

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 31038  
Docket No. MW-30349  
95-3-92-3-73

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 Carrier violated the Agreement when it assigned an outside contractor (Herzog Construction Company) to perform Maintenance of Way work (unloading ties) along the Wyoming Division westbound mainline track between Mile Posts 934.00 and 933.27 on August 29, 1990 (System File S-416/910139).
- (2) The Carrier violated the Agreement when it assigned an outside contractor (Herzog Construction Company) to perform Maintenance of Way Subdepartment work (unloading ties) along the Wyoming Division westbound mainline track between Mile Posts 933.27 and 932.60 on September 13, 1990 (System File S-417/910138).
- (3) The Carrier further violated the Agreement when it assigned an outside contractor (Herzog Construction Company) to perform Maintenance of Way work (unloading ties) along the Wyoming Division westbound mainline track between Mile Posts 932.60 and 930.75 on October 27, 1990 (System File S-418/910137).
- (4) As a result of the violation referred to in Part (1) above, Roadway Equipment Operator D. Melius shall be allowed nine (9) hours and fifteen (15) minutes' pay at the REO Class II straight time rate for the time consumed by the employe of the outside contractor in the performance of the work in question.

- (5) As a result of the violation referred to in Part (2) above, Roadway Equipment Operator D. Melius shall be allowed eleven and one-half (11 1/2) hours' pay at the REO Class II straight time rate for the time consumed by the employe of the outside contractor in the performance of the work in question.
- (6) As a result of the violation referred to in Part (3) above, Roadway Equipment Operator D. Melius shall be allowed eleven hours' pay at the REO Class II time and one-half overtime rate for the time consumed by the employe of the outside contractor in the performance of the work in question."

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 dated April 12, 1990, the Carrier advised the Organization of its intent to solicit bids to cover the unloading of ties from cars at various locations across the system. Over the Organization's objection, the contractor's forces performed the work on the days set forth in the claim.

This matter has been addressed before on the property and has been resolved in the Organization's favor. Third Division Award 28590. That Award is not palpably in error and shall be followed. Compensation shall be awarded for times, if any, Claimant was in a furloughed status.

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**AWARD**

Claim sustained in accordance with the Findings.

**ORDER**

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.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

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

LABOR MEMBER'S CONCURRENCE  
AND DISSENT  
TO  
AWARDS 31037, 31038, 31041,  
31042, 31044 AND 31045,  
DOCKETS MW-30347, MW-30349, MW-30391,  
MW-30406, MW-30411 AND MW-30414  
(Referee Benn)

These awards correctly find that the Carrier violated the Agreement, hence a partial concurrence is appropriate. However, the Majority has misrepresented the findings of precedent Award 30005 in order to justify its denial of damages to Claimants who were not furloughed at the time of the violation. While it is true that in Award 30005 the Board awarded damages to furloughed claimants, it did so simply because all of the claimants were furloughed at the time of the violation. This fact is amply demonstrated by the fact that in Award 30528, with the participation of the same Referee as in Award 30005, the Board awarded damages to claimants who were not furloughed at the time in a dispute involving the contracting out of similar work.

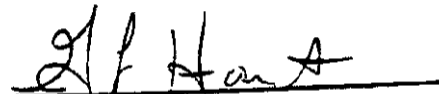
In denying and/or declining to award damages in other claims presented by the Organization, this same Majority has often expressed its regard for the value of the principle of stare decisis, which it has described as the settling of similar disputes arising under the same rules in a similar manner in order to promote stability. However, in order for stare decisis to have any value in promoting stability, the Board must apply it even-handedly. Stability is not promoted when the Majority of this

Labor Member's Concurrence  
and Dissent to Awards 31037,  
31038, 31041, 31042,  
31044 and 31045  
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Board misrepresents the findings of a prior award in order to avoid  
an award of damages where a violation is found.

Inasmuch as the Majority here has misrepresented the findings  
of Award 30005 and refused to recognize the efficacy of precedent  
awards in order to impose its own notions of equity and industrial  
justice, the subject awards are palpably erroneous and valueless as  
precedent on the issue of damages.

Respectfully submitted,

  
G. L. Hart  
Labor Member