

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

(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Union Pacific Railroad Company

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

(1) The Agreement was violated when outside forces were assigned to perform grading, trenching, dirt removal, backfilling and leveling work in the vicinity of Mile Post 903 at the Altamont/Aspen Tunnels on the Wyoming Division beginning September 15, 1986 (System File M-521/870211).

(2) The Agreement was further violated when the Carrier did not afford the General Chairman a meeting to discuss the work referred to in Part (1) as contemplated by Rule 52(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Group 19 Roadway Equipment Operators D. L. Squibb, L. E. Easton, J. F. Gerrard, J. R. Gillen, E. H. Wold, C. D. Steuben and R. L. Goettshe shall each be allowed pay at the Class A Roadway Equipment Operator's straight time rate for an equal proportionate share of the man-hours expended by the outside forces beginning sixty (60) days retroactive from November 18, 1986 and continuing through December 19, 1986."

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.

This dispute concerns the Carrier's assignment to an outside concern of certain roadbed stabilization work near Mile Post 903 east of Evanston, Wyoming, in September 1986. On August 28, 1986, Carrier provided the General Chairman with a notice of intent to contract out the work, stating that it

"... has customarily been performed in this fashion pursuant to Rule 52(d)." On September 5, 1986, the General Chairman wrote the Carrier objecting to the Carrier plans to contract out the work and requested a conference to discuss the matter. Further correspondence by the Organization requesting a conference proved unavailing and the work was contracted out, beginning September 15, 1986, and ending December 19, 1986.

During the handling of this dispute on the property, the Organization asserted that the contracted work is of a character that is contractually reserved to, and has customarily been performed by, members of its craft. Carrier never refuted that the work normally would accrue to the Organization's craft; instead, it contended on the property that its actions were justified on the grounds that the work required special equipment and supervisory skills and the past practice supported its action. In its Submission before this Board, Carrier raised a number of additional arguments for the first time. As we have reiterated on numerous occasions, however, we are authorized to consider only the arguments and evidence presented by the parties during the handling of the dispute on the property. Newly presented arguments must be deemed waived.

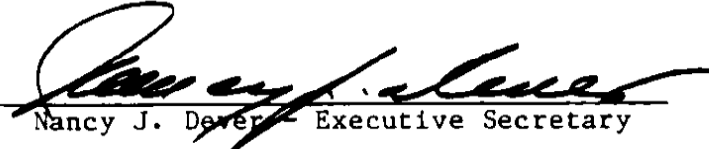
These arguments which have been considered as properly presented by the Carrier are in the nature of an affirmative defense. Rule 52 permits the Carrier to contract out work if certain exceptional circumstances are present. These include situations where special skills are required that the employees do not possess or special equipment must be used that the Carrier does not own; unavailability of material due to a supplier maintaining exclusivity in installing the material, and an emergency. The burden of establishing these exceptions to the general prohibition against subcontracting is on the Carrier, and we do not believe it has met that burden here, since no probative evidence was offered to support its assertions. We will sustain the claim on that basis. It should be noted that in so doing, we make no finding that Carrier violated the Agreement by failing to hold a conference on the matter pursuant to the Organization's requests. Based on our review of the correspondence, it appears that Carrier did invite discussion of the matter. We are unable to ascertain from the record why no conference took place.

The remaining issue concerns the remedy for the violation. It is the intent of this Award to make Claimants, furloughed at the time of the dispute, whole and they are to be compensated for the amount of time that the outside forces worked, such time to be determined by the parties, who are directed to consult the work records to determine the appropriate number of hours.

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 24th day of July 1992.