

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14042
Docket No. 13926
12-2-NRAB-00002-110007**

The Second Division consisted of the regular members and in addition Referee Lynette A. Ross when award was rendered.

**(International Brotherhood of Electrical Workers
PARTIES TO DISPUTE: (
(BNSF Railway Company**

STATEMENT OF CLAIM:

- “1. That in violation of the governing Agreement, ATSF Rule 88 of Appendix No. 7 in particular, the BNSF Railway Company arbitrarily subcontracted work belonging to the Electrical Craft Employees represented by this Organization.**
- 2. That accordingly, the BNSF Railway Company be ordered to compensate Electrical Craft Employees T. L. Keith, K. A. Miller, J. C. Wharton, K. D. Wagner, T. D. Lewis, L. B. Hensen, P. G. Lunsford, R. A. Saucedo, C. W. Hodgins, H. O. Folks, L. G. Abad, E. E. Noonan, A. D. Jolly, D. B. Allen, C. B. Lamb, C. W. Metzger, G. R. Eckhart, S. Cooper, J. J. Jensen, J. T. Carr, S. H. Rule, K. A. Watson, J. W. Fibnk, W. L. Newman, J. E. Smart, D. F. Smock, P. W. Mclinn, T. M. Dedonder, J. L. Foster, J. J. Zahourek and M. L. Shepard for the amount provided for under the parties controlling Agreement and as amended by PEB 219.”**

FINDINGS:

The Second 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.

At the Arbitration Hearing before the Board, the Carrier contended that the March 11, 2011 Notification of Intention to File an Ex-Parte Submission (Notice of Intent) filed by the Organization (Petitioner) did not meet the procedural requirement of paragraph 1.(a) of the National Railroad Adjustment Board's Uniform Rules of Procedure (Revised June 23, 2003) quoted below. The Carrier's objection stems from the Organization's failure to furnish a separate copy of the Notice of Intent to the Carrier (Respondent).

**“NATIONAL RAILROAD ADJUSTMENT BOARD
UNIFORM RULES OF PROCEDURE
(Revised June 23, 2003)**

These Uniform Rules of Procedure are effective with Notices of Intent dated on or after July 1, 2003. In instances where Circular No. 1 issued October 10, 1934, differs from these Uniform Rules of Procedure, these Uniform Rules of Procedure will govern.

1. (a) A Notice of Intent to file a Submission, which will contain a full Statement of Claim, must be filed with the appropriate Division of the Board. A separate copy of the Notice of Intent must be furnished to the Respondent by the Petitioner . . .” (Emphasis added)

The Carrier contends that its review of the Notice of Intent prior to the arbitration Hearing before this tribunal revealed that the Organization had never sent to the Carrier a separate copy of the Notice, as required by paragraph 1.(a) above. The Carrier avers that because of the Organization's failure to comply with the Board's Uniform Rules of Procedure, the instant claim is procedurally defective and outside the Board's jurisdiction. Therefore, the Carrier argues that the claim must be dismissed, citing Second Division Award 5729, as well as Third Division Awards 19530 and 23170 in support of its position.

The Organization does not dispute that the March 11, 2011 Notice of Intent did not indicate that a copy of the Notice had been sent to the Carrier. Upon raising the procedural issue at the arbitration Hearing, the Organization made no request for additional time or a reconvening of the Hearing in order to locate evidence in refutation of the Carrier's procedural objection. Rather, the Organization contended that after it had served the Notice of Intent, the Board promptly notified the parties that the claim would be listed to the Board. Therefore, the Carrier received ample notice that the claim was going forward, and was not procedurally disadvantaged.

Furthermore, the Organization argued that the instant Notice of Intent is identical in all respects to previous Notices filed with the Second Division involving claims on this Carrier's property. According to the Organization, those claims were adjudicated by the Board without any objection from the Carrier. The Notices referenced by the Organization, and reviewed by the Board during the arbitration Hearing, are dated March 21 and May 28, 2003, and January 29, 2004. In the Organization's view, the Carrier presently disingenuously raises a technical argument that is clearly at odds with the parties' history of arbitrating claims listed with the Second Division. Consequently, the Organization argues that the Board possesses jurisdiction over the instant claim and must adjudicate it based on the parties' Agreement due process and merit arguments advanced during the on-property handling of the dispute.

The Board fully considered the parties' arguments. We hold that the instant claim is not arbitrable given the Organization's failure to file the Notice of Intent in the manner prescribed by paragraph 1.(a) of the Board's Uniform Rules of Procedure. The precise requirement that the Petitioner "must" provide a copy of the Notice of Intent to the Respondent is also found in the NRAB Instructions Sheet, effective July 1, 2003, governing these parties, and reads as follows:

"NRAB INSTRUCTIONS SHEET"

A. In order to file a case with the NRAB, the Petitioner must:

(1) Serve the appropriate Division of the Board (refer to Circular No. 1 to determine which Division is appropriate) with a Notice

of Intent letter advising of the intention to file a Submission within 75 days from the date notice is given.

(2) Furnish a separate copy of the Notice of Intent to the Respondent. Unless the Carrier is the Petitioner, the Respondent is the highest officer designated to handle labor relations matters on the involved Carrier.

* * *

These instructions must be complied with or disputes will not be progressed further.” (NRAB Instructions Sheet, page 3.)

The Board also notes that a sample Notice of Intent, which appears on Page 4 of the NRAB Instructions Sheet, includes the following text at the bottom of the sample letter and underneath the signature line: “Copy: (Railroad involved – See NRAB INSTRUCTIONS SHEET – Part A-2).”

Like the Uniform Rules of Procedure, the NRAB Instructions Sheet also states that the Petitioner “must” file a separate Notice of Intent with the Respondent. The record in this case reveals that the Organization failed to follow that key procedural requirement, which the Carrier had a right to enforce and the Board has no authority to waive. See, Third Division Award 23170, *supra*, which essentially held that the Carrier’s failure to sign its Submission to the Board violated a procedural rule of Circular No. 1, thereby effectively rendering the dispute not arbitrable by the Board.

The Board is likewise reluctant to allow procedural matters to undermine our ability to decide a claim based on its merits. However, for the foregoing reasons the Board is compelled to dismiss the instant claim because the Organization failed to comply with the mandatory notification requirement prescribed in the Uniform Rules of Procedure.

The Carrier also averred in this particular case that the claim as originally filed by the Organization, on March 16, and subsequently on November 16, 2010, was framed differently from the claim presented for consideration by the Board. Specifically, the Carrier asserted that the claim as set forth in the March 11, 2011

Notice of Intent cited, for the first time, Rule 88 as grounds for the claim. According to the Carrier, the Board must also dismiss the claim because it was not handled in the usual manner.

The Organization responded that the Carrier's assertion is without merit. The Organization argued that because the claim is rooted in provisions of the subcontracting provisions of the September 25, 1964 National Agreement, Rule 88, the Electricians' Classification of Work Rule, was properly before the Carrier at all times during the claims handling process. According to the Organization, the Carrier was not taken by surprise by the citation of Rule 88 in the Notice of Intent, and the Carrier's objection is without merit. The Organization further argued that while the claim was handled on the property, the Carrier never properly denied it pursuant to Rule 39 of the Agreement.

After duly considering the parties' arguments in support of their respective positions, and based on the arbitral precedent established by Third Division Awards 20456 and 21441 requiring that the claim submitted to the Board must not be substantially different from the claim as handled on the property and that Rules cannot be supplied for the first time in the Notice of Intent, the Board concludes that the instant claim is not arbitrable as a result of the Organization's failure to comply with the NRAB's notice procedure, and must be dismissed.

AWARD

Claim dismissed.

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 Second Division

Dated at Chicago, Illinois, this 22nd day of October 2012.