

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37695
Docket No. MW-37759
06-3-03-3-122

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 Employees
(National Railroad Passenger Corporation (Amtrak) –
(Northeast Corridor

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces (TDI) to install station location signs on the platform in Baltimore Station on February 25, 26, 27, 28 and March 1, 2002, instead of Mr. D. McCadden (System File NEC-BMWE-SD-4186 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. McCadden shall now be compensated for forty-five (45) hours' pay at his respective straight time rate of pay.”

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 claim protests the Carrier's use of a contractor to install station location signs in the Baltimore Station on the claim dates as a violation of the Scope Rule. The pertinent sections of that Rule are as follows:

"SCOPE AND WORK CLASSIFICATIONS

A. SCOPE

* * *

. . . In the event AMTRAK plans to contract out work within the scope of the schedule agreement, the Director-Labor Relations shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto.

* * *

Nothing in this Rule shall affect the existing rights of either party in connection with contracting out except as provided below. Its purpose is to require AMTRAK to give advance notice and, if requested, to meet with the General Chairman to discuss and if possible reach an understanding in connection therewith, except in emergencies. 'Emergencies' as that term is used herein applies to fires, floods, heavy snow and like circumstances.

1. EXCEPTIONS

- A. Effective March 2, 1987, the following work may not be contracted out without the written concurrence, except in case of emergency, of the appropriate General Chairman.

* * *

- (3) Bridge and Building inspection, maintenance, construction or repair of the type being performed by Amtrak forces under the

scope of this Agreement on January 1, 1987, specifically excluding major construction projects and non-railroad projects.

B. WORK CLASSIFICATION RULE

* * *

ARTICLE I - BRIDGE AND BUILDING AND TRACK DEPARTMENTS

The description of each position title outlined in this Article is intended to cover the primary duties of that position and, in addition, it is understood that each title comprehends other work generally recognized as work of that particular classification.

* * *

14. B&B Mechanic - Construct, repair and maintain bridges, buildings and other structures.

ARTICLE IV - APPLICATION AND INTENT

* * *

This Scope Rule does not apply to work on any property owned by AMTRAK which is leased to a lessee who under the lease assumes responsibility for work on the leased property. Property owned or operated by AMTRAK necessary for the operation of the railroads coming under the Scope of this Agreement will not be leased for the purpose of evading the application of this Agreement."

The record establishes that the Carrier entered into an Advertising Agreement with TDI under which space on station platforms, including Baltimore Station, was leased for the installation of advertising materials. The protested work consists of billboards with a large section for advertising as well as a portion at the bottom with the station name and directional arrows to both Washington and Boston. It is the installation of the station location signs that is protested herein. It

is undisputed that no notice was served, no meeting held nor concurrence obtained with respect to this contracting transaction.

The Organization argues that the work in dispute falls into the category of maintenance of buildings and other structures which are integral to the Carrier's operations as a passenger carrier and which have been customarily and traditionally performed by employees of the B&B Department. Because such work is encompassed within the Scope of the Agreement, and has been admittedly performed by employees in the past, the Organization asserts that the Carrier was obliged to both serve notice and obtain concurrence from the General Chairman concerning the contracting transaction and its failure to do so violates the Agreement, citing Third Division Awards 3955, 5172, 11072, 11139, 19268, 19898, 19924 and 30684. The Organization contends that the lease only covers advertising and not the installation of location signs on station platforms, and that, if the lease did apply, the Carrier would be in violation of Article IV of the Scope Rule by attempting to transfer the maintenance and repair obligations related to installation of station location signs as a method of evading its obligations under the Agreement, relying on Third Division Awards 28759, 30661 and 30971. The Organization submits that the Claimant suffered a measurable loss of work opportunity and the Carrier failed to prove its "fully employed" affirmative defense by showing that the Claimant's work could not have been rescheduled permitting him to perform the disputed work which was not an emergency, citing Third Division Awards 27614 and 29592; Public Law Board No. 6671, Awards 1, 2 and 3. It requests compensation for the time expended by the contractor in installing the station signs.

The Carrier argues that the installation of the advertising equipment under its lease agreement with *Transportation Displays Incorporated (TDI)* does not constitute construction, repair or maintenance of a facility which could be considered work reserved to BMW-represented employees under the Agreement. It notes that the billboards are not owned by the Carrier and were installed at TDI's expense in an area encompassed by the terms of the Lease Agreement. The Carrier contends that the language of Article IV of the Scope Rule clearly excludes the work in issue from its coverage, because its primary function is advertising, not an integral part of the operation of a passenger railroad. It asserts that it was neither obliged to serve notice nor obtain concurrence from the General Chairman under these circumstances. Before the Board, the Carrier also points to a virtually identical dispute filed by the Organization in October 2001 concerning the installation of similar signage in Philadelphia and abandoned after the Carrier's

response in August 2002 as a tacit admission by it that such work is not reserved exclusively to BMW-employees, a requirement to establish a Scope Rule violation, citing Third Division Awards 23549, 25523, 26236 and 30095. The Carrier also contends that the Claimant was gainfully employed during the claim period and suffered no loss of compensation.

A careful review of the record convinces the Board that the Organization made out a prima facie case that the work of installing station location signs on the platform in Baltimore Station is encompassed within the Scope of the Agreement as maintenance of other structures that are an integral part of Carrier's operation. While the Lease Agreement was appropriately for space on the platform for advertising structures, it could not remove Scope-covered work from the Agreement. This claim only protests the contracting of the station location signs, a portion of the information on the billboards that were installed by TDI, and not the entire advertising space. As such signage has been installed and maintained by employees under the Agreement in the past, not necessarily to the exclusion of all others, it arguably falls within the Scope of the Agreement and the Carrier was obliged to serve notice and meet with the Organization, upon request, to discuss the contracting. Had that occurred, the parties may have been able to separate out the advertising content which properly could be contracted under the terms of the lease from the station location signs, or made some accommodation concerning the amount of time it would have taken to perform that aspect of the work. The Carrier's failure to comply with the notice provisions of the Scope Rule violates the Agreement. See Third Division Award 18287.

With respect to the appropriate remedy, it appears that the Organization seeks reimbursement to the Claimant for the cumulative time that TDI was installing its advertising billboards on the platform in the Baltimore station. Because we have found that the part of the billboard that has advertising content, rather than station location and directional signs, was appropriately contracted under the terms of the Lease Agreement and not encompassed within the strictures of the Scope Rule, we remand the case to the parties to ascertain what portion of the 45 hours sought is attributable to the station location signs found at the bottom of the billboard, and direct compensation to the Claimant at the straight time rate for only those hours allocated to the work in dispute. See Third Division Award 27614.

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 30th day of January 2006.

National Railroad Adjustment Board
Third Division Award No. 37695
Carrier Member's Dissent

Docket MW-37759

In the instant case, Amtrak leased space on its station platform to Transportation Displays Incorporated, for the installation advertising. This lease included not only the right to install advertising materials, but the necessary equipment on which to display those advertisements.

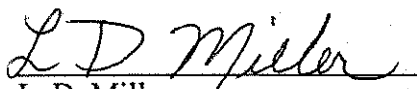
There is no dispute that on a small part of the equipment installed by TDI for the display of their advertising material the name of the city (Baltimore) and the direction to New York and Washington was indicated. However, we are at a loss to understand the majority's decision that the inclusion of this information on TDI's display equipment constitutes a violation of BMW scope rule.

As set forth in the record, the advertising equipment is not owned by Amtrak, was not installed exclusively for Amtrak's benefit, nor at Amtrak's instigation. Clearly, under these circumstances, the work is not reserved to the craft under the agreement.

Furthermore, for the majority to determine that the BMW should have been consulted about the performance of work on the display equipment owned by TDI, or offered the opportunity to participate in the fabrication of that display equipment, is absurd.

Amtrak BMW employees do not have rights to perform work on equipment not owned by Amtrak. The decision of the majority in this case to afford them penalty compensation for work to which they have no rights is palpably erroneous.

We therefore dissent to the majority's opinion in this case.


L. D. Miller
Carrier Member