

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Chesapeake and Ohio Railway Company (Southern Region)

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

(1) The Carrier violated the Agreement when, without notification to and without a conference having been held as required by the October 24, 1957 Letter of Agreement, it assigned outside forces to perform roadbed stabilization work on the Northern Division from Mile Post 20.4 to Mile Post 20.7 between September 5 and November 2, 1984 (System File C-TC-2499/MG-4992).

(2) Because of the aforesaid violation, '*** a Foreman be paid as a Foreman Inspector for each and every day and hour that the contractor is on property and that Mr. Richardson and two (2) cut off Laborers from the Northern Division be paid for each and every day the contractor is on property.
***'"

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 employees 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.

The Organization charges the Carrier assigned outside forces to perform roadbed stabilization work without a conference being held as required by a Letter of Agreement dated October 24, 1957, and identified as Appendix "B" which in pertinent part states:

"As explained to you during our conference at Huntington, W. Va., and as you are well aware, it has been the policy of this company to perform all maintenance of way work covered by the Maintenance of Way Agreements with maintenance of way forces except where special equipment was needed, special skills were required, patented processes were used, or when we do not have sufficient qualified forces

to perform the work. In each instance where it has been necessary to deviate from this practice in contracting such work, the Railway Company has discussed the matter with you as General Chairman before letting any such work to contract.

We expect to continue this practice in the future and if you agree that this disposes of your request, please so indicate your acceptance in the space provided."

The Carrier maintains the work contracted out did not belong to the Organization. The Carrier bases this position on the necessity to use an outside contractor because a patented process was required and the work has always been contracted out. Furthermore, the Carrier argues the work was excepted since special skill and a patented process was involved.

The record clearly establishes the "work" performed by the outside contractor using a patented injection method was roadbed stabilization work. There is no evidence in this record that such work is not normally performed by Maintenance of Way employees.

The argument advanced by the Carrier that this work could only be done by the use of a special patented process somehow exempts the work from the scope of the Agreement and Appendix "B" is not based upon generally accepted principles of contract interpretation.

Herein, the Carrier has attempted to argue from a specific exception set forth in Appendix "B" to a general conclusion that the work does not accrue to Maintenance of Way employees. The "work" is roadbed stabilization, and there is no evidence all such work is excluded by use of special equipment or a patented process. On the contrary, their utilization is a specific exception which requires the Carrier to discuss the matter with the General Chairman before contracting out such work. See Third Division Award 25967. The determination to use special equipment and a patented process to perform roadbed stabilization lies with the Carrier. That decision does not alter the fact that roadbed stabilization is work that could be performed by Maintenance of Way employees, but not in this instance because of the special requirements the Carrier imposed. The equipment utilized does not alter the work. Rather, it alters the method of performing the work and clearly falls within the purview of Appendix "B".

A W A R D

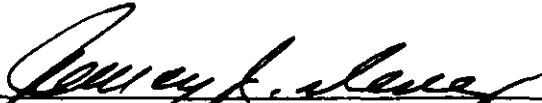
Claim sustained.

Form 1
Page 3

Award No. 28486
Docket No. MW-26905
90-3-85-3-677

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 7th day of August 1990.