

CORRECTED

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28311
Docket No. MW-28025
90-3-87-3-587

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr., when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation - (Amtrak)
Northeast Corridor

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces to repair a water line on a hot water generator in the 30th Street Station Steam Tunnell (sic) on February 21, 1986 (System File NEC-BMWE-SD-1522).

(2) The Carrier also violated the Agreement when it did not give the General Chairman advance written notice of its intention to contract out said work.

(3) As a consequence of the aforesaid violations, Plumbers F. X. Lawler and R. T. James shall each be allowed eight (8) hours of pay at their respective straight time rates."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

The Organization asserts that the Carrier assigned two employees of an outside contractor to repair and replace a two-inch cold water line on a hot water generator in the 30th Street Station steam tunnel. The Claimants are Plumbers regularly assigned to the 30th Street Station, and the Organization seeks eight hours' pay for each of them.

There is no dispute that such work is regularly performed by employees represented by the Organization; that the type of work is identified in the Scope and Work Classifications Rules; and that the Carrier did not give advance notice of the specific work to the General Chairman (although, as will be seen, the Carrier argues that a previous notice of an overall project was applicable).

In the claims handling procedure, the initial response of the Carrier was that "the work claimed was performed" by outside contractors, but was done "in accordance with an agreement" between the Carrier and the Organization. The next answer by the Carrier was that the work was done "in conjunction with the 30th Street Station Improvement Project," which had been the subject of an Agreement with the Organization in 1980. Throughout the dispute, the Organization contends that the hot water generator was separate from and not included in any description of the Improvement Project.

The final appeal reply of the Carrier contended there was "no record of the work claimed." This contention is allegedly supported by a record of work performed by the contractors on that date.

Based on the earlier admissions by the Carrier, as noted above, the Board cannot accept the Carrier's defense that the work was not performed. Further, the Carrier did not provide convincing proof contrary to the Organization's consistent contention that the work was not part of the Improvement Project and was of a nature normally performed by Plumbers.

Thus, the Board determines that the Claim must be supported to the extent that the Carrier failed to provide proper advance notice to the Organization. The Carrier argues, however, that no pay is warranted for the Claimants, since they were employed and under pay on other work at the time of the incident.

There are circumstances where the Board has directed payment to claimants. Such may be applicable where loss of work opportunity (overtime or use of furloughed employees) is obvious and/or where the carrier's violation could be readily predetermined or was deliberately undertaken. In this instance, however, the Board follows the reasoning of numerous previous Awards. Among these is Third Division Award 26673, cited by the Carrier in a companion case currently under review, which stated:

"The record of this case demonstrates Carrier's failure to comply with the provisions of Article IV of the May 17, 1968, National Agreement; no notice of the intent to subcontract was furnished to the Organization. Further, the work is normally considered to be within the Scope of the Agreement.

With respect to the remedy, both Claimants were fully employed on the date of the claimed work. While the Carrier's violation in this case is clear, it has been a well established principle of this Board to deny compensation for Article IV violations when no loss of earnings is demonstrated (see for example Third Division Award 23560). We will follow that doctrine in this dispute, with the caveat that repeated violations could well result in a different holding."

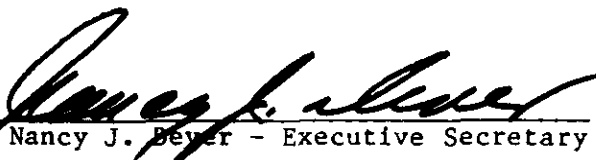
Other recent findings to the same effect are Third Division Awards 23560, 25247, and 25567. This last Award provided pay while Claimants were on furlough, but not for the period after their recall to service.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1990.