

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42579  
Docket No. MW-42351  
17-3-NRAB-00003-130346**

**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 (Herzog) to perform Maintenance of Way and Structures Department work (ditching, cleaning cuts, building walkways and associated right of way cleanup duties) in the vicinity of Newcastle, California on the Roseville Subdivision commencing on May 8, 2012 and continuing (System File D-1259S-207/1573076).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance notice of its intent to contract out the aforesaid 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 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 R. Strosnider shall now “\*\*\* be allowed compensation for the loss of work opportunity suffered when the contractor performed his scope covered duties commencing on May 8, 2012. Specifically, Claimant must be allowed the proportionate amount of man hours worked by the contracted employees at his respective straight time rate of pay as**

compensation for the violation of the Agreement \*\*\*' and continuing until the violation ceases."

**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 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 "Cima, Mohave, and Roseville Subs," was sufficient.

On the record before this Board, the Carrier met its burden to prove that the Herzog Multi-Purpose Machine ("MPM") is specialized equipment, the use of which was not a violation under the facts and circumstances at hand. Furthermore, it is undisputed that Herzog owns the patent on the MPM, does not sell the MPM, and only leases the MPM with a Herzog employee as the sole operator of the MPM. Therefore, the Carrier did not violate the Agreement. See on-property Third Division Award 29158.

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 42579, DOCKET MW-42351  
(Referee Robert A. Grey)

In this case, the Majority erred on multiple accounts in its decision. 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 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 party's 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 paraphrase, 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.

Moreover, the Majority's reliance on Award 29158 to support its findings that the MPM is special equipment is misplaced. Award 29158 involved the Carrier utilizing outside forces to perform roofing work and had nothing to do with the MPM. It should be noted that Award 29158 did reaffirm the Carrier's obligations under the December 11, 1981 National Letter of Agreement to reduce the incidence of subcontracting and to attempt to procure rental equipment. Notwithstanding, the Majority's reliance on Award 29158 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