

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Norfolk and Western Railway Company

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

(1) The Carrier violated the Agreement when it assigned outside forces to construct a right-of-way fence between Mile Post 109.6 and Mile Post 110.8 on the Connelville District from August 28, 1984 to September 10, 1984 (Carrier's File MW-ROK-84-11).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) B&B Foreman R. Cummings and Carpenters H. Hoeflich, R. Federer, G. Whitaker, J. Kopacko and C. DeBaker shall each be allowed eighty (80) hours of pay at their respective straight time rates because of the aforesaid violations."

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 employes 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 established and hold seniority in their respective classes in the Bridge and Building Sub-Department of the Maintenance of Way and Structures Department.

Beginning on August 28, 1984, and continuing through September 10, 1984, Carrier assigned outside forces to construct a right-of-way fence between Mile Post 109.6 and Mile Post 110.8 on the Connelville District between Hopedal and Pittsburgh Junction, Ohio. There is no dispute that Carrier failed to notify the General Chairman of its intention to contract out the fence construction work in accordance with Article IV of the Agreement, which provides:

"ARTICLE IV - CONTRACTING OUT

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved 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.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt 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.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement."

Carrier maintains that it is obligated by law in the State of Ohio to have fencing along property lines where livestock is maintained on the adjacent property. Carrier argues that it needed to take immediate action, and after canvassing its forces, determined that no forces were available to construct the fence within the time frame allowed. The Organization argues that even if that was the case, Carrier was not relieved of its obligations under Article IV.

We agree with the Organization. Carrier has an obligation to assert good faith efforts to reduce the incidence of subcontracting and increase the use of maintenance of way forces. Carrier failed to do so in this case. The fact that Carrier has not met its burden in this regard is a fundamental and overriding concern precedent to reaching any finding as to exclusivity and is a compelling basis on which to sustain the Claim.

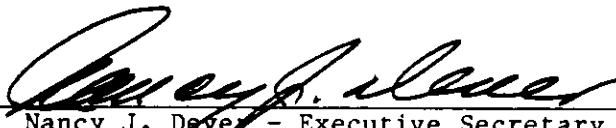
While the Board finds that Count I of the Claim must be sustained, the Claimants during the period in question were fully employed and thus were not adversely affected in any monetary sense. The record here discloses no evidence of suffered loss and consequently we will deny the Claim for damages in Count 3.

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 10th day of August 1989.