

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30824  
Docket No. MW-30216  
95-3-91-3-665

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 Employes  
(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 (Harney Rock and Paving Company) to perform work of grading, transporting and compacting dirt for the construction of a new roadbed for a load out and a set out track at the North Powder ballast pit, North Powder, Oregon from March 26 through April 6, 1990 (System File S-324/900501).

(2) The Agreement was further violated when the Carrier did not notify the General Chairman of its intent to contract out the work referred to in Part (1) above, prior to the contracting out of said work, as contemplated by Rule 52(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Roadway Equipment Operators D. W. Turk, N. L. Milner, D. W. Dacus, B. Fanning, K. C. Howell, M. A. Smietana and W. A. Cleaver shall each be allowed pay for one hundred (100) straight time hours at their respective Group 19 Class A rate of pay."

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.

The Organization contends that maintenance of way forces were improperly denied work accruing to them in the following circumstances:

"Beginning March 26 and including April 6, 1990, the Carrier assigned an outside concern (Harney Rock and Paving Company), to operate heavy equipment recognized as that which is normally assigned to the Roadway Equipment Subdepartment in connection with the work of building grade, transporting and compacting dirt for the construction of a new roadbed for a 'loadout' and a 'setout' track at the North Powder ballast pit at North Powder, Oregon."

The Board finds the record in this dispute highly confusing. On-property correspondence and the parties' submissions principally concern whether or not the Carrier, based on applicable rules and past practice, does or does not have the right to contract this type of work. This controversy has been reviewed on numerous occasions in other Awards and need not be reexamined here. This is because a more fundamental consideration is more directly relevant. This is the question of whether the work was under the control of the Carrier.

The record on this point is not as clear as it might be, since there is evidence that the Carrier initially gave the General Chairman a notice of its intention to perform the work. The Board is persuaded, however, that the work in question was actually under the control of a lessee of Carrier property (Harney Rock and Paving) and that the work was performed for the benefit and under the control of such lessee. Under these circumstances, it is well established that application of the Scope Rule is simply not appropriate.

AWARD

Claim denied.

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O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of April 1995.