

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30673  
Docket No. MW-28527  
95-3-88-3-353

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(Southern Pacific Transportation Company  
( (Eastern Lines)

STATEMENT OF CLAIM:

"Claim of the System Committee of Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces to perform grading and paving work at the Amtrak Passenger Station at Lake Charles, Louisiana, on August 12, 13, 14 and 17, 1987 (System File MW 87-133/ 465-51-A).
- (2) As a consequence of the violation referred to in Part (1) hereof, Claimants O. Roberts, A. Mathews, S. Davis, L. Smith, J.J. Scott, J.C. Dugas, E. Broussard, C.L. Fontenot, W.J. Batiste, Sr., E. J. Thomas, J.W. Lavergne, J.M. Lewis, W.J. Mitchell and J.L. Bush shall each be allowed pay for thirty-two (32) hours at their respective straight time rates."

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.

On June 19, 1987, Carrier, as required by Article 36 of the Agreement, served Notice No. 28 advising that it intended to contract out the work of grading and hot mix asphalt paving at the Amtrak Passenger Station at Lake Charles, Louisiana. Carrier claimed that it was necessary to have this work performed by a contractor because "hot mix asphalt work requires equipment not owned by the Company."

The Organization challenged the notice, contending that Maintenance of Way employees have performed this type of work for many years using Carrier owned or leased equipment. Formal claim was subsequently filed on August 31, 1987, alleging that the use of contractor forces to perform the disputed work violated Article 2, Seniority Rules, Article 6, Seniority Rosters, Article 8, Promotions and Filling of Vacancies, Article 16, General Rules, and Article 17, Roadway Machines. The Organization further alleged that since this was not emergency work, Claimants could have performed this work after their regular assigned working hours and also on the weekend. In addition, the Organization asserted that by the use of outside forces Carrier failed to make a good faith effort to reduce the incidence of subcontracting as agreed to by the parties in a letter dated December 11, 1981.

In denying the claim, Carrier contended that notice had been served on March 11, 1987, advising the Organization that Amtrak was contracting for repair of the platform area at the old Amtrak Station adjacent to the parking lot. Carrier maintained that the construction of the parking lot, the work at issue here, was simply incidental to this work.

As the claim progressed, the Organization also argued that the June 19, 1987 notice was not timely because, in its view, Carrier had already reached an agreement with an outside contractor to perform the work prior to notifying the Organization. It requested that Carrier supply a copy of the agreement to determine whether notice was in fact timely served. The Organization also submitted letters from a number of employees, attesting to the fact that they have performed the same type of work as was performed by the contractor in connection with this claim.

Carrier denied the claim through the various channels of appeal, arguing that the work performed by the contractor was work which was not exclusively reserved to Maintenance of Way employees. It further argued that the notice was indeed timely, and that, since Claimants were fully employed during the claim period, they suffered no loss of earnings.

A full review of the record convinces the Board that Carrier arguments as to the justification of using outside forces are not persuasive under the applicable rules. Previous performance of such work by Carrier forces was not specifically refuted with probative evidence. Moreover, in its Submission before this Board, Carrier attempted to argue for the first time that the work at issue was performed on property leased to Amtrak, contracted by Amtrak, and for the benefit of Amtrak. Our examination of the record, however, reveals that while Carrier contended on the property that the disputed work was "incidental" to a project involving Amtrak, there was never any suggestion that Carrier was not involved in the contracting out of the work at issue here, and we will not draw that inference based on the record as it stands. It is well established that new arguments and evidence, not previously raised during the handling of a claim on the property, are not properly before this Board for consideration. Absent any other compelling defense, we find that Carrier did violate the Agreement when it assigned the disputed work to an outside contractor.

The question remains as to the remedy, with the Organization contending that Claimants are entitled to monetary damages despite the fact that they were fully employed on the claim dates. While the Board is fully cognizant that there exists a divergence of views on this subject, we find that in this specific case there is no valid basis for payment of damages absent any evidence that Claimants suffered provable monetary loss. Consequently, the demand for monetary compensation or relief contained in paragraph 2 of the claim is denied.

#### AWARD

Claim sustained in accordance with the Findings.

#### O R D E R

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.

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NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of January 1995.