

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31034
Docket No. MW-30326
95-3-92-3-57

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
(Union Pacific Railroad Company

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

- (1) The Agreement was violated when the Carrier assigned or otherwise permitted outside forces to perform fence work (constructing and repairing right of way fence) on the south side of the track between Mile Posts 676.50 and 678.75 near Sinclair, Wyoming, on July 18 through 30, 1990 (System Files S-393/910027).
- (2) The Agreement was further violated when the Carrier assigned or otherwise permitted outside forces to perform fence work (remove old fence, repair and construct right of way fence) on the north side of the track between Mile Posts 637 and 643 near Ramsey, Wyoming beginning August 20 through September 27, 1990 and continuing (System File S-400/910068).
- (3) As a consequence of the violation referred to in Part (1) above, Foreman P. C. Curby and furloughed Maintenance of Way employe A. Guardiola shall each be allowed '*** compensation for a [sic] equal proportionate share of all man hours worked by the outside contracting force on July 18, 19, 20, 21, 23, 24, 25, 26, 27, 28 and 30, 1990. This compensation must be at the respective straight time and applicable overtime B & B Foreman and Laborers rates of pay as explained in General Chairman Wehril's letter of April 26, 1989.'

- (4) As a consequence of the violation referred to in Part (2) above, Foreman P. C. Curby and furloughed Maintenance of Way employes A. Guardiola and D. D. Fernandez shall each be allowed '*** compensation for an equal proportionate share of all man hours worked by the outside contracting force on August 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, September 12, 13, 14, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 1990 and continuing until this violation of the Agreement no longer exists. This compensation must be at the respective straight time and applicable overtime B & B Foreman and Laborers rates of pay as explained in General Chairman Wehril's letter of April 26, 1989.'"

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.

By letter of June 15, 1990, the Carrier notified the Organization that "As information, individuals will be repairing and constructing fences along the Carrier's right-of-way between Walcott and Green River in the State of Wyoming...."

Even assuming the work in dispute is construed as subcontracting (the Carrier asserts that the work was performed by ranchers on their land paralleling the right-of-way where the land had been leased from the Carrier), the Carrier's ability to contract out this type of work has been decided on the property. See Third Division Award 30221. The claim must therefore be denied.

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AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of September 1995.

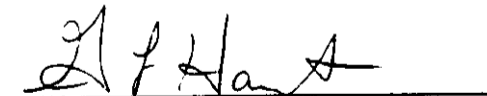
LABOR MEMBER'S DISSENT
TO
AWARD 31034, DOCKET MW-30326
(Referee Benn)

This same Majority has often expressed the value of the principle of stare decisis, which it has described as the settling of similar disputes in a similar manner in order to promote stability in the relationship between the parties. The trouble with this Majority is that it often has trouble identifying which precedent awards are closely similar for the purpose of applying that principle. In the instant case, the work involved the construction and repair of over eight (8) miles of barbed wire right of way fence. Inasmuch as the facts and circumstances involved were identical to those involved in the dispute decided by Third Division Award 29916, except as to dates and locations of the work, this case was ripe for the application of the principle of stare decisis, based on Award 29916. The reader is encouraged to see Award 29916 to verify this fact, since Award 29916 devoted twelve pages explaining the facts surrounding the dispute it decided. However, instead of identifying an award in a similar dispute on which to base its decision, this Majority chose to search for a denial award in order to rationalize the denial of this claim. The trouble with the Majority's decision to do so is that the award it chose (Award 30221) involved totally different work, that of the installation of approximately two tenths of a mile of chain link fence in a yard area. Again, the reader is invited to verify this fact by referring to Award 30221.

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While the principle of stare decisis is laudable, it has value in cases before this Board only if the Majority is careful to apply it correctly by ensuring that the facts and circumstances surrounding the dispute in the prior award are truly similar to those present in the dispute to be decided. The Majority in this case demonstrated an unconscionable disregard for the facts by citing dissimilar Award 30221 as a basis for its decision rather than identifying the nearly identical factual situation found in Award 29916 to correctly apply stare decisis. Hence, Award 31034 is palpably erroneous and can have no value as precedent.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "G. L. Hart", is written over a horizontal line.

G. L. Hart
Labor Member