

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31036
Docket No. MW-30331
95-3-92-3-64

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(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 (Marlatt Construction Company and Bottorff Construction Company) to perform Maintenance of Way and Structures Department work in connection concrete work (setting forms, installing reinforcement bar, pour and finish concrete and removing forms, installing and reinforcing culverts) involved with the repairing of an arch draining system at approximately Mile Post 116.30 on the Kansas Division beginning on June 20, 1990 and continuing (System File S-399/910069).
- (2) The Agreement was further violated when the Carrier failed to timely furnish the General Chairman with proper advance written notice of its intention to contract out said work or afford the General Chairman a meeting to discuss 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. J. Kobza, C. D. Skala, V. A. Ratcliff and furloughed B&B Carpenters R. R. Newman, S. Ricks and D. G. Hogan shall each be allowed compensation for the loss of work opportunity suffered in an amount equal to an '*** equal proportionate share of their respective group and classes man hours worked, past, present and future, but the outside contracting force in performing the aforementioned work of Roadway Equipment Operators and Kansas Division Bridge and Building Subdepartment on the Kansas Division' beginning on June 20, 1990 and continuing."

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 notice dated June 19, 1990, the Carrier informed the Organization of its intent to contract out "emergency repairs to arch drainage structure" at M.P. 116.30 on the Marysville Subdivision. By letter of June 25, 1990, the Organization objected to the contracting out of the work and requested the holding of a conference prior to the work being performed by the contractor. After the exchange of further letters, conference was held on July 16, 1990, without resolution.

However, the work was contracted out and was performed commencing June 20, 1990 (one day after the Carrier's notification and prior to the July 16, 1990 conference). According to the Carrier's evidence (a statement from its Company Manager, C. Sexton), the contractor was brought in to remove the unstable fill and damaged structure. The condition of the structure required the presence of a watchman 24 hours per day because of the unstable fill and the mud slides that continued throughout the project. Further, according to the Carrier's evidence, the weather during the project was rainy causing slides and high water conditions and the contractor was utilized due to the urgency of needing to protect the main line and the difficulty in the construction of this type of structure.

The contractor performed the work past the filing of the claim on September 22, 1990.

This case presents a set of facts where the contracted work commenced one day after the Carrier sent the Organization notice of its intent to contract the work and over three weeks prior to the conference held pursuant to the Organization's request. The added element here is that the Carrier asserts the work was necessitated by an emergency condition.

With respect to the kind of work involved in this dispute, this Board has held that the Carrier can contract out such work. See Third Division Award 31035 and Awards cited therein.

The problem in this case is the question concerning the timing of the notice to the Organization and the claimed emergency nature of the work.

With respect to emergencies, Rule 52(a) permits contracting of work for reasons including "... when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces." With respect to the obligation to give notice, Rule 52(a) requires notification to the Organization "as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases."

We are satisfied that when the work commenced on June 20, 1990, the Carrier was faced with an emergency thereby excusing the Carrier from its notice obligations for that emergency. The record shows that at the time the work began, the situation was unstable, the structure was damaged and the conditions were such that there were heavy rains, flooding and slides.

However, there is no showing in this record to support a conclusion that the emergency remained for the months the contractor took to perform the work. Indeed, the evidence supplied by the employees shows that the contractor's work force fluctuated greatly on any given day ("jumping any where from 2 Labors [sic] a day to 12 Labors [sic] on a given day who were hired off the street."), thereby suggesting that the emergency condition did not exist for the entire period in which the work was performed. In brief, we are satisfied that, at some point, what started out as an emergency situation became stabilized and the work transformed into an ordinary contracting out arrangement for which the Organization was not given appropriate advance notification.

Under the unique facts of this case, we are satisfied that it is reasonable to conclude that the emergency stabilized after seven days (June 27, 1990). Upon balancing the rights at issue in these disputes, and because of the problems with the notice (the Carrier asserts that those handling the claim proceeded without even knowing that the work had begun) and the holding of the conference after the work had commenced, we find that from June 27, 1990 until the conference was held (July 16, 1990), only employees on furlough shall be entitled to be made whole for loss of a work opportunity.

However, because the work started out as an emergency, given

that the parties held the conference on July 16, 1990 and further given the Carrier's previously found ability to contract out this type of work, the Carrier shall not be liable past the date of the conference.

AWARD

Claim sustained in accordance with the Findings.

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 1st day of September 1995.