

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39741
Docket No. MW-38841
09-3-NRAB-00003-050272
(05-3-272)**

The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
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 (Pacific West) to perform Maintenance of Way work (replace track pans) at the fueling facilities at the El Paso Yard, in El Paso, Texas, commencing on March 14, 2004 and continuing through April 18, 2004, instead of Messrs. F. Edgar and H. Moreno (Carrier’s File 1398193 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 violation referred to in Parts (1) and/or (2) above, Claimants F. Edgar and H. Moreno shall now each ‘ . . . be paid their proportionate share at the respective rate of their assigned positions, for the one thousand (1000) straight time hours and the eight hundred forty (840) hours at the time and one half rate, worked by the outside contractor and its employees**

to make the repairs described herein. Payment shall be in addition to any compensation they may have already received.”

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 Claimants established and hold seniority as Mechanics in the Water Service Sub-department on the Tucson Division, Eastern Seniority District. At the time of the instant dispute, they were on furlough status because of force reductions. Beginning on March 14 and continuing through April 18, 2004, the Carrier utilized an outside contractor (Pacific West) to replace tracks pans on both tracks at the fueling facilities west of the train way in El Paso, Texas.

The Organization states, and the Carrier does not dispute, that Maintenance of Way work within the El Paso Terminal is performed by terminal gangs consisting of a specific ratio of employees per class working under separate Agreements coming under the jurisdiction of two different General Chairmen (R. D. Sanchez and L. Below).

By letter dated January 26, 2004, General Chairman, Sanchez of the Southern Pacific Atlantic Federation, confirmed a telephone conference with the Carrier, held on January 23, concerning the notice he had received of the Carrier's intent to subcontract the work at issue and his objections thereto. There is no dispute that the Carrier did not send notice to General Chairman Below of the Pacific Federation.

On May 4, 2004, General Chairman Below filed the instant claim, asserting that the work in question had historically and exclusively been performed by Water Service Sub-department employees. The claim included a statement by Claimant F. Edgar that he had installed and repaired track pans at El Paso Yard. A statement by Claimant Moreno stated simply that the contractors were performing the employees' jobs and it was not fair.

The applicable Agreement language provides:

"Rule 9

- (a) In the event the Carrier plans to contract out work within the scope of this Collective Bargaining Agreement, the Carrier will notify the General Chairman 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.**
- (b) 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 will promptly meet with him for that purpose."**

While the Carrier asserts that the claim must be denied because the Organization cannot demonstrate that the work in question was reserved to its members, it does not dispute that the terminal gang employees potentially affected by the subcontracting worked under two separate Agreements, subject to the jurisdiction of two General Chairmen. The record demonstrates that the work in question is arguably scope-covered. Therefore, the applicable Rule clearly required advance notice, and the Carrier does not deny that notice was required. However, it gave notice to only one of two General Chairmen who represented, separately, the two groups of employees at issue. The Carrier offered no explanation for this action, nor has it provided any support for its apparent position that notice only to one General Chairman, who did not represent all of the employees at issue, was sufficient to satisfy its obligations under Rule 9. We find that by failing to provide advance notice to all appropriate representatives, the Organization was denied its contractual right to discuss the matter with the Carrier before outside forces were

used. The claim will be sustained solely on the basis of this notice/consultation violation.

With respect to the remedy, the Carrier disputes the Organization's statement as to the number of hours worked by the contractor, and there was no evidence presented on the property concerning this issue. We remand the case to the parties to determine the number of hours worked by the contractor's forces on the dates set forth in the claim. Given the nature of the violation, the Claimants shall be proportionately compensated for those hours. See Third Division Award 32862.

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 26th day of June 2009.