

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35935
Docket No. MW-34772
02-3-98-3-459**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Maryland and Pennsylvania 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 (Yellow Cab Taxi Service) to transport train crews from York to Spring Grove, Pennsylvania and from Spring Grove to York beginning September 30, 1996 and continuing instead of assigning System Foreman D. R. Allen to perform said work.**
- (2) The claims as presented by Vice Chairman C. T. Burkendine to President S. H. Hill on February 4, 1997 and March 27, 1997 shall be allowed as presented because said claims were not disallowed by President S. H. Hill in accordance with Article VIII, Paragraph M, Step 3.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the Claimant shall be compensated for all hours expended by the contractor’s forces in the performance of the work in question.”**

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.

Claimant D. R. Allen established and held seniority as a System Foreman. On the dates that the instant dispute arose, he was regularly assigned to his position with headquarters at York, Pennsylvania.

On September 30, October 6, 13, 20, November 3, 10, 17, December 8, 22, 1996, January 12, 19, March 9, 16, April 13, and 20, 1997 and allegedly continuing, the Carrier assigned Yellow Cab Company employees, who held no seniority or work rights under the Agreement to transport train crews from York to Spring Grove and/or Spring Grove to York.

It appears that the Carrier exclusively assigned such transportation work to the Claimant for approximately 13 years prior to the instant occurrences. In the instant case, the Carrier did not provide the General Chairman or District Chairman with advance notice of its intention to assign the subject work to an outside contractor.

The Organization takes the position that the Carrier violated the Agreement in this case. It makes a number of contentions. First, it claims that the Carrier's President signed the certified mail receipt acknowledging the appeal by the General Chairman's representative on February 7, 1997 and thus, pursuant to Article VII DISCIPLINE AND DISCHARGE, Section M, Step 3, had until April 8, 1997 to notify the Vice Chairman of the reasons for disallowing the appeal. However, such response is conspicuously absent from the record and thus the claim must be allowed. Further, the Organization argues that the work of transporting train crews from Spring Grove to York and back is "generally recognized as Maintenance of Way work" based on the clear and established past practice of the parties. While it admits that such work is not specified in Article I—SCOPE OF AGREEMENT, it is clear that the Claimant fulfilled this work for a period of 13 years. Further, the Organization takes the position that the Carrier violated the National Agreement when it failed to give the required 15-day written notice to the Organization of such contracting. According to the Organization, the Claimant was fully qualified, willing and available to perform all work involved in this dispute and would have done so if the Carrier had assigned him.

The Carrier takes the position that the Organization has not met its burden of proof in this matter. First, the Carrier argues that no claims were properly filed for the date of September 30, 1996 and that in fact this date was dealt with by the Board in Third Division Award 35769. According to the Carrier, because no claim was ever filed for September 30, 1996, it was not necessary for the Carrier to respond to the claim. Further, for the same reasons as asserted by the Carrier in Third Division Award 35769, the claim must fail. The Carrier contends that the work involved has not been exclusively performed by BMW - represented employees and thus, the work in question is not exclusively reserved to the Organization. While the Carrier admits that it did not give 15 days advance notice to the Organization, it asserts that it was relieved from this obligation because the work did not belong within the jurisdiction of the Organization.

After a review of the evidence, the Board finds that the Organization has been able to sustain its burden of proof in this matter. We note that both parties cited Third Division Award 35769. We note that Award 35769 dealt with the same Claimant making the same claim against the same Carrier, albeit for different dates. In that case, the Organization contended that the Carrier improperly assigned Yellow Cab to transport train crews on September 22 and 29, 1996. In that case, the Board held:

“Given the ambiguity coupled with the absence of bargaining history evidence, it is proper to use past practice to ascertain what the parties intended when they extended scope coverage to “. . . work generally recognized as Maintenance of Way work. . . .” On this record, it is readily apparent that the phrase includes what has been assigned to scope covered employees for 13 years to the exclusion of all outsiders.

Although the Carrier asserted, in its April 4, 1997 reply on the property, that commercial taxis had been used for crew transportation, this contention must be rejected. There was no proof of even a single instance where a taxi was used prior to the claim date. It is well settled that mere assertion, by itself, is not sufficient to rebut the Organization’s evidence of exclusive past performance.

In the overall, therefore, we find the Carrier violated the Agreement when it failed to provide notice and when it contracted out the disputed work in the manner it did. These findings of violation, however, do not include

any of the Organization's contentions that raise issues arising from national bargaining."

For the same reasons as noted by the Board in Award 35769, we find that the Carrier was obligated to give the Organization notice of its intent to contract out the work of transporting train crews. Because it was the work of the Organization and the Claimant, the Carrier was under an obligation to give 15 days notice of such contracting.

Further, we note that the Carrier argued that there was no claim filed by the Organization for September 30, 1996. The Carrier alleges that the claim involving September 30 was discussed and resolved in Award 35769. However, we cannot find this to be true. We reviewed Award 35769 which clearly specifies that the dates covered were only September 22 and 29, 1996. Thus, September 30, 1996 is clearly not covered by Award 35769. Further, there is some evidence in the record of the instant case that September 30, 1996 was raised by the Organization and acknowledged by the Carrier during the course of the proceeding. Thus, we reject the Carrier's contention regarding September 30, 1996.

Thus, the Board finds that the Carrier violated the Agreement by contracting out the work in dispute. The remaining issue is the scope of the remedy. While the Carrier contends that the Claimant was fully employed and thus not entitled to any compensation, we believe that a monetary remedy is necessary to make the Claimant whole (See Third Division Awards 31594, "... the fact that Claimants were fully employed . . . does not negate liability for the proven violation . . . " and 32435 "... Monetary damages are in order to compensate Claimants for the lost work opportunity and to stimulate compliance with the subcontracting notification and Scope provisions of the Agreement").

The amount of time spent by the Yellow Cab Taxi Company to transport train crews is not specified. Thus, the exact amount of compensation to be granted to the Claimant cannot be determined. We find that this issue can best be resolved by directing the parties, within a reasonable amount of time from the date of the issuance of this Award, to check the Carrier's records to verify the number of hours that outside forces were used to perform the work at issue. The Claimant shall be entitled to compensation based on the total number of hours actually worked by the outside contractor in the performance of the disputed work.

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.

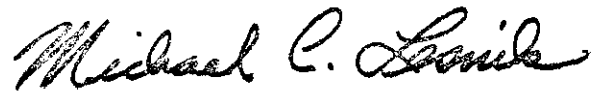
NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 20th day of February, 2002.

**Carrier Member's Dissent
to
Third Division Award 35935; Docket MW-34772
(Referee Steven M. Bierig)**

Third Division Award 35769, which was rendered on October 24, 2001, sustained an essentially identical claim submitted on behalf of System Foreman D. R. Allen for September 22 and 29, 1996.

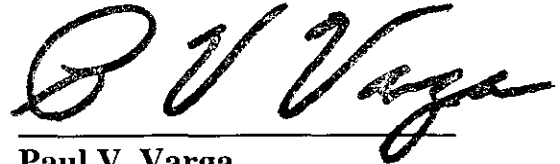
For the sake of brevity, we dissent to this Award for the same reasons set forth in our Dissent to Award 35769.



Michael C. Lesnik



Martin W. Fingerhut



Paul V. Varga

February 20, 2002