

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31171
Docket No. MW-30768
95-3-92-3-573

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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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 (N. J. and Sons Construction Company) to remove old asphalt, gravel and debris in preparation for installing new asphalt, install new asphalt and perform asphalt patching work at all Carrier railroad grade crossings between Mile Post 127 near Paddock, Nebraska and Mile Post 65 near Schuyler, Nebraska beginning March 27, 1991 and continuing (System File S-518/910584).
- (2) The Agreement was further violated when the Carrier failed to provide a proper advance notice and make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Foreman R. E. Portis, Group Three Machine Operator J. M. Cheek and Carpenters J. R. Ryan, R. D. Cutsor and D. D. Carruthers shall each be allowed pay, at their respective rates of pay, for an equal proportionate share of the total number of man-hours expended by the contractor's forces commencing March 27, 1991 and continuing until the project was completed."

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.

This dispute arises out of the Carrier's use of outside forces to perform asphalt patching and paving work on various crossings in Nebraska. The record reveals that the Carrier gave notice of its intention to contract asphalt paved road crossings on an "as needed" basis at various locations on the Council Bluffs Subdivision on February 28, 1991. The Organization responded on March 7, 1991, objecting to the fact that no locations and dates were specified and requesting that a conference be held prior to the work being contracted. The Carrier indicated a willingness to meet in its March 25, 1991 reply, and suggested that the Organization put the matter on the agenda at their next conference on contracting notices. The matter was discussed in conference on April 1, 1991. The contracting in issue commenced on March 27, 1991, five days prior to the conference.

The ability of this Carrier to contract out asphalt paving work on road crossings under Rule 52(b) has been upheld in P.L.B. No. 5546, Award 2 and Third Division Awards 29966 and 30190. Given the practice established on this property for the kind of contracting out involved in this case, there is no basis for determining that these Awards are palpably erroneous. In the interests of stability, we shall follow their holdings.

With respect to the Organization's contention that the Carrier failed to live up to its good faith obligation to meet in conference prior to the work commencing, we note that while the Carrier met its Rule 52(a) obligation to serve notice at least 15 days prior to the contracting, it failed to respond to the Organization's timely request for a conference within that period. Under the particular facts of this case, where the Organization voiced its objection to the fact that the Carrier had failed to specify the dates of the contemplated contracting, and timely and specifically requested a conference prior to the commencement of work, it was incumbent upon the Carrier under Rule 52(a) to "promptly meet" with the Organization.

We are unable to say that the Carrier satisfied its obligation by delaying its response concerning its willingness to meet for two weeks - a letter the Organization claims it did not receive until 2 days after the contracting had commenced - and suggesting a time for the meeting which it knew (but the Organization did not know) was after the contracting started. The Carrier offered no explanation for its delay in this case. This Board has held in similar circumstances that the Carrier's commencement of work prior to the good faith discussion meeting violates Rule 52(a). Third Division Awards 28943, 29121, 29472. Our determination is not affected by the fact that lack of notice on this property has been held not to be of determinative significance where a prior practice of contracting has been established. Third Division Awards 30167, 30004 and 28789. Unlike the situation in Third Division Award 30287, the Organization cannot be held jointly responsible for the timing of the conference under the peculiar facts of this case.

Accordingly, we find that the Carrier did not properly contract out the work in accordance with the effective Agreement based solely upon its failure to satisfy the prompt meeting requirements of Rule 52(a). As noted in Third Division Award 30066, the question of appropriate remedy in these circumstances has been dealt with repeatedly on this property, and appears to confine damage awards to furloughed employees. Since the record established that the claimants were fully employed and suffered no loss of earnings as a result of this contracting out, their claim for monetary relief must be denied.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders than 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 26th day of September 1995.