

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36966
Docket No. MW-36149
04-3-00-3-287

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Herzog Contracting Corporation) to perform routine Maintenance of Way work (unload and distribute ties) in the vicinity of Hood River, Oregon and working east to The Dalles, Oregon on the Portland Subdivision beginning on January 26, 1999 and continuing (System File J-9952-57/1184875).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52 and the December 11, 1981 Letter of Understanding.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Roadway Equipment Operator J. A. Wheeler shall now be compensated at his applicable straight time rate of pay and for normally considered overtime hours at his applicable time and one-half rate of pay for the total number of man-hours expended by the outside forces in the performance of the work in question beginning January 26, 1999 and

continuing and he shall have all rights and benefits restored that may have been lost as a result of said violations."

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 alleges that the Carrier, without prior notice, contracted with the outside concern for the unloading and distribution of ties in the vicinity of Hood River, Oregon, and working east to The Dalles, Oregon, on the Portland Subdivision, beginning on January 26, 1999 and continuing to completion.

The factual predicate in this case and the arguments advanced by the parties are substantially similar to those decided in Third Division Awards 36514 and 36516 which involved the same parties and the same kind of work. After careful review and without comment on Part 1 of the claim and de novo arguments raised by the Carrier too late to be considered, we find that there is no reason why the instant case should be treated any differently.

The Board held in those referenced cases that the work of unloading and distributing ties was at least arguably scope covered due to "mixed practice" and that, at minimum, notice should have been provided to the Organization before contracting out. The so-called "exclusivity defense" was rejected in those cases as a defense for purposes of notice. See also Third Division Awards 32338 and 32862 and Awards cited therein. In this case, the record establishes that the requisite notice and opportunity to conference were not even sent by the Carrier to the General Chairman until a week after the subcontractor commenced performing the work.

Accordingly, Parts 2 and 3 of this claim will be sustained, with a referral to the Parties for a determination of the hours worked by the contractor's forces on the dates set forth in the claim.

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 21st day of April 2004.