

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35858
Docket No. MW-34759
01-3-98-3-431

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(National Railroad Passenger Corporation (Amtrak))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned Pipefitters represented by the Sheet Metal Workers International Association (SMWIA) to repair and replace roof drain pipes at Coach Shop II at the Carrier's Beech Grove Facility, Beech Grove, Indiana, beginning November 25, 1996 and continuing (Carrier's File BMWE-306 NRP).
- (2) As a consequence of the aforesaid violation, Claimants R. Ploughe, D. Tester, B. Creed and K. Kress shall each be compensated at their respective rates ‘ . . . for all hours worked by the “Pipefitters” in replacing/repairing the roof drains in Coach Shop II commencing November 25, 1996 and to continue until the work is assigned to the B&B or the conclusion of the project.”

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.

As Third Party in Interest, the Sheet Metal Workers International Association (SMWIA) was advised of the pendency of this dispute, but chose not to file a Submission with the Board.

This claim protests the Carrier's assignment of Pipefitters rather than B&B Department employees (Plumber and Carpenters) to perform the work of retrofitting existing drainage fixtures and installing additional fixtures using PVC pipe to channel run-off water from the roof of Coach Shop II at the Beech Grove Maintenance facility between November 18, 1996 and March 18, 1997. It involves the use of the joint check procedure within the scope provision of the Agreement, as contained in Side Letter No. 6 dated June 27, 1992, and the Carrier's determination that the work in dispute was not work "ordinarily performed" by the Organization as it has been traditionally performed in the past in that territory by both SMWIA - represented and BMW - represented employees.

The record reflects that the Organization submitted a lengthy (44 page) joint check report including statements of ten employees concerning their routine performance of drainage work of this nature in the past, billing invoices for material used by the B&B Department in the performance of such work including PVC piping and accessories for roof drainage systems, a job record log, a February 1976 Memo on Scope at the Beech Grove facility specifying that B&B work includes roofs and storm drains, an Interoffice Memo dated April 27, 1979 listing B&B projects to include reconnecting roof drain system and midway storm drainage, and a Memo from Carrier representative Cross dated November 25, 1996 agreeing that the work in dispute accrues to B&B Plumbers, but noting the existence of only one qualified Plumber. The SMWIA documentation included seven employee statements concerning their performance of this type of work at Beech Grove in the past, and its position that the general unwritten guideline concerning work jurisdiction with respect to drainage systems at this location was that the roof funnel and pipe to the first pipe joint was installed by the B&B Department, all piping from the first joint to the main trunkline and from there to where the drain goes underground (overhead drain work) was performed by Pipefitters, and all underground drain pipes were installed by the B&B Department.

The joint check was initially requested by the Organization on December 4, 1996, but was not conducted until January 28, 1997. Thereafter, in its February 12, 1997 findings, the Carrier sets out its position that past installation of drainage systems throughout the Beech Grove facility was performed by both SMWIA - represented and BMWE - represented employees, listing seven different buildings and which group installed the drainage systems. The Carrier concludes that because each Agreement has a general scope clause and does not specifically reserve this work to one or the other group, its practice shows no exclusivity by the Organization and no violation in its assignment of the work to the SMWIA - represented employees.

The Organization initially argues that the claim was filed timely with the Board and progressed in a timely and proper manner on the property. It relies upon the Memo on scope at Beech Grove in support of its contention that the work of installing and maintaining all sanitary and storm drains and below ground water lines accrues specifically to the B&B Department Plumber, but has historically also been performed by B&B Carpenters. The Organization asserts that a few minor instances where the Carrier has made recent improper assignments of small jobs of this nature to SMWIA - represented employees cannot defeat BMWE's contractual right to this work, as it is difficult to police such a large area especially with the Carrier not permitting its representatives the ability to walk the grounds for this purpose. The Organization contends that, regardless of whether the Claimants were fully employed, this represents a loss of work opportunity for them now and a loss of future work, which requires a monetary remedy.

The Carrier contends that the claim was not timely progressed to the Board, although waiving its Rule 14 time limit argument on the property. It argues that the Organization failed to sustain its burden of proving that B&B employees customarily and historically performed the disputed work to the exclusion of all others, or that the Scope Rule requires such work to be assigned to a specific class of employee. The Carrier notes that it followed proper procedure and considered all evidence of work assignments and practice prior to concluding that its assignment to SMWIA - represented employees did not violate the Agreement. The Carrier asserts that the Claimants were either fully employed during the claim period or unavailable for work, negating any entitlement to a monetary remedy.

The record reveals that this claim was denied by the Carrier's highest designated officer on December 23, 1997, and that the Notice of Intent is dated June 25, 1998.

While the NRAB Uniform Rules of Procedure state that time limits are governed by the postmarked date, the record in this case does not contain a copy of the postmarked envelope. In this case, while the Board did not formally acknowledge its receipt until June 29, 1998, the upper left hand corner of the Notice of Intent bears a date stamp indicating actual receipt by the Board on June 26, 1998. Thus, the Notice of Intent met the 185 day filing deadline and the claim is timely.

A careful review of the record convinces the Board that the Organization failed to sustain its burden of proving that the Carrier's assignment of work in this case violated Article 1 of its Agreement. There is no doubt that the scope clause is general in nature. While we may not agree with the Carrier that the Organization has to prove total exclusivity of performance in order to meet the "ordinarily and traditionally performed" standard of the Rule, in this case the joint check and documents submitted by both Organizations reveal a mixed practice of assignment of overhead drain work to both SMWIA - represented and BMWWE - represented employees. Thus, it cannot be said that the Organization has shown that it ordinarily performs the work in issue, requiring its assignment under the Scope Rule. Accordingly, the claim must be 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 18th day of December, 2001.