

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31268
Docket No. MW-30944
95-3-92-3-833

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former
(Chesapeake and Ohio Railway Company)

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

- (1) The Agreement was violated when the Carrier assigned outside forces (Paynes Loader and Construction) to perform Maintenance of Way and Structures Department work in connection with the construction of a fence between Mile Posts 61.0 and 62.0 on June 26, 27 and 28, 1991 [System File C-TC-5270/12(91-1521) COS].
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intent to contract out said work or discuss the matter in conference in good faith prior to contracting out said work as required by the October 24, 1957 Letter of Agreement (Appendix 'B').
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Class A Operator F. Barker, Sr. shall be allowed twenty-four (24) hours' pay [eight (8) hours' pay for each day worked by the outside forces] at the Class A Operator's 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.

The Organization alleges Carrier violation of numerous Agreement Rules and Appendix B of the Southern Region Agreement, Book 7, in that the Carrier utilized an outside contractor to clear Carrier right-of-way for the building of a fence. The Organization argues that the work was within the Scope of the Agreement and that the Claimant was denied the opportunity to perform the work. The Organization maintains that the Claimant, a Class "A" Operator, was available, that the equipment was available and that the Carrier failed to fulfill its obligations to utilize its employees in the performance of the work.

The Carrier maintains that it violated no Agreement provisions in the use of an outside contractor to install fence on the dates of June 26, 27, and 28, 1991. It refutes the Organization's evidence and holds that:

"... fencing has been performed in a variety of ways over the years. We have had fencing gangs, we have furnished material to farmers and they erect their own fence, contractors have performed the work, etc. Sometimes we get permission from a landowner to erect a fence on their property--depending upon the location and vicinity. There is no consistent practice for performing this work."

The Carrier maintains that the work does not belong to the employees and even if the claim had merit, the Claimant worked all three days in dispute as a Class "A" Operator. The Carrier argues that its actions were proper and that the Claimant was under pay and suffered no loss of earnings.

The Board studied the arguments of the parties to this dispute along with the negotiated Agreements. We find that the work is within the Scope of the Agreement and governed by Rule 83 and Appendix B. Pertinent to Appendix B is the requirement that the Carrier discuss the possible contracting out with the "General Chairman before letting any such work to contract." None of the special skills, patented process or other factors are herein indicated to obviate that directive. Rule 83 requires Carrier to utilize its forces if the work belongs to the employees and those employees can be secured.

A study of the record shows probative evidence that the work has been performed by the employees. Statements by employees and a photographic record are followed by the Carrier statement, supra, which demonstrates at best, a mixed practice. Such proof requires that the Carrier give notice. This was not done and as such, this Board finds the Carrier violated the Agreement.

While the Claimant was under pay during the three days in dispute, there is no showing in this record that the Organization is wrong in contending that the Claimant lost a work opportunity. There is no evidence of record that the work performed could not have been scheduled for the employee at another time, or that the employee was continually employed or could not have performed the work on overtime. These and other issues are the very reasons that notifications are given. The notification affords the General Chairman the ability to attempt to maintain work for BMW represented employees rather than the loss of work to outsiders to the Agreement through contracting out (Third Division Awards 30970, 30977). Lacking that notification and without substantive proof that the employee did not lose a work opportunity, part (3) of the claim is sustained.

AWARD

Claim sustained.

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 November 1995.