

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30912
Docket No. MW-30230
95-3-91-3-689

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
(
(CSX Transportation, Inc. (former Seaboard
(System Railroad)

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

(1) The Carrier violated the Agreement when, without a conference having been held between the Chief Engineering Officer and the General Chairman, as required by Rule 2, it assigned outside forces (D. R. Davies) to perform right of way maintenance work (ditching and filling in the roadbed) between Mile Post AN 883.0 and Mile Post AN 866.5 on the Dothan Subdivision of the Mobile Division on March 19, 20, 21, 22, 23, 26, 27, 28 and 30, 1990 [System File 90-45/12(90-697) SSY].

(2) As a consequence of the aforesaid violation, Machine Operator D. S. Spivey shall be allowed sixty-two (62) hours' pay at his straight time rate and eighteen and one-half (18 1/2) hours' pay at his time and one-half rate."

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.

At issue here is the Carrier's use of an outside contractor's employee to perform "ditching and filling" work on the Dothan Subdivision beginning March 19, 1990 and continuing on eight non-consecutive days thereafter through March 30, 1990. The work was occasioned by track damage caused by heavy rains commencing on March 16. The track involved was out of service, but was restored on March 21.

There was an "emergency" involved in the sense that the damage came from unanticipated natural causes and resulted in traffic interruption. However, the work performed was not on an "emergency" around-the-clock basis, but, rather, proceeded on an intermittent schedule.

The Organization faults the Carrier for its failure to provide opportunity for conference with the General Chairman, as provided in Rule 2. Under the circumstances of traffic interruption, the Board finds the absence of advance notice is not of significance here.

The basic question is whether the work was of a nature which is regularly performed and could have been performed in this instance by Carrier forces, particularly by the Claimant, holding Group A Machine Operator seniority. From the record, the Board concludes that the Carrier has not demonstrated that the work could not have been readily performed by its forces and equipment. Support for this is found in the Carrier's final response, which unilaterally agreed to pay the Claimant that portion of the claim (18½ hours at time and one-half rate) although with the understanding that "such does not set a precedent and will not be referred to by either party in the handling of any future case."

The Organization, as was its right, continued to insist on payment of the claim in full. As stated in its Submission, the Carrier points out that the Claimant was fully employed during the straight-time hours in question and argues he should not receive a "windfall" payment for work he was not available to perform.

Thus, the remaining issue is one which has been reviewed countless times by the Board -- whether, in sustaining Awards involving contracting, there should be payment to Claimants for hours during which they were otherwise compensated. Without once again reviewing the arguments on both sides of this question, the Board here concludes that payment should be made. This is not an instance in which there is any serious doubt that the work could have been performed by Carrier forces, and this was even more certainly the case after traffic had been resumed on the track.

To the extent that the work -- which extended over a two-week period -- could have been assigned to the Claimant and/or to others and was not, an irrecoverable loss of work opportunity occurred by use of the contractor's forces. Payment is not a "windfall," but is rather an appropriate remedy involving application of Rule 2.

In its sustaining action, the Board directs payment only of the straight-time portion of the claim, since the remainder has assumably already been paid.

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 8th day of June 1995.