

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40367
Docket No. MW-40647
10-3-NRAB-00003-080500**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 (Blattner Construction Co.) to perform Maintenance of Way and Structures Department work (remove/replace bridges and related work) on existing main line No. 2 Track at Mile Posts 1178.44, 1178.00, 1175.50, 1174.74, 1174.35, 1173.58, 1170.76 and 1170.64 beginning on February 5, 2007 and continuing (Carrier’s File 1474919 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 Rule 59 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 A. Armnendariz, R. Sturtz, C. De Jesus and D. Garcia shall now be compensated at their respective and applicable 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 commencing on February 5, 2007 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.

By notice dated September 19, 2005, the Carrier advised the Organization as follows:

“This is a 15-day notice of our intent to contract the following work:

Location: from Wilma to Lisbon, New Mexico on the Railroad’s Lordsburg Subdivision mile post 1660 to mile post 1177.

Specific Work: providing labor, supervision, grading, subballast, asphalt, culvert work, equipment rental and associated items for construction of a second main line.”

Upon request of the Organization, the parties conferenced the notice, but did not reach an understanding.

As stated in the claim, the dispute concerns the work at “. . . Mile Posts 1178.44, 1178.00, 1175.50, 1174.74, 1174.35, 1173.58, 1170.76 and 1170.64 beginning on February 5, 2007 and continuing. . . .” The Organization argues that some of the

locations where the disputed work was performed were not covered by the September 19, 2005 notice. Comparing that notice to the work involved shows that the Organization is correct. The September 19, 2005 notice specifies "Location: from Wilma to Lisbon, New Mexico on the Railroad's Lordsburg Subdivision mile post 1660 to mile post 1177." As the Organization points out, work at Mile Posts 1178.44 and 1178.00 are not covered by the notice. It has been held that prior notices which do not sufficiently identify the location where the work is going to be performed do not constitute sufficient notice. See e.g., Public Law Board No. 7096, Award 15 (where the evidence revealed that the Carrier could not show that it notified the Organization that it was contracting out work for specific service orders for work locations not mentioned in prior notices). Compare Third Division Award 32333 cited by the Carrier where the disputed work "... at M.P. 40.50 to 40.75 near Ontario, California" was within the "... breadth of the notice of the work to be contracted . . ." ("... MP 39 to MP 55 located between Ontario and Pedley, California . . ." as stated in the notice).

But the Organization's problem is that this alleged shortcoming in the notice was not an argument that it raised on the property. See Third Division Award 29909:

"... Thus, it is new argument which, under our Rules, cannot be considered. This Board has long subscribed to the premise that matters that have not been dealt with on the property cannot be advanced for the first time before this Board. . . ."

Indeed, in its May 22, 2007 letter, the Carrier specifically advised the Organization that "... [t]his notice covers the work you allege to have been performed by Blattner Construction Co. on the Lordsburg Subdivision, near Lisbon, New Mexico . . . [and t]he location that you are claiming compensation for is obviously the same locations and the mentioned notice covers that area." Even though the claim identifies work locations outside those specified in the September 19, 2005 notice, on the property, the Organization did not take exception to that assertion. The Organization's arguments now raising notice deficiencies concerning locations of the work constitute new argument not raised on the property and, therefore, cannot be considered by the Board.

Form 1
Page 4

Award No. 40367
Docket No. MW-40647
10-3-NRAB-00003-080500

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 25th day of March 2010.