay for a proportionate

share of all man-hours expended by the outside forces in the performance of the aforesaid work during the months of March and April 1999."

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.

On May 21, 1999, the Organization submitted a claim on behalf of the Claimant asserting that within the Water Service Sub-department a violation had occurred when an outside contractor performed scope protected work. The claim maintains that three men working for MJB Pipeline Construction Company expended 500 man hours in March and April 1999 between mileposts 4.5 and 5.0 of the Oakland District, Western Division, Oakland California, "to install a 2 inch water line, tapping into a 4 inch line, and then continuing the 2 inch line to a waste treatment plant and a car wash." The Organization argued that the Claimant was available to perform the work, which was historically, traditionally, and customarily work performed by BMWE-represented employees.

During the progression of this claim, several issues emerged. The number of hours claimed changed from 500 to 402 without explanation. The Carrier challenged the Organization to identify the specific dates when the work was allegedly performed and received no response. The Carrier further noted that the work was properly contracted out in conformity with Article IV; the notice of intent was responded to by the Organization; and the work was conferred on the property. The Carrier further provided information that this was water services as

part of the "major intermodal yard reconstruction at W. Oakland" and in another notice that "UP water service would be used for any temporary work as needed and as forces are available." The Carrier maintained that it was not obligated to piecemeal out a small part of the very large project. The Carrier also provided substantial evidence of a longstanding practice to contract out this type of work.

After a full review of the record, the Board finds that the work at issue was properly contracted out following notice and conference. Moreover, the water service work and subcontracting records indicate that this was proper practice on this property for the same type of work previously and historically performed by outsiders. The Organization did not challenge this with any evidence of record that in this instance it customarily belonged to the BMWE-represented employees. Nor did the Organization argue against the Carrier's defense that it need not piecemeal the project. Our study of the record includes the notice that water service on this project would use BMWE-represented employees "for any temporary work as needed and as forces are available." While the claim is vague as to the dates the outside contractor performed this work, the Carrier did provide the Organization with a statement that reads, in pertinent part, as follows:

"July 23, 1999 Letter provided show past practice of contracting water service work. Full employment & Notice served. Employee performing other duties on project during time."

This response lists the Claimant as not available, while the Carrier earlier notes that "the work must be finished in a timely manner."

The Board finds that the Organization has neither perfected its claim with dates and information on the specific Claimant's availability, nor provided sufficient proof to overcome the Carrier's argument that the work was properly performed without violating the Agreement. We find no evidence provided by the Organization to prove the alleged violation. There are no statements from the Claimant that he was available or could have been made available to perform the work of three outsiders to the Agreement on whatever dates or hours they performed the work. Because similar work also performed by BMWE-represented employees has been contracted out, we find no proof in this instance to hold that the

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Carrier violated the Agreement. Simply put, the Organization failed in its burden to prove all the basic elements of its claim. 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 29th day of December 2003.