

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43533
Docket No. MW-42930
19-3-NRAB-00003-150142**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(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 (B&P Enterprises) to perform Maintenance of Way and Structures Department work (install ties, road crossings and related clean up) on the Wagoner Subdivision between Mile Post 564.87 and Mile Post 582 at Wagoner, Oklahoma beginning on November 8, 2013 through December 21, 2013 (System File UP700SN14/1597868 MPR).**
- (2) The Agreement was further violated when the Carrier failed to fulfill its obligation under the Agreement to notify the Organization in advance of the work it contemplates assigning to an outside contractor or make a good-faith effort to reduce the amount of contracting as required in Rule 9 and the December 11, 1981 Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants T. McNulty and D. King shall now each be compensated for one hundred fifty-five (155) hours at their respective straight time rates 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 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 have all established and retain seniority within the Track Sub-Department of the Carrier's Maintenance of Way Department. On the dates relevant to this dispute, they were regularly assigned to the Wagoner Subdivision.

"On December 7, 2012, the Carrier provided notice of its intent to contract out:

This is to advise that the Company intends to contract work from time to time to outside contractors at the attached locations. Some of the work to be performed will be tie renewal, crossing renewal, and drainage work. Equipment to be used; backhoe, dump truck, trackhoe, loader, bulldozer, brush-hog mower, crane and chainsaw with operators and traffic control

support services in connection with construction and repair of road crossings.

This is the type of work that has customarily and traditionally been performed by outside contractors' forces. Serving of this notice is not to be construed as an indication that the work described above necessarily falls within the scope of your agreement, or as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMW.

In the event you desire a conference in connection with this notice, all follow-up contacts should be with the Labor Relations Department.

Locations on Wichita Service Unit:

Coffeyville Subdivision:	B327 to M.P. 662.8 (Paola to Colleyville)
Parsons Subdivision:	M.P. 43.3 to M.P. 386 (Paola to Parsons)
Cherokee Subdivision:	M.P. 386 to M.P. 566.05 (Parsons to McAlester)
Pryor Industrial Lead	
Wagoner Subdivision:	M.P. 498.5 to M.P. 661
Tulsa Branch:	M.P. 278.3 to M.P. 324.8
Van Buren Subdivision:	M.P. 497.2 to M.P. 343.6
Lost Springs Subdivision:	M.P. 172.05 to M.P. 241.8
McPherson Subdivision:	M.P. 518 to M.P. 474.7
Wichita Subdivision:	M.P. 453 to M.P. 485.9
Arkansas City, Midland Valley, and Hutchinson Industrial Leads	
Enid Subdivision:	M.P. 242 to M.P. 436
Oklahoma City Subdivision:	M.P. 482.0 to M.P. 515
Duncan Subdivision:	M.P. 436 to Chico, M.P. 561
Lawton Branch:	M.P. 0 to M.P. 56.2
Shawnee Branch:	M.P. 513.6 to M.P. 482"

The Organization requested a conference and the parties met on June 11, 2014, to discuss the notice but no agreement was reached.

On November 8, 2013, through December 21, 2013, the Carrier assigned outside forces to perform routine Maintenance of Way Department work of installing ties, road crossings, and related clean up between Mile Posts 564.87 and 582 on the Wagoner Subdivision. The Organization claims this work as theirs exclusively and avers that the

Carrier failed to comply with the contracting out provisions of the Agreement, specifically the provisions requiring the Carrier to provide proper advance notice of its intent to contract out the work. The Carrier points out that the location of the work done was specifically included on the December 2012 notice.

Rule 9 of the parties' Agreement is essentially a codification of Article IV of the 1968 National Agreement. It reads,

“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 Chairmen, 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. A good faith effort will be made 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 and progress claims in connection therewith.”

The Organization contends that the Carrier has improperly contracted out work that is historically and customarily performed by members of the Maintenance of Way. The Organization contends that the Claimants were capable, qualified, and willing to perform the work done by outside forces. The Organization contends that the Carrier failed to properly notify the General Chairman of its intention to assign the work, failed to discuss the intended contracting in good faith, and failed to assert any reason that would justify the use of an outside contractor.

The Organization contends that the blanket notice issued by the Carrier on December 7, 2012, failed to meet the notice requirements of the National Letter of Agreement. The Organization contends that at their conference, the Carrier failed to provide the specific reason for contracting out, failed to identify the work to be contracted out, and did not make good faith efforts to reach an understanding. The Organization contends that the Carrier did not identify a specific time when any of the work mentioned in the notice would occur. The Organization contends that the Carrier's failure in this regard prevented a meaningful conference from occurring.

The Carrier contends that it has a rich history of using outside forces for this work and that, at most, the Organization has demonstrated a mixed practice. The Carrier contends that its right to utilize outside forces has been recognized by this Board in numerous awards, *citing*, Third Division Award 30754. The Carrier contends that this Board should follow *stare decisis* and find that the Carrier had the right to contract out crossing work, so long as proper notice is provided.

The Carrier contends that it furnished proper advance notice to the Organization regarding its intent to use outside forces specific to tie and crossing work within the time limits required by the Rule. The Carrier contends that it conferenced with the Organization, but an agreement could not be reached.

Other Boards have found “blanket” notices to be problematic when they fail to provide sufficient information to allow the parties to have a meaningful dialogue regarding the intent to contract out. Third Division Award 42542. Suffice to say that a notice that fails to provide a time frame, specific location, and/or the nature of the work to be contracted will generally be found insufficient.

In Third Division Award 42225, the Board found that a notice that essentially said that the Carrier intended to contract out any bargaining unit work, at any time during the year, and anywhere on the North Platte District, was “no notice, really, and is absolutely inadequate in terms of providing the Organization with the information it is entitled to.”

On the other hand, in Special Board of Adjustment No. 1130, Award 13, the Board, relying on prior on-property awards, found that where the notice listed locations and identified the type of work to be performed and the equipment to be used, it was not deficient. “Nothing in Article IV requires more specificity than that provided by the Carrier in this notice.” The Carrier’s notice need only provide sufficient information to allow the Organization to adequately discuss the matter in conference.

The Notice herein provided the specific work to be done, the equipment to be used, and the locations of that work. The location of the complained of work is specifically listed in the attachment to the notice. While the Notice covers a large geographical area, it still provided enough information to allow the parties to conference meaningfully. In accord with prior awards on this property, the notice cannot be said to be deficient.

Furthermore, the work at issue is the type of work that the Carrier has contracted out in the past. Although the employees have also performed this work, the Carrier has demonstrated a mixed practice with respect to this type of work. As a result, the Carrier did not violate the Agreement when it contracted out this work.

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 27th day of March 2019.