

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 31041  
Docket No. MW-30391  
95-3-92-3-136

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 Employes  
(  
(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 outside forces (Herzog Contracting Corporation) to unload crossties between Mile Posts 191 and 221 and between Mile Posts 106 and 150 on the eastbound track of the Nebraska Division on October 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 22, 23, 24, 25, 26, 29, 30, 31 and November 1 and 2, 1990 (System File S-434/910190).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work and make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Roadway Equipment Operators D. J. Kobza and C. D. Skala shall each be allowed pay at their respective rates of pay for an equal proportionate share of the three hundred twenty (320) straight time hours expended by the outside forces."

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.

By letter dated April 18, 1990, the Organization objected to the Carrier's contracting out the work. Conference was held on May 15, 1990 without resolution. The contractor's forces began the work on October 1, 1990.

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, Claimants were in a furloughed status.

**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.

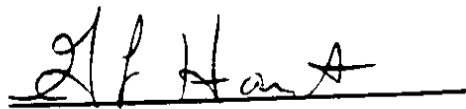
In denying and/or declining to award damages in other claims presented by the Organization, this same Majority has often expressed its regard for the value of the principle of stare decisis, which it has described as the settling of similar disputes arising under the same rules in a similar manner in 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  
Page Two

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,

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

G. L. Hart  
Labor Member