

The Third Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(The Denver and Rio Grande Western Railroad Company.

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned ditching work in the 'big cut' on the Cane Creek Branch, beginning December 19, 1983, to outside forces (System File D-61-83/MW-8-84).

(2) Director of Personnel M. M. Kanderis failed to disallow the claim (appealed to him under date of June 13, 1984) as contractually stipulated within subsections (a) and (c) of Rule 29.

(3) As a consequence of either or both (1) and/or (2) above, Messrs. D. L. Drake, T. C. Meitzler, F. D. Ward, L. D. Moore, O. Ratliff and B. Murray shall each

'be compensated an equal proportionate share of the straight time and overtime man-hours expended by the contractor's employees.'"

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

Claimants hold seniority as equipment operators in the Road Equipment subdepartment of the Maintenance of Way and Structures Department. According to the Organization's petition, beginning on December 19, 1983, Carrier assigned outside forces to perform ditching work in the "big cut" on the Cane Creek Branch near Moab, Utah. The work consisted of removing rock and debris from the ditches along the right-of-way in the cut. In the performance of this work, the outside contractor used one (1) cat backhoe, two (2) dumpsters, one (1) D-3 cut, one (1) motor grader and one (1) D-8 dozer. The Organization contended that work of this character, including work at this same location,

has traditionally and customarily been performed by Carrier's Road Equipment subdepartment forces and consequently, Rules 1, 2, 3, and 4 of the controlling Agreement were violated when said work was performed by these outside forces. It set forth arguments and data to support its position that said work accrued to BMWE forces. Also, it charged that Carrier failed to comply with the explicit terms of the Letter of Agreement, dated December 11, 1981, when Carrier belatedly notified the General Chairman of its intent to contract out said work. On this point, it asserted that Carrier's notice was singularly untimely, since it didn't comport with the fifteen (15) days advance notification required by the aforesaid Letter of Agreement. Specifically, it noted that while the notice was dated December 14, 1983 and received by the General Chairman, Carrier actually commenced the work on December 19, 1983. It further pointed out that Carrier was less than forthright, when it apprised the Organization that said work would start in approximately two (2) or three (3) weeks and, then begin this work four (4) days after the General Chairman was notified. It cited numerous Third Division Awards on the obligatory and procedural requirements of advanced notification under Article IV of the May 17, 1968 Agreement. Furthermore, and in response to Carrier's arguments that scaling and trimming canyon walls was work not encompassed within the controlling Agreement, the Organization observed that when outside forces used roadway equipment to remove rocks and debris from the right-of-way, this action breached the controlling Agreement. In effect, said work was covered protected work. In addition, the Organization maintained that Carrier committed a procedural violation, when it failed to respond in timely fashion to the Organization's appeals letter dated June 13, 1984.

In rebuttal and with respect to the procedural question raised by the Organization, Carrier asserted that the Director of Personnel and Labor Relations denied the Organization's June 13, 1984 appeals letter on August 9, 1984, when said Carrier official mailed his denial letter to the Organization. In this connection, it pointed out that the parties have "long" relied upon the U. S. Postal Service as a means to exchange correspondence without the use of certified or registered mail and implicitly observed that this practice worked to the mutual satisfaction of the parties.

As to the substantive merits of the claim, Carrier denied that maintenance ditching was performed and instead asserted that the work performed by the outside contractor involved the scaling and trimming of the vertical walls of the "big cut" on Cane Creek Branch which included cleaning up the "big cut" after the scaling and trimming. It also argued that Claimants were unqualified to operate the machinery or perform the total work involved and were, in fact, unavailable for this work. It took exception to the Organization's contention that it (Carrier) failed to comply with the Letter of Agreement, dated December 11, 1981, (Article IV - Contracting out) arguing that the Organization's December 19, 1983, letter requesting a conference was not received until January 23, 1984. It acknowledged that a conference was held on January 23, 1984, but asserted that such delay was attributed to the Organization's failure to timely notify Carrier that a conference was requested.

In considering this case, the Board rejects the Organization's contention that Carrier failed to respond in timely fashion to the General Chairman's June 13, 1984, Letter of Appeal. From the record and in the absence of evidence that the parties traditional reliance upon the U. S. Postal Service to exchange correspondence precipitated conflict or delays, we have to assume a good faith commitment to this normative exchange process. The same is apropos the Organization's December 15, 1983 response letter to Carrier's December 14, 1983 notification to use outside forces. We find no reason predicated upon the parties past history, as established by the record, to conclude that either party was acting in bad faith or under cover of rationalized argument.

On the other hand, and consistent with the intent of the Letter of Agreement dated December 11, 1981 (Article IV - Contracting out) we find Carrier's notification of outside forces on December 9, 1983 somewhat premature and at variance with the contemplated objectives of the aforesaid Agreement. Since this action in our judgment, constituted a breach of the December 11, 1981 Letter of Agreement's implicit spirit, we find that Carrier violated the understanding that it was required to tender notification as far in advance of the date of the contracting transaction as practicable or no less than in fifteen (15) days prior thereto. Beginning the disputed work on December 19, 1983 was not in accordance with this requirement. Conversely, we find no plausible grounds, given our decisional holdings in past cases to award compensation, since all claimants, except one, who was on vacation, were actively employed at the time the work was performed. See Third Division Awards 23402, 18305, 19155, 19399, 19948.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1988.