

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42574  
Docket No. MW-42066  
17-3-NRAB-00003-120441**

**The Third Division consisted of the regular members and in addition Referee Robert A. Grey 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 (DeAngelo Brothers) to perform Maintenance of Way and Structures Department work (cleaning brush and scrap from right of way) between Mile Posts 423 and 248 near Gaviota, California beginning on May 2, 2011 and continuing through June 21, 2011 (System File T-1159S-523/1557416 SPW).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice of its intent to contract out the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces in accordance with the provisions of Rule 59 and the December 11, 1981 National Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant K. Mack shall now be compensated for two hundred and ninety-six (296) hours at his respective straight time rate of pay”**

**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 Organization met its burden to prove that the contracted-out work which is the subject of this dispute is arguably scope-covered pursuant to the Agreement. Therefore, the Carrier was required to provide notice in advance of contracting-out, even if it is work not performed exclusively by Organization members. See on-property Third Division Awards 18714, 28989, 29158, 36515, 39708 and 40932.**

**Awards on this property have ruled notice stating “as needed . . . at various locations in California and Nevada” to be sufficient, and notice stating “on an as needed basis” on a number of named subdivisions to be sufficient, for similar notice periods of time. See Third Division Awards 37852 and 40932, respectively. Therefore, the notice in this case, stating “various locations on the Los Angeles Service Unit,” was sufficient.**

**The Carrier met its burden to prove the existence of a mixed practice. Therefore, the Carrier did not violate the Agreement. See on-property Third Division Awards 29158 and 40932.**

**None of the above-cited on-property Awards are palpably erroneous. The Board notes that neither party dissented from any of them. Nothing in the record provides a basis for deviating from the on-property precedent established by these Awards. They will therefore be followed in the interest of stability.**

**In light of the above, the Board does not reach the parties’ other arguments.**

**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 19th day of April 2017.

LABOR MEMBER'S DISSENT

TO

AWARD 42574, DOCKET MW-42066, AWARD 42581, DOCKET MW-42367,  
AWARD 42583, DOCKET MW-42385, AWARD 42584, DOCKET MW-42388,

(Referee Robert A. Grey)

In these cases, the Majority erred on multiple accounts in its decisions. However, there are two (2) serious errors that must be specifically addressed regarding the precedent cited by the award. First, the Majority's reliance on Awards 37852 and 40932 was improper. Initially, it must be noted that neither of the awards quoted or contained the exact language of the notification letter. Rather, the awards summarized the notification letter from the on-property handling of their respective cases. Accordingly, the Majority's holding that those notifications were sufficient to allow it to accept the ones in these cases was based solely on speculation.

Notwithstanding, when accessing the archived files, the Majority's reliance on Awards 37852 and 40932 is even more problematic. In Award 37852, the Carrier relied on a statement from a manager paraphrasing a notification which allegedly applied in that case. Notably, the notification letter itself was never included within either parties' submission or within the on-property handling. Accordingly, any reliance on Award 37852 would be improper. The Majority's reliance on Award 40932 was also improper. Award 40932 also paraphrased a notification letter from the on-property handling of that case. Upon reviewing the notification letter that was paraphrased, it is substantially different than the ones involved herein as it was for a six (6) month period and provided specific mile posts on subdivisions and leads where the work would occur. Accordingly, the Majority's reliance on Awards 37852 and 40932 was improper.

The Majority also erred when it cited Awards 29158 and 40932 within its holding that the Carrier established a mixed practice allowing it to contract out the claimed work. Both awards were sustained in favor of the Organization and do not support the Majority's findings. Award 40932 specifically rejected the Carrier's mixed practice defense and held that the Carrier's voluminous documentation of an alleged practice of contracting out the claimed work was challenged and effectively countered by the Organization. Accordingly, the Majority's reliance on Awards 29158 and 40932 was improper.

For the above mentioned reasons, it is clear that the Majority erred in rendering its decision. Therefore, I respectfully dissent.

Respectfully submitted,



Zachary C. Voegel  
Labor Member