

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30671
Docket No. MW-28244
95-3-87-3-825

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 Way Employees
(
(Union 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 to perform roadbed stabilization work on the North Platte Subdivision beginning August 5, 1986 (System File M-455/860207).
- (2) The Agreement was further violated when the Carrier did not notify the General Chairman, in writing, fifteen (15) days in advance of the contracting transaction of its plan to assign said work to outside forces.
- (3) As a consequence of Part (1) and/or (2) above, furloughed Foreman T.F. Staroska, Group 12 Roadway Power Tool Machine Operators B.G. Whitefoot and J.T. Kobus and Extra Gang Laborers R.L. Wehrer, D.E. Ortiz and M.H. Higgins shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside forces in performing the work referred to in part (1) hereof."

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.

On August 6, 1986, Carrier advised the Organization of its intent to contract out work involving the injection of a lime and fly ash slurry at various locations on the North Platte Subdivision in order to stabilize the roadbed. The Carrier pointed out that it was not equipped to handle the work. The Organization responded, requesting a conference and maintaining that its forces should perform the work, since it is expressly reserved to them under Rule 9, which states:

"RULE 9. TRACK SUBDEPARTMENT

Construction and maintenance of roadway and track, such as rail laying, tie renewals, ballasting, surfacing and lining track, fabrication of track panels, maintaining and renewing frogs, switches, railroad crossing, etc., repairing existing right of way fences, construction of new fences up to one continuous mile, ordinary individual repair or replacement of signs, mowing and cleaning right of way, loading, unloading and handling of track material and other work incidental thereto shall be performed by forces in the Track Department.

* * * *

(e) TRACK MACHINE OPERATORS. Work in connection with the operation, care and running repairs of track equipment listed as follows:

(Track Liner, Jack Tamper, Track Tampers, Track Maintainers, Ballast Regulator, Track Undercutter, Track Cleaner, Speed Swing Cranes)

* * * *

(g) ROADWAY POWER TOOL MACHINE OPERATORS. Work in connection with operation, care and running repairs of track machines listed as follows:

(Compressors, Adzing Machine, Power Jack, Tie Bed Scarifier, Track-air, Rail Grinder (mounted on flange wheels), Ballast Router, Dun-Rite Gauger, Gandy Crane, Tie Saw, Tie End Remover)

(h) ROADWAY POWER TOOL OPERATORS. Work in connection with operation, care and running repairs of track power tools listed as follows:

(Power Wrench-Bolt Machine, Powers Tampers, Spike Pullers, Spike Drivers (operating off compressor), Track Drills, Tool Grinders, Air Hammers, Spike Drivers - self contained unit, Hand Rail Grinder)

* * * *

(v) TRACK LABORER EXTRA GANG. Employees assigned on extra gangs engaged in new construction or work not customarily done by section gangs such as reballasting, rail relay, tie renewals, bank widening, grade and line changes or emergency work occasioned by inclement weather, derailments or other natural disasters."

The Organization contends that the foregoing clearly establishes that work of the character involved herein was encompassed within the scope of the Agreement and consequently was protected work. It observes that none of the exceptions detailed in Rule 52 regarding subcontracting was present in this case, and, as such, Carrier was precluded from contracting out the work.

Carrier defended by asserting that it had neither the equipment nor the skilled personnel to perform the stabilization work. The difficulty with that argument is that Carrier did not notify the Organization until the work was already in progress nor did Carrier meet with the Organization as required. As we read the record, the work of track stabilization clearly accrues to Maintenance of Way forces. See Third Division Award 28486, which reaches that same conclusion. With respect to the defenses raised by the Carrier, those issues should have been discussed during a conference which was supposed to have taken place before the subcontracting began. Third Division Award 29979; Public Law Board No. 4768, Award No 1. Whether timely notice with ensuing conference would have led to an arrangement for the participation of Carrier forces is not known, but this does not require resolution here.

The Board concludes that the claim must be sustained. We direct the Carrier and the Organization to consult the work records to determine the exact number of days and hours that contractor's forces were utilized in violation of the Agreement. Such records shall be used to compensate the Claimants named herein, all of whom were furloughed on the claim dates. The claim is sustained as presented, including as regards the remedy, i.e., computation of monies owed as per paragraph 3 of said claim.

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AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of January 1995.

CARRIER MEMBERS' DISSENT
TO THIRD DIVISION AWARD 30671
DOCKET MW-28244

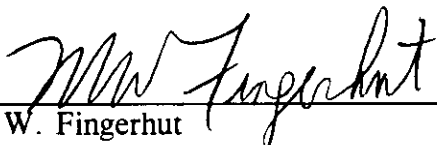
(Referee Goldstein)

The majority decision contains many errors. Perhaps the best, or worst example is found at page 3 of the Award which recites:


"As we read the record, the work of track stabilization clearly accrues to Maintenance of Way forces. See, Third Division Award 28486, which reaches the same conclusion."

The difficulty with the majority's reliance on Award 28486 as the barometer to measure the rights of the parties in this dispute is that Award 28486 involved the Chesapeake and Ohio Railway Company, not the Carrier in this dispute. Even a cursory perusal of Award 28486 shows that the analysis was based upon a review of agreements between the parties which bear no resemblance to Rule 52, the Rule governing contracting out on this Carrier. We are, perhaps, being too unkind to the majority. The dispute was argued before the Referee on January 22, 1991, more than four years ago. Under such circumstances, it is understandable that the facts and issues could become muddled and confusing.

Without wasting more time on this Award, it should be obvious that while the majority's conclusions may provide some dubious comfort to the employees of the railroad involved in Award 28486, it adds no precedential value to an interpretation of Rule 52.



M.W. Fingerhut



M.C. Lesnik



P.V. Varga