

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 36965  
Docket No. MW-36148  
04-3-00-3-315**

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employes  
(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 an outside contractor (Robinson Plumbing, Inc.) to perform routine Water Service Subdepartment work (water line and related work in connection with the installation of HVAC heating and air conditioning system) at the yard office building in Eugene, Oregon beginning November 27, 1998 and continuing (Carrier's File 1181056 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, 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 G. L. Davis, T. J. Walsh, J. H. Dodson, G. A. Sampson, W. A. Deathrage and M. L. Brieserneister shall now each be ‘ . . . paid forty (40) hours per week at their respective rates of pay for the duration of time that the outside contractors were performing this work [start to finish].’”**

**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 subcontracted work at issue in this claim was the installation of copper plumbing supply and return lines to boilers and chillers, installing new cooling towers, process pumps, back-flow devices, HVAC equipment, duct work, and the removal of old mechanical equipment and lighting fixtures in a renovation of the Yard Office Building in Eugene, Oregon. Except for M. L. Brieserneister, who was withdrawn as a Claimant by the Organization because he had retired prior to the claim dates, the Claimants were regularly assigned to Water Service Gang No. 8089, in the Water Service Subdepartment headquartered at Eugene, Oregon, Eastern Seniority District, Roseville Division.

Careful analysis of the voluminous record leaves us persuaded that the work in question was of a type previously performed by outside contractors and by BMW-represented employees. In that connection, the Carrier never denied written statements from the Claimants that they possessed the necessary skills and experience to do such work, had in fact performed nearly identical work in the past, including in 1993 at the Brooklyn Yard Office in Portland, Oregon, and were asked to submit an in-house bid for the Eugene project. By the same token, the Organization also failed to effectively refute evidence from the Carrier showing that it had subcontracted such work on various prior occasions after giving due notice and discussion opportunity to the appropriate BMW General Chairman.

Under well-entrenched arbitral precedent, such "mixed practice" does not constitute evidence of "custom, practice and tradition of exclusive performance" normally required to make out a violation of a "general" Scope Rule. See Third Division Awards 35822 and 30185. For this reason, Part 1 of the claim is denied. On the other hand, it is also well-established that "exclusivity" is not the proper test in determining whether advance notice is required under Article IV of the May 17, 1968 National Agreement." See Awards Third Division Awards 36516 and 36517, citing Awards 29912, 29979, 30944, 31599, 31777, and 32862. "If the Organization has established that BMW-represented employees have, at times, performed the disputed work, then advance notice is required even if Organization forces have not performed the work to the exclusion of other crafts or contractors."

Turning to Part 2 of the claim, we are not persuaded that the Carrier violated the good faith notice/conference requirements of Article IV of the May 17, 1968 National Agreement and/or the 1981 Berge-Hopkins Letter or Understanding. The notice aspect of this case appears to come down to whether the June 18, 1998 notice the Carrier sent concerning this subcontract was addressed to and conferenced with the right General Chairman; not whether the Carrier did or did not make a good faith effort to notify. In that regard the evidence on balance persuades us that notice was sent to and received by one of the two BMW General Chairmen representing employees in Oregon. The claim was filed by the other General Chairman. Further, although the initial appeal letter and the claim submitted to the Board make nuanced references to lack of "proper" notice, neither the initial claim letter nor the initial appeal letter alleges an outright failure of notice or denial of conference. Based on all of the foregoing, Part 2 of the claim likewise is denied. We do not reach Part 3 of the claim.

**AWARD**

**Claim denied.**

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**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 21st day of April 2004.**