

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 40085  
Docket No. MW-38356  
09-3-NRAB-00003-0040299  
(04-3-299)

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employes  
(  
(Union Pacific Railroad Company (former Missouri  
( 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 (Jim Scott & Sons Construction Co.) to perform routine Maintenance of Way Department work (preparing ground, dirt and base for building new track, welding new tracks to install new switches) in the vicinity of Mile Post 821.00 in the Alfalfa Terminal Yard, El Paso, Texas beginning January 27, 2003 and continuing (System File MW-03-176/1364764 MPR).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intent to contract out said work or make a good-faith effort to reduce the amount of contracting as provided in 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, Claimants R. S. Martinez, M. R. Hernandez, E. R. Lujan, R. O. Carrasco, G. J. Montoya, F. C. Norris, E. P. Sandoval, J. R. Luna, R. Landa, J. G. Maesse, R. Ramirez, M. Lara, Jr., R. Garcia, G. Madrid, C. Hernandez, D. R. Ortiz, R. Serna, L. R. Wiesman, A. Estrada, M. E. Lopez and J. M. Arrendondo shall now each be compensated at their respective rates of pay for an equal and proportionate share of the total man-hours expended by the outside**

forces in the performance of the aforesaid work beginning January 27, 2003 and continuing.”

**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 on the Del Rio Division in various Departments including the Track Subdepartment, the Roadway Machine Subdepartment and the Welding Subdepartment. All Claimants were regularly assigned as such with headquarters at the Alfalfa Terminal Yard in El Paso, Texas, with a workweek consisting of Monday through Friday from 7:00 A.M. to 3:30 P.M. with Saturday and Sunday as designated rest days.

Beginning on January 27, 2003 and continuing until an unknown date, the Carrier allegedly assigned or otherwise allowed Jim Scott & Sons Construction Company to perform the routine Maintenance of Way work of operating a bulldozer, backhoe, motor graders, front-end loaders, speed swings, scrapers, water trucks and gang trucks to transport men and material to prepare ground, dirt and base for building new track and welding new tracks to install new switches in the vicinity of Mile Post 821.00 in the Alfalfa Terminal Yard in El Paso, Texas.

According to the Organization, the Carrier violated the Agreement when it did not give the Organization advance notice of its intent to contract out the relevant work. In addition, the Carrier had customarily assigned work of this nature to be performed by BMW-represented employees. The Organization further claims that this work is consistent with the Scope Rule. According to the Organization, the Claimants were fully qualified and capable of performing the designated work. The work done by Jim

**Scott & Sons Construction Company is within the jurisdiction of the Organization and, therefore, the Claimants should have performed said work. In addition, before contracting out, it was the Carrier's responsibility to provide proper advance notice. Because the Claimants were denied the right to perform the relevant work, the Organization argues that the Claimants should be compensated for the lost work opportunity.**

**Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. It contends that the work that was contracted out does not belong to BMW-represented employees under either the express language of the Scope Rule or any binding past practice. In addition, it contends that it has the right to contract out such work based on longstanding arbitral precedent. Further, the Carrier contends that because there is a past practice of using contractors to perform the relevant work, it is allowed to contract out said work.**

**Appendix D, Article IV of the May 1968 National Agreement provides:**

**"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. . . ."**

After a thorough review of the matter, the Board finds that the Carrier did not provide the required advance notice of the proposed contracting to the General Chairman. Such requirement must have been fulfilled by the Carrier in order to sustain its position. “. . . [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.” See Third Division Awards 36516, 36514 and 36292.

In the instant case, it is undisputed that the Carrier did not provide the Organization the advance notice required. The work in question was arguably scope-covered and at a minimum, notice should have been provided to the Organization before the Carrier contracted for its performance.

As a remedy, due to lost work opportunities, the Claimants shall be made whole for the actual number of hours of contractor-performed work at the Claimants' respective rates of pay. Because the record in this case is unclear as to the number of hours expended by the contractor, the matter is now remanded to the parties to determine the number of hours that the contractor's forces expended on the project. Once the number of actual hours expended by the contractor is verified, the Claimants shall be made whole for the actual number of hours expended.

**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 19th day of November 2009.