

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36284
Docket No. MW-35569
02-3-99-3-458

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) This Agreement was violated when the Carrier assigned outside forces (Gillespie Construction Company) to perform work sealing existing catch basins, tapping pipes, installing a new prefabricated catch basin and installing a shut-off valve between the old catch basin and the new one at the Collinwood Flexi-Flo Terminal, Collinwood Yard, Cleveland, Ohio on August 1, 2, 5, 6 and 7, 1996 (System Docket MW-5081).
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman prior written notice of its plan to assign said work to outside forces.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B & B employees K. G. Champa, W. E. Johnson, and G. Pongunis shall each be allowed forty (40) hours' pay at their applicable straight time rate.”

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 was advised of the pendency of this dispute, but chose not to file a Submission with the Board.

The Carrier desired to improve surface drainage at the Flexi-Flo Terminal in the Collinwood Yard. It contemplated sealing the existing catch basins, tapping pipes into them, installing a new pre-fab catch basin, and installing a shut-off valve between the old and new basins. This project required such tasks as digging ditches, laying and fitting pipe, installing equipment, and so on. The Carrier engaged a contractor to perform the work in early August 1996. No contracting out notice was given to the General Chairman.

The Organization maintains that this was a violation of Rule 1, including paragraphs 2 and 3 which deal with the Carrier's "notice obligation" in the event it "plans to contract out within the scope of this Agreement. . . ." It insists that a B & B Foreman and two B & B Mechanics should have been assigned to this project.

To begin with, the Carrier objects to the Organization making a "notice obligation" argument to the Board. It believes this argument was raised too late. However, the evidence indicates otherwise. The Organization advised the Carrier of this particular claim prior to its Notice of Intent being filed with the Board. And, as observed in Third Division Award 34228, "the Board has recognized . . . that all matters raised prior to the date of the Notice of Intent to this Board are proper matters for the Board's consideration. . . ."

The Carrier contends nevertheless that the Organization's claim should be denied on the ground that the work in question is outside the Scope Rule, specifically, that it concerns work not "generally recognized as Maintenance of Way work. . . ."

But the record shows at least four instances in which B&B personnel from this bargaining unit have done essentially the same type of catch basin work. It may well be that contractors have also done some of this work although there is no hard evidence to that effect. But even if it were true, the work in dispute would still fall within the Scope Rule. That being so, the Carrier should have notified the General Chairman of its intent to contract out. The Carrier's failure to do so was a violation of Rule 1. The fact that the Carrier may have been free to contract out this work does not excuse its failure to provide notice.

B&B personnel should be reimbursed for their lost work opportunity, the same number of hours as the contractor's work force spent on this project.

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 28th day of October 2002.