

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 36746  
Docket No. MW-36252  
03-3-00-3-472

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

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

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (James White Construction) to perform concrete removal and installation work at the fuel pad in Avon Yard at Avon, Indiana beginning on October 19 through November 10, 1998 [Carrier's File 12(99-823)].
- (2) As a consequence of the violation referred to in Part (1) above, B&B employes C. R. Wyatt, E. W. Bryant, W. R. Hackman and the senior B&B foreman in the Southwest Seniority District of the Indianapolis Division shall each be allowed one hundred forty (140) hours' pay at their applicable 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 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.

This case presents a dispute over the Carrier's assignment of outside contracting forces to perform the work of breaking up and removing deteriorated concrete, reforming and pouring of new concrete and/or placement of epoxy grout, in reconstruction of a fuel pad at Avon, Indiana, beginning October 19 through November 10, 1998. There is no apparent disagreement in this record that the work in question was work within the Scope of the Agreement and thus subject to the following notice, meeting and good faith understanding requirements of the Scope Rule:

"In the event the Company plans to contract out work within the scope of this Agreement except in emergencies, the Company shall notify the General Chairman involved in writing as far in advance as is practicable and in any event not less than fifteen (15) days prior thereto. 'Emergencies' applies to fires, floods, heavy snow and like circumstances.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representatives shall make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the Company may nevertheless proceed with said contracting and the organization may file and progress claims in connection therewith."

Except for bona fide emergencies, in which the notice and discussion are waived, the Rule does not specify what would justify subcontracting of Agreement-covered work when a decision to contract out work covered under the Scope Rule is grieved by the Organization. However, as a matter of practice, these Parties recognize that certain criteria generally must be demonstrated by Conrail, i.e., lack of available equipment, special equipment, or lack of manpower. By letter dated September 18, 1998, the Carrier gave written Notice to the respective BMW General Chairmen of its intent to contract the above-described work, asserting: "We

are contracting this work because our forces do not possess necessary equipment nor do we have sufficient manpower for completion of the work.”

By letter dated September 25, 1998, General Chairman Geller protested the subcontracting of the concrete fuel pad reconstruction work, challenged the factual accuracy of Carrier’s stated reasons and requested “discussion in compliance with the third paragraph of our Scope Rule prior to the repairs taking place.” The Carrier did not respond or comply with that request for a meeting to discuss the subcontracting but rather proceeded with the announced subcontracting during the period October 19 - November 10, 1998. By claim letter dated December 18, 1998, the Organization filed the instant claim alleging violation of the Scope Rule and seeking 140 hours’ pay at the applicable straight time rates for B&B employees C. R. Wyatt, E. W. Bryant, W. R. Hackman and “the senior B&B foreman in the Southwest Seniority District of the Indianapolis Division.”

In denying that claim on January 18, 1999, the Division Engineer simply asserted that no violation had occurred because the Carrier had fully met its good-faith obligations under the Second and Third paragraphs of the Scope Rule by sending the September 18, 1998 Notice of intent to contract. Neither in the initial denial nor in subsequent appeals did the Carrier refute the Organization’s assertion that no pre-contracting meeting was allowed or that “on October 19, 1998, outside contractor, James White Construction, began working at Avon Yards at the fuel pad busting out existing concrete where track rails were installed and re-formed and poured new concrete for rail installation. The private contractor had four employees working ten (10) hours a day on October 19, 20, 21, 22, 26, 27, 28, 29, November 2, 3, 4, 5, 9, 10, 1998.” In denying the appeals, however, the Carrier primarily relied on a “full employment” defense to the remedial damages portion of the claim; while also denying the merits on grounds that sending an “informational” letter of notice was all that the Rule required and that the Organization had not disproven the Carrier’s assertion of lack of equipment.

We conclude that the Carrier’s position on the merits in this case is untenable because it reads the third paragraph of the Scope Rule out of the contract. Compliance with the notice requirement of the second paragraph is only a first step and no defense when the Carrier blatantly fails or refuses to comply with the good-faith pre-contract discussion requirement of the third paragraph. See Special Board of Adjustment No. 1016, Award 141. With respect to the Carrier’s other affirmative defenses, we find persuasive precedent between these same Parties in

Special Board of Adjustment No. 1016, Award 144 to be ample authority for a sustaining award in the instant case:

“In contracting out situations where proper notice was not served and discussion meetings were not held, the Carrier effectively denies itself the benefit of the full employment defense. Had the parties engaged in the kind of good faith discussions contemplated by the Scope Rule, who knows what scheduling arrangements could have been developed to accommodate the people involved. In the absence of such discussions, the fact that employees may have been elsewhere during the Claim period is simply not persuasive.”

See also Awards 32505, Awards 32858, 35565, 35588, 36022 and 36509.

**AWARD**

Claim sustained.

**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 22nd day of October 2003.