

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36797
Docket No. MW-36276
03-3-00-3-493

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 Employees
(CSX Transportation, Inc. (former 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 (Nelson Excavating Company) to perform Maintenance of Way work (remove trees and brush, grading, drive piling and install landscape timbers) to form a sound barrier wall along the tracks between Mile Posts 1 and 3 on the Cleveland Short Line in Cleveland, Ohio beginning on April 5 and continuing through May 14, 1999 [Carrier's Files 12(99-658) and 12(99-745).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a good-faith written notice of its intent to contract out the work described in Part (1) above as required by the Scope Rule.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants K. G. Champa, F. R. Hoyt, J. D. D'Orazio, S. J. LaCavera, R. H. Zinni, K. Watts, W. D. Nicklow, F. O. Wilson, R. C. Burrows, P. J. Kolcan, K. W. Wilson, P. Shea, G. Pongonis, R. Sheridan, D. J. Cole, A. A. Colarusso, R. Watts, W. Suredum, P. Massari and B. Williamson shall now each be compensated for eight (8) hours'

pay at their respective straight time rates of pay and four (4) hours' pay at their respective time and one-half rates of pay for each date of April 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, May 3, 4, 5, 6, 7, 10, 11, 12, 13, and 14, 1999."

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.

On August 25, 1998, the Carrier sent the Organization the following advisory:

"Subject: East Cleveland Ohio-Installation of Sound Barriers and Landscaping, Various Locations on the Chicago Line, Dearborn Division.

Gentlemen:

As information, we intend to contract for the installation of sound barriers and landscaping at the subject location.

We are contracting this work because our forces do not possess the necessary equipment and/or expertise nor have they historically performed this type of work."

In a September 2, 1998 reply to the Carrier's advisory, the General Chairman stated the following:

"I cannot accede to your request. This work is actually fencing and is specifically spelled out in our Agreement stating that our forces will perform all fence installation. Nothing in the Scope Rule states that the BMW will only perform routine fence installation. BMW fences/barriers have historically and should continue to be assigned to perform this work."

The General Chairman went on to state that furloughed M of W employees would "welcome" an opportunity to perform the work, and that the necessary equipment was "available" to be rented or leased. Finally, the General Chairman stated that the Carrier's August 25 notice was "too vague" in that it failed to identify when the work was anticipated to commence, the number of contractor employees involved or the length of the project.

Thereafter, on December 16, 1998, the Carrier sent the General Chairman an updated advisory which set forth:

"Pursuant to our previously issued notice, please be advised we also intend to contract for the installation of sound barriers and landscaping at various locations on the Short Line.

This amends our notice dated August 25, 1998 under the same file number."

In a subsequent response, the General Chairman reiterated his earlier arguments, further asserting that when the Carrier "used this outside concern" on the dates noted supra, it specifically violated Agreement Rules 1, 3, and 17.

At the outset, the Organization raised certain procedural arguments with regard to this matter. Specifically, the General Chairman maintained that the Carrier failed to provide "proper" advance written notice with respect to the disputed work. However, the record demonstrates that on August 25 and again on

December 16, 1998, the Carrier provided contractually sufficient advance written notice regarding the sound barrier project.

The Organization further asserted that the Claimants were furloughed in November - December 1999. However, that argument goes only to remedy and, moreover, is de novo at the Board level and may not be considered due to the Organization's failure to proffer that evidence in on-property correspondence.

Turning to the merits of the dispute, the Carrier contended that it lacked sufficient manpower and equipment to perform the subject work. For its part, the Organization asserts that the Claimants have "constructed sound barriers" and have "ample experience" in performing such work. However, the work is not embraced by specific contract language and the Organization has not been able to carry its burden of persuasion on this record that the work at issue was reserved to Agreement-covered employees by custom, practice and tradition. While it is clear that the Claimants may have performed fencing or retaining wall work, there is no evidence on this record demonstrating that the sound barrier project constituted work that is covered under the Agreement Scope Rule, nor is there persuasive record evidence which convinces the Board that the Organization has historically performed same. Based upon this disposition of the case it is not necessary to reach or comment upon remedy-related arguments, e.g., "full employment," so no opinion is expressed or implied concerning such remedial matters.

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 29th day of December 2003.