

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Norfolk and Western Railway Company (former
(Illinois Terminal Railroad Company

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

(1) The Carrier violated the Agreement when it assigned outside forces to install a culvert at Mile Post 143.32 in the vicinity of Renick, Missouri beginning on or about December 4, 1984 (System File MW-MOB-85-16).

(2) As a consequence of the aforesaid violation, furloughed B&B Employees, R. D. Andrews, M. D. Riley, M. S. Morgan, A. R. Whitmore, C. M. Cook, G. A. Hammons, R. E. Maddox, J. W. Turner, P. Swinford and C. J. Torri shall each be allowed eight (8) hours of pay, at their respective rates, for each day on which the outside concern performed the work referred to in Part (1) hereof and furloughed Backhoe Operator G. J. Arnold shall be allowed fifty-six (56) hours of pay at the backhoe 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 employees 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 letter dated August 15, 1984, the Carrier served notice upon the Organization that it intended to contract out the work of replacing a stone box culvert at Renick, Missouri. The Carrier justified its decision by asserting that it did "not possess the necessary skilled manpower, supervision, or equipment to satisfactorily accomplish a project of this nature." Following a conference with the General Chairman to discuss the notice, the Carrier reiterated it did not have the necessary special equipment to perform the work in an efficient manner. Over the objection of the Organization, the work was performed by a contractor, commencing on or about December 4, 1984.

Article IV of the May 17, 1968, National Agreement and the December 11, 1981, Letter of Agreement between the Organization and the National Carriers' Conference Committee required the Carrier to give the Organization advance notice of its intention to contract out work within the scope of the Agreement. This notice must state the Carrier's reasons for contracting out the work. The intent of the Agreements was to allow the parties an opportunity to explore the possibility of using covered employees rather than outside contractors. The Organization argues there were sufficient employees available to perform the work and that the Carrier could have leased the large tractor type backhoe necessary for this project.

The Carrier first asserts it was privileged to contract out the work because it is work which is not exclusively within the scope of the Agreement. This argument is based upon its position that the scope rule is general in nature and the work has been contracted out before. Under these circumstances, the Organization would have the burden of proving the exclusive right to perform the work. In response, the Organization noted the exclusivity argument was advanced by the Carrier for the first time before this Board. The record supports the Organization's objection. Throughout the handling of this dispute on the property, the Carrier supported its decision solely upon its position that it lacked the manpower and equipment. The Carrier cannot now be heard to argue it could have subcontracted the work even if it had the employees and machines.

The Carrier's defense in this case must be based upon its showing that the project required special equipment and/or employees with special skills. With respect to the equipment necessary for this job, it appears from the record that the only machine used by the contractor was a large backhoe. The Organization asserts the employees have worked with such equipment before and that it could be readily leased if the Carrier did not have one. We do not equate the term "special equipment" with any machine which the Carrier does not own. Rather, the term implies there is something relatively unique about the machine so that it could not be readily obtained by the Carrier. In the December 11, 1981 Letter of Agreement, the Carriers undertook a commitment to increase the procurement of rental equipment to be operated by Carrier employees as a way of reducing the incidence of subcontracting. There is no evidence in this record to show the contractor used any equipment that would not have been readily available to the Carrier.

Similarly, there is no evidence in the record to show that the contractor used employees with special skills not had by Claimants. It appears the plans for this project had been prepared by the Carrier's Maintenance of Way & Structures Department. The Carrier acknowledges its employees have installed culverts, albeit small ones. We must conclude the Carrier has not established it did not have the skilled manpower for this work.

For the reasons stated above, we must find that the Carrier improperly contracted out the work. The Carrier argues, however, that Claimants were fully employed during the entire time the contractor was working. This

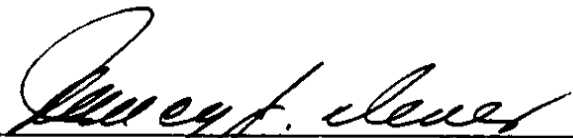
is contrary to the Organization's position that Claimants were furloughed at the same time the work was begun. There is no documentation in the record to enable this Board to reach a conclusion one way or the other as to the availability of the Claimants, although it is reasonable to conclude the parties each have records showing the time worked by Claimants. Accordingly we direct the Claim be sustained only with respect to those furloughed employees who actually suffered wage loss as a result of unemployment during the time period the work was performed by the contractor.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 31st day of July 1989.

CARRIER MEMBERS' DISSENT
TO
AWARD 28012, DOCKET MW-27186
(Referee Robert W. McAllister)

The Majority in its Findings, incorrectly sustained the Organization's claim to work Carrier subcontracted after giving notice and discussing the proposed subcontracting with the Organization pursuant to requirements of the May 16, 1968 National Agreement. In so doing, the Majority ignored a legion of Awards that require the proponent of a claim to support the alleged rule violation with substantial evidence; the Majority erroneously accepted the Organization's unsupported allegations as facts.

The Majority rejected, as new argument, Carrier's position that the claimed work was not reserved to the Organization. Contrary to that finding, Carrier's denial of the initial claim stressed that the work involved the "boring and jacking method" and "the work performed [by the contractor] bears no similarity" to work previously performed by company forces. The Organization never introduced any evidence to the contrary showing the work was "within the scope of the applicable schedule agreement." Despite the lack of evidence, the Majority sustained the claim. Since there was no evidence to show the work was reserved to the Organization, that finding was without basis and is erroneous.

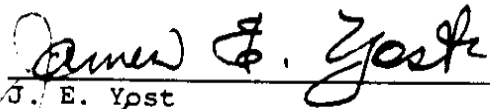
The Majority also found that "it appears from the record that the only machine used by the contractor was a large backhoe" and that "there is no evidence in the record to show that the contractor used employees with special skills not had by Claimants." Neither point supports the sustaining Award.

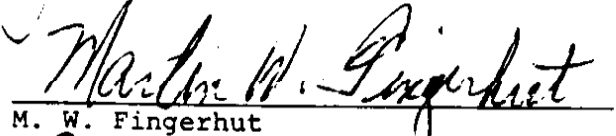
The project consisted of replacing a stone box culvert with a 10 foot diameter steel plate culvert; during the handling on the property Carrier

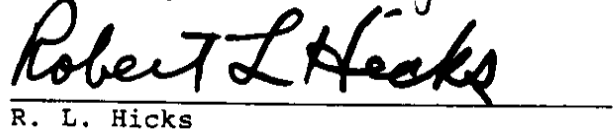
repeatedly stated, without contradiction, this installation was accomplished by the boring and jacking method (to avoid disturbing the roadbed), not by the cut and cover method. While a large backhoe was used for adjacent excavation work, it is elementary that such a piece of equipment alone is not sufficient to do the pipe installation by the method utilized. Therefore, the Board's conclusion that obtaining a backhoe would have enabled Carrier forces to perform the work is patently erroneous.

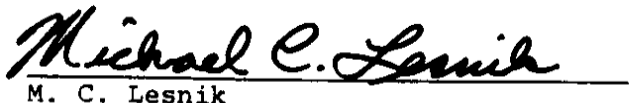
Finally, with regard to the "skilled employee" issue, the Organization presented absolutely no evidence to prove that Carrier employees ever performed work of this nature. It was the burden of the Organization to prove that point, and since it did not, the Majority's conclusion improperly represents the practice on the property.

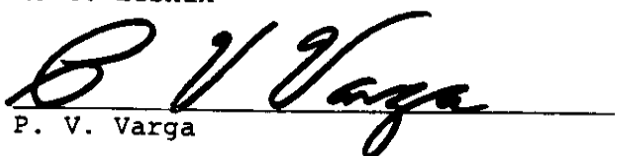
For the reasons stated, Award 28012 is erroneous and we dissent.


J. E. Yost


M. W. Fingerhut


R. L. Hicks


M. C. Lesnik


P. V. Varga