

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30974  
Docket No. MW-30058

95-3-91-3-465

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

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

STATEMENT OF CLAIM:

"(1) The Agreement was violated when the Carrier assigned or otherwise permitted outside forces (Long Island Railroad) to perform track maintenance and repair at the Harold Interlocking on the New York Division beginning January 11, 1990, and continuing (System File NEC-BMWE-SD-2710 AMT)

(2) The Agreement was further violated when the Carrier failed and refused to furnish the General Chairman with advance written notice of its intention to contract out said work.

(3) The claim\* as presented by General Chairman J. Dodd on March 12, 1990, to Division Engineer A. E. Fazio shall be allowed because said claim was not disallowed by Division Engineer Fazio in accordance with Rule 64 of the Agreement.

(4) As a consequence of the violations referred to in Parts (1) and/or (2) and/or (3) above, Southern District Maintenance of Way employes who were entitled by virtue of their seniority to perform the work identified in Part (1) above, shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by the outside forces performing the work in Part (1) above, beginning sixty (60) days retroactive from March 12, 1990, and continuing until the violation is corrected."

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.

The Carrier's main predecessor, the Pennsylvania Railroad Company ("Penn") entered into a series of Joint Facilities Agreements (FA) with the Long Island Railroad Company ("LIRR") designed to allow LIRR to operate its trains over Penn's trackage in order to gain access to Penn Station. The January 20, 1966 FA, which renewed a similar agreement dating from 1940, was itself superseded by the March 1988 version of the FA. Under the 1966 FA, the Parties described the transaction as a lease agreement, although Penn retained control of the property and was responsible for the maintenance and repair of the leased property.

In conjunction with the 1988 FA, the Carrier, LIRR and the Metropolitan Transportation Authority ("MTA") agreed to accomplish improvements to Penn Station. This included track improvements as well as renovations within the passenger station itself. As an outgrowth of these negotiations, the Carrier and LIRR ("Railroad") on March 9, 1988, entered the "Agreement to Reconfigure and Maintain Tracks in the Vicinity of Harold Interlocking, Queens, New York." Pertinent to this case the Harold Interlocking Agreement of March 9, 1988 reads as follows:

"2. IMPROVEMENTS

A. This Agreement shall constitute an Agreement pursuant to Article IV of the Joint Facility Agreement, which provides that all improvements to these tracks in the vicinity of Harold Interlocking shall be as mutually agreed upon in writing by the parties hereto. Railroad shall submit plans and specifications to Amtrak and shall make such reasonable changes therein as Amtrak may request. Such plans and specifications, and any changes thereto, shall be deemed approved in principle by Amtrak within fifteen (15) days of receipt.

B. Railroad shall, at Railroad's sole cost and expense, be responsible for construction and maintenance of improvements to the tracks in the vicinity of Harold Interlocking, including but not limited to the following improvements which have been agreed to by Amtrak:

(1) Demolition and removal of existing tracks and utilities which are scheduled to be abandoned, together with their appurtenances and structures as shown in the plans and specifications.

(2) Relocation and/or modification of existing tracks and utilities which are scheduled to be retained as shown in the plans and specifications.

(3) Preparation of yard subgrades.

(4) Construction of underground drainage and water lines, including their appurtenances and structures.

(5) Construction of underground distribution ducts and conduits for AC power, DC power, signals and communication lines, including manholes, handholes, pullboxes and appurtenances, including installation of wiring and connections.

(6) Construction of concrete and asphaltic concrete for track sub-slabs.

(7) Construction of new running rail, guard rail, turnouts, crossing, switches and contact rail. Track work includes ballasts and wood tie construction.

(8) Construction of related electrical work including luminaries, loudspeakers, closed circuit television, fire alarms, telephones, signals, switch machines and their appurtenances and poles.

(9) Restoration or replacement of existing features disturbed by construction, including access stairway, utility trench pits, and sidewalks.

(10) Any other construction as may be required to install and operate the Harold Interlocking.

C. Construction and Maintenance by Amtrak

(1) Amtrak will continue to maintain all signal facilities presently maintained by it, until such time as the foregoing Railroad improvements are completed and are operable from Harold Tower.

(2) Amtrak shall construct, and thereafter maintain, a track turnout connecting track 2 with Railroad's new track to be constructed to the south of track 2 at a point identified as 'A' on the attached Exhibit 'A'.

(3) Amtrak shall have the right and obligation to construct and maintain catenaries systems for all tracks which are presently existing within the area covered by this agreement, or which may be constructed in the future.

\* \* \*

4. MAINTENANCE AND OPERATION OF RAILROAD TRAFFIC

Railroad shall be responsible for all transportation functions (including train movements, the personnel involved therein, and associated operations), maintenance of equipment functions and maintenance of existing and future railroad improvements located in the vicinity of Harold Interlocking as identified in Exhibit A. Such responsibilities shall be performed in such a manner as not to unduly interfere with Amtrak's provision of rail passenger service, the operation of trains, or Amtrak's ability to perform its legal railroad obligations to third parties consistent with the Joint Facility Agreement. Railroad shall conduct its operations so that no part of its equipment shall foul any track, transmission, signal or any other structure of Amtrak, unless Amtrak agrees under certain circumstances to permit such fouling. Throughout the term of this Agreement, Railroad shall, at its sole cost and expense, maintain and repair the specified tracks in the vicinity of Harold Interlocking as identified on Exhibit A in accordance with the minimum Federal Railroad Administration ("FRA") standards for class one track, and shall comply with all FRA standards pertaining to track and signal operation and maintenance."

On March 12, 1990 the Organization presented the following claim, sent Certified Return Receipt mail:

"The Carrier entered into, without the knowledge of the Union, an arrangement whereby certain tracks outside the vicinity of Harold Interlocking would be leased from Amtrak to the Long Island Railroad. This agreement was entered into on March 9, 1988 and was made available to the Union on January 25, 1990.

Statement of Claim:

That this agreement provided that work historically performed by BMW Southern District workers would now be performed by the Long Island Railroad.

This arrangement violates the current Agreement, particularly Article 4 of the Scope Rule in effect between Amtrak and the BMWWE...."

Carrier received the certified letter on March 14, 1990 but did not respond within 60 days, as required by Rule 64. On May 23, 1990, the General Chairman sent Carrier the following:

"Please consider this appeal in accordance with Rule 64 of the Agreement... The original claim is dated March 12, 1990 and was sent to Division Engineer Fazio via certified mail number P 479 399 997. The original claim objected to the leasing of certain tracks outside of Harold Interlocking from Amtrak to the Long Island Railroad and makes specific objection to the transfer of BMWWE work performed by BMWWE represented Amtrak employees to Long Island Railroad workers.

\* \* \*

This should be considered a continuing claim as per Rule 64(e).

Although the Division Engineer has had this claim for over sixty days, he has elected not to respond to the claim...."

Carrier replied to the appeal on June 27, 1990, with a denial as follows:

"Your claim referring to an Agreement established between Amtrak and the LIRR pertaining to the 'Harold' Interlocking has been received by this office on May 29, 1990.

However, the date of the letter is March 12, 1990, which is not timely according to the 60 day limit established by our Agreement. This is a fatal flaw and on its own, reason for denial in its entirety of this claim.

Secondly, this office took no part whatsoever in the negotiations or arranging of the Agreement between Amtrak and LIRR. Such action was not initiated nor handled at this level. Therefore, this office is simply not in a position to further respond to your claim.

However, it must be noted that no Amtrak BMWWE employees have been furloughed as a result of this Agreement."

Rule 64 (a) specifically stipulates that claims for compensation must be presented, in writing, within 60 days from the date of the occurrence on which the claim is based. Rule 64 (b) also requires that when such claims are not allowed, the employee or his representative will be notified, in writing, within 60 days from the date the claim was filed.

In this dispute, the Organization submitted a stale claim two years after the grievable occurrence and this is not a valid "continuing claim" as that term of art is used in Rule 64 (e). But Carrier also erred when it neglected to respond to the claim received on March 14, 1990, within the requisite 60 days. Instead, almost two and one-half months later, Carrier responded, asserting that since the initial claim was untimely under Rule 64 (a) Carrier was free to ignore the time limits set forth in Rule 64 (b). To the extent that Third Division Award 26549, cited by Carrier, supports such handling, we are persuaded that it is wrongly decided and does not deserve to be considered valid precedent. On the other hand, we are not persuaded that the intent and purpose of the time limits provisions of Rule 64 (b) requires us to sustain ad infinitum this plainly invalid claim. On balance, we hold that the better reasoned disposition of these countervailing time limits violations, and one expressly approved in Disputes Committee Decision No. 16, is to sustain the claim only for the period from date of receipt by the Carrier, March 14, 1990 through date of denial by Carrier on June 29, 1990.

#### 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 26th day of July 1995.