

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 28710
Docket No. MW-26986
91-3-86-3-21

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
(Norfolk and Western Railway Company (formerly The
Pittsburgh and West Virginia Railway 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 perform masonry repair work in the McGugin and Craighead Tunnels on the Connelsville District November 1 through December 3, 1984, both dates inclusive (System File MW-ROK-84-14).

(2) As a consequence of the aforesaid violation, furloughed Carpenters J. Anderson, T. Ciesielski, C. Marsili, R. Phillis, M. Digman, P. Uscio, B. Bryner and J. McKindley shall each be allowed eight (8) hours of pay at their respective straight time rate and applicable overtime pay for each day on which the outside concern performed the work mentioned in Part (1) hereof during the claim period."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

Claimants had seniority in the Bridge and Building Sub-department of the Maintenance of Way and Structures Department. By letter dated May 29, 1984, the Carrier advised the Organization's General Chairman as follows:

"This is to advise you of Carrier's intent to engage an outside contractor or contractors for the purpose of performing tunnel maintenance on three tunnels on the Pittsburgh Division, Connellsville district.

This work will consist of the application of pressurized epoxy and shotcrete to the following tunnels:

McGugin Tunnel - Hickory, PA
Craighead Tunnel - Avella, PA
Greentree Tunnel - Rook, PA

Contractors have been consistently utilized to perform this type of work on prior occasions.

The Carrier does not possess the necessary skilled manpower, supervision or equipment to satisfactorily accomplish a project of this nature.

If you have any questions regarding this project or wish to discuss it further, please let us know."

According to the Carrier, "the work involved the inspection of the tunnel for cracks and fissures at points of stress and the application of pressurized epoxy and concrete to make repairs."

By letter dated June 2, 1984, the Organization requested a meeting to discuss matters raised in the Carrier's notification. Nevertheless, outside forces performed the work until December 3, 1984.

In Third Division Award 25860, this Board addressed a dispute between these parties concerning the use of outside forces to perform similar masonry repair work in the Hickory Tunnel at Hickory, Pennsylvania. In sustaining the Claim, this Board stated:

"* * *

The work included inspection of the tunnel for cracks and use of pressurized epoxy and concrete to repair them where found.

* * *

... We believe the work involved here is work reserved to the Bridge and Building Department by Agreement unless contracting of it can otherwise be justified. As stated in Award 20372, 'Carrier has the burden to justify an exception.' In our view Carrier has not supported

its position that its employees are not qualified to perform the disputed work. While admitting its employees pumped grout, etc. Carrier makes no explanation of how the skills for these jobs differ, if at all. Rather Carrier merely asserts the epoxy and shotcrete are new developments, but the facts show at least with reference to the shotcrete, that there has been disputes between the parties concerning it since about 1970. While the Carrier now states it has consistently contracted every project where the process has been used no evidence in support of this assertion is offered. ... As we find this is work of a type reserved by Agreement to the claiming employees, and as Carrier has presented no evidence to establish its employees were not capable of performing the work, or that the work has consistently been contracted out, there is no need to reach the question of the extent of Carrier's responsibility to train.

* * *

Award 25860 covers this dispute. While the Carrier disagrees with the reasoning of that Award, after reviewing that Award, we are unable to find Award 25860 palpably erroneous. See also, Third Division Award 28339 between these parties which also involved the use of outside forces to perform tunnel masonry repair work ("Nonetheless, Award 25860 appears controlling here. It has been carefully examined and not found to be in palpable error.") To now hold otherwise would be an invitation to chaos.

Carrier's argument that "If Carrier had had the specialized equipment and employees skilled in its operation to enable Carrier to perform the work with its own forces, carpenters would have been used" is not persuasive. The Carrier recognizes "that claimants held dual seniority as painters and carpenters." Therefore, see Award 25860 where, as here, the claimants therein were also painters:

"... If, as Carrier contends, no B & B Department carpenters were on furlough and it would have been carpenters, rather than Claimants who would have performed the work, no relief would be afforded Carrier by virtue of that fact. The seniority roster is departmental and its benefits are available to all within its coverage."

Further, the Carrier has not sufficiently demonstrated to deny this Claim that "the application of pressurized concrete and epoxy involves the use of expensive, specialized machinery which Carrier does not own, and with which its employees have no experience whatever." Again, in accord with Award 25860, "Carrier has the burden to justify an exception." In light of the prior Award ("Carrier has presented no evidence to establish its employees were not capable of performing the work") and the fact that we are unable to conclude that the Carrier has sufficiently demonstrated in this matter that the employees were not capable of performing the work, that argument cannot prevail in this case. Moreover, the Carrier's assertion that "any investment by the Carrier for the purchase or rental of this equipment ... would be a wasted expense" is similarly not supported in this record. See Award 25860 ("The record is silent on the question of how extensive or expensive the necessary equipment is, how readily available leased or rented equipment might be and what efforts in that direction were made by Carrier.").

In light of the missed work opportunity resulting from the Carrier's use of outside forces and in light of Award 25860, Claimants shall be compensated. In this matter, the Organization seeks compensation for Claimants at the applicable straight time and overtime rates "while the claimants were on furlough status." The fact that Claimants were furloughed from the Paint Gangs on October 31, 1984 and that the work at issue may have commenced in the summer of 1984 does not change the result. The contracting out of the work nevertheless amounted to a lost work opportunity during the period set forth in the Claim. However, the Organization's request in the Claim for overtime is denied. Compensation shall be at the straight time rate as in Award 25860.

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 28th day of March 1991.