

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30823  
Docket No. MW-30212  
95-3-91-3-661

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of 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 an outside concern (Neosho Construction Company) to perform roadway equipment operator's work (operation of a crane for pile driving, handling material and the placing of a bridge) at approximately Mile Post 177.75 on the Kansas Division from May 7 through June 6, 1990 (System File S-374/900646).

(2) The Agreement was further violated when the Carrier failed to schedule and hold a conference with the General Chairman, prior to its contracting out the above described work, in accordance with Rule 52.

(3) As a consequence of the violations referred to in either Part (1) and/or Part (2) above, Roadway Equipment Operator J. A. Poersch shall be compensated for an equal proportionate share of the total number of man-hours worked by the Neosho Construction Company forces in the performance of the work involved here."

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 waived right of appearance at hearing thereon.

By letter dated March 19, 1990, the Carrier advised the General Chairman as follows:

"This is to advise of the Carrier's intent to solicit bids to cover the construction of Bridge 177.77 in conjunction with the extension of Rudy Siding.

This work is being performed under the provisions of the Agreement which states 'Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out.'

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, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMWE."

The General Chairman replied in detail on March 26, 1990, concluding with a request for a conference "prior to the work being assigned to and performed by a contractor". At this point, under Rule 52, the Carrier was obligated to have a designated representative "promptly meet" with the General Chairman (regardless of whether the Carrier believed it had the authority to contract the work under the provision mentioned in its letter).

On April 26, 1990, the Carrier replied that it was "reevaluating the economics of construction of the bridge" and that it was "possible" that it would be constructed by Carrier forces. The Carrier suggested that "we hold this subject for further review in conference." This obviously added to the Carrier's responsibility to meet with the General Chairman prior to any possible contracting. The conference occurred on May 15, 1990, and three days later the Carrier advised that a contractor had been engaged to provide off-track cranes with operators. However, agreement had been reached, on or probably prior to May 15, to use Carrier forces for all other aspects of the project.

According to the Organization, what the Carrier did not state was that the contract work involving the cranes had commenced even prior to the May 15 conference. There is no convincing evidence that this was not the case. The fact remains that the Carrier acted prior to the required conference. This is clearly not in compliance with the terms of Rule 52.

On this basis, and without regard to what may be the underlying merits, the Board concludes that a sustaining Award is appropriate. This is not barred by the fact that the Claimant was otherwise employed during the claim period. The parties are directed to meet to agree on an appropriate number of hours of payment. If the parties fail to agree, then the Board determines that the Claimant shall receive a day's pay for each day the contractor's crane or cranes was or were in operation.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

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 27th day of April 1995.