

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 31652  
Docket No. MW-31016  
96-3-92-3-957**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 the Carrier assigned outside forces (Marlett Construction Company) to perform roadway machine operator's work (building berm and grade) for trackage at Bonner Springs, Muncie and Loring, Kansas and assisting Carrier's forces in moving or aligning trackage thereat beginning July 10, 1991 and continuing (System File S-593/920018).
- (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 violated the December 11, 1981 Letter of Understanding when it failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of their Maintenance of Way forces.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Roadway Machine Operators R. L. Wehrer, L. J. Doebele, L. H. Cudney, A. L. James, D. K. Melius and Group 15 Truck Drivers J. J. Kenworthy and T. W. Brummett shall each be allowed '\*\*\*an equal proportionate share of the man hours worked by the outside contracting forces in performing the referred to operation of designated Roadway Equipment and Dump Trucks at their respective Group 19 and Group 15 straight time and overtime rates of pay as compensation for the loss of work opportunity suffered....' during the period the contractor forces performed said work."

**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.

This dispute arises out of the Carrier's use of outside forces to perform berm and grading work. The record reveals that the Carrier gave notice of its intention to contract out such work on July 2, 1991, which was received by the Organization on July 5, 1991. By letter dated July 9, 1991 the Organization objected to the contracting and requested a conference prior to the commencement of the work. The Carrier responded to the Organization's concerns and expressed a willingness to meet in its July 16, 1991 reply, suggesting that the Organization put the matter on the agenda at their next conference on contracting notices. The matter was discussed in conference on July 22, 1991.

The claim alleges that the work of the contractor commenced on July 10, 1991. The Carrier's February 27, 1992 response states, in pertinent part:

"The awarding of this bid was not done until July 9, 1991 and Marlatt was informed they were the successful bidder by letter dated July 11, 1991. I am advised by Marlatt they did not begin the project until July 29, 1991...."

The ability of the Carrier to contract out this type of berm and grading work under Rule 52(b) has been upheld in Third Division Awards 31288, 30210, 31029, 30193, 28622, 28619, 20701 and Public Law Board No. 5546, Cases 3 and 6. Given the practice established on this property for the kind of contracting out involved in this case, there is no basis for determining that these Awards are palpably erroneous. In the interests of stability, we shall follow their holdings.

However, notwithstanding the Carrier's right to contract out the work because it has done so in the past with the Organization's acquiescence, the Board is not satisfied that the Carrier complied with the notice requirements of Rule 52 in this case. Rule 52(a) states that when the Carrier intends to contract out, it "...shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto." There is no dispute that notice of intent to contract out this work was given on July 2, 1991 and received by the Organization on July 5, 1991. By the Carrier's own admission, the "contracting transaction" occurred on July 9, 1991. Therefore, less than the required 15 days' advance notice was given, and we find that the Carrier failed to meet its notice obligations imposed by Rule 52(a).

Accordingly, we find that the Carrier did not properly contract the work in accordance with the effective Agreement based solely upon its failure to satisfy the notice requirements of Rule 52(a). The question of appropriate remedy in these circumstances has been dealt with repeatedly on this property, and appears to confine damage awards to furloughed employees. Third Division Awards 31284, 31288, 31171, 30066. Since the record established that the Claimants were fully employed and suffered no loss of earnings as a result of this contracting out, their claim for monetary relief must be denied.

### 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 29th day of August 1996.