

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42219
Docket No. MW-41920
15-3-NRAB-00003-120240**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
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(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 (Horizontal Boring and Tunneling) to perform Maintenance of Way and Structures Department work (install culverts) at locations between Mile Posts 344.02 and 349.77 on the Blair Subdivision commencing on October 18, 2010 and continuing through December 3, 2010 (System File D-1052U-726/1546962).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out said work or make a good-faith effort to reach an understanding concerning said contracting as required by Rule 52 and the December 11, 1981 Letter of Understanding.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants E. Bartlett, L. Ring, M. Coan, R. Frenzen and J. Snell shall now “*** be allowed an equal share of the straight time and overtime hours worked by the outside contracting force as described in this claim, at their respective Group 1, and 3 rates of pay, both straight time and overtime, as compensation for the violation of the Agreement for the work performed by the employees from Horizontal Boring and Tunneling. This equates to three hundred sixty (360) hours each at the Claimants’ respective rate of pay. ***”**

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 were given due notice of hearing thereon.

The Organization filed this claim to protest the Carrier's use of a contractor to install culverts, which is traditional Bridge & Building work under Rule 8, between October 18 and December 3, 2010, between Mile Posts 344.02 and 349.77 on the Blair Subdivision. The Carrier contends that it provided proper advance notice of the proposed contracting; that arbitral precedent affirms the Carrier's right to contract grading and installation of culverts; the Carrier has a well-established past practice of utilizing outside forces to perform road and track maintenance and construction work under Rule 52(b); and the Organization has not met its burden of proof.

The claim challenged the installation of culverts by Horizontal Boring and Tunneling. The Carrier argues that the Board has recognized a mixed past practice relative to grading that should be applied here. However, grading and installing culverts are quite different (although a certain amount of grading may be incidental to the installation of culverts). The claim does not mention grading as such, and reference to prior Board Awards on grading is irrelevant to the resolution of this dispute.

The Carrier served notice of the proposed contracting by letter dated April 15, 2010. The Parties met in conference on April 27, 2010. The notice provided:

“This is a 15-day notice of our intent to contract the following work:

Location: Mile Post 344.02 to 349.77, Blair Subdivision

Specific Work: Grading, drainage and bridge construction for Blair Subdivision second main line between Blair and Kennard, Nebraska

Serving of this ‘notice’ is not to be construed as an indication that the work described above necessarily falls within the ‘scope’ of your agreement, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMW.

The Parties met in conference on April 27, 2010. In its April 30, 2011 letter summarizing the substance of the meeting, the Organization noted that the “notice” failed to give any reason for the contracting and that the Carrier’s indicated that special equipment was needed but its representative was unable to identify what that equipment was. By letter dated June 1, 2010, the Carrier responded, indicating that special equipment was needed (but without identifying such equipment) and that the Carrier “has a strong mixed practice of contracting out such work.”

There is no dispute that Carrier forces have installed regularly and traditionally installed culverts and that they have the skills to perform the work. All the same, the Board reviewed the numerous Awards submitted by the Carrier, almost all of which focus on grading, brush cutting and dirt work – not installing culverts. However, Awards 40293 and 31029 upheld subcontracting of culvert installation. Award 31029 in particular referenced prior Awards, stating: “Those Awards are not palpably erroneous and, in the interest of stability, they will be followed.” On the basis of those prior Awards, the Board is compelled to find that there is a mixed past practice of having both Carrier forces and contractors install culverts. On that basis, the claim is denied.

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 17th day of November 2015.