

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 37696  
Docket No. MW-37782  
06-3-03-3-140

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 Employes  
(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 (Penn Fabrication) to perform Maintenance of Way work (fabricate bridge walkway supports) instead of Messrs. W. Carr, B. DiEleuterio, L. Black, M. Petrillo and T. Ruff (System File NEC-BMWE-SD-4185 AMT).
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its plans to contract out said work.
- (3) As a consequence of the violation referred to in Part (1) above, Claimants W. Carr, B. DiEleuterio, L. Black, M. Petrillo and T. Ruff shall now ' . . . be allowed the sum of \$12,000.00. The Union would require that an equal proportionate share of this amount be distributed to the claimants. . . .’”

**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 contracting out the fabrication of 100 bridge walkway supports ("figure 4's") without advance notice to, discussion with, and concurrence by the General Chairman 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.

\* \* \*

1. Foreman - Directs and works with employees assigned under their jurisdiction.

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

19. Welder - Welds Maintenance of Way materials and equipment by use of oxyacetylene or electric arc method where facilities for such welding are provided by the Maintenance of Way Department, exclusive of welding performed by plumbers, pipefitters and tinsmiths in connection with their work."

The record reflects that for the past eight years much of the work of fabricating figure 4's has been performed by B&B Welders, with the help of Mechanics, in the Carrier's shops at Wilmington, Delaware. During that time the Carrier ordered the material from Penn Fabrication and it arrived as steel angle, not as a finished product. During the week of January 21, 2002 the Carrier accepted delivery of 100 fully fabricated galvanized figure 4's from Penn Fabrication for a total cost of \$12,000.00.

The Carrier had not used galvanized figure 4's previously and was not equipped to perform the galvanizing process. Written statements from Foreman Carr, Welder DiEleuterio and Mechanic Black establish that the figure 4's are designed to specifically meet the Carrier specifications, and that the 100 prefabricated figure 4's fell short of meeting specifications in certain areas and could not be easily modified because the galvanized coating became toxic when exposed to the heat of welding or burning.

The claim was filed with two different Carrier representatives seeking the total cost of the goods to be split among the Claimants. Both Carrier officers responded denying the claim, asserting that it purchased prefabricated material and did not contract out, and pointing out that the claim was excessive because it included the cost of materials and delivery as well as labor. The Organization's appeals of May 22 and June 12, 2002 seek compensation on behalf of the Claimants "for all time made" by Penn Fabricating. On the property and before the Board, the Carrier points out that the Organization amended the monetary portion of the claim, a fatal flaw, and argues that it was procedurally invalid. The Carrier's assertion that \$8600.00 of the cost of the prefabricated figure 4's was attributable to the cost of materials and delivery and the hot-dip galvanizing process which the Carrier was not equipped to perform was not rebutted by the Organization.

The Organization argues that the fabrication of figure 4's falls within the scope of the Agreement because it is construction and maintenance of bridges which has customarily been performed by B&B employees, and that the Carrier was required not only to give the General Chairman notice of its intention to contract out this work, but obtain his written concurrence before doing so, citing Special Board of Adjustment decisions of Arbitrators Wallin and Fishgold on Track Panel and Pre-Plated Ties disputes it had with the Union Pacific Railroad Company. It asserts that the Carrier's "purchase of materials" defense is a ruse because historically what has been purchased from Penn Fabrication is the angle steel material, not the fabricating of such material, and that these items were not pre-manufactured goods on the shelf, but had to be made to the Carrier's specifications by the contractor. The Organization contends that the monetary remedy should be sustained due to the loss of work opportunity for the Claimants, despite their being "fully employed" and to maintain the integrity of the Agreement, relying on Third Division Awards 27614 and 31996; Public Law Board No. 6671, Awards 1, 2 and 3.

The Carrier initially argues that the claim is procedurally invalid because it was amended on appeal, citing Third Division Awards 15847, 29272 and 36020. With respect to the merits, the Carrier contends that the Scope Rule does not apply to the

purchase of prefabricated materials, relying on Third Division Awards 27902 and 32598. The Carrier asserts that the Organization failed to establish that the fabrication work is reserved exclusively to B&B employees by Agreement or practice or that the Carrier is restricted from purchasing component parts from outside vendors. See Third Division Awards 25523, 26236, 27571, 27697, 28213, 31245 and 31829. It relies on Third Division Award 32058 for the proposition that a carrier is free to purchase parts, whether off the shelf or manufactured to specifications, and that such purchase does not infringe upon employees' rights to the work because the parts or materials do not belong to the Carrier until after they have been manufactured. Finally the Carrier notes that the claimed amount is excessive because it includes costs not associated with the actual fabrication work in issue.

Initially we note that the Board is unable to accept the Carrier's assertion that the Organization substantially amended its claim necessitating its dismissal, which was the finding in Third Division Awards 15847 and 36020. The Organization's appeals "for all time made" were apparently attempting to respond to assertions made by the Carrier in its denials as to components of the total cost of the contract. The Carrier was fully advised what the Organization was seeking and the basis of its claim, facts which did not change throughout the claim processing.

A careful review of the record convinces the Board that, under the particular facts of this case, the Organization established a prima facie showing that by both language and practice, the fabrication of figure 4's was historically and customarily performed by BMW-represented employees. The Carrier's assertion, without proof, that it had purchased prefabricated supports on several occasions in the past does not adequately rebut the direct evidence of employees that they have performed the fabrication of figure 4's from angled steel furnished by Penn Fabrications for at least the past eight years. Under the language of the Scope Rule of the Agreement, the Carrier was obliged, at a minimum, to give the Organization notice of its intention to contract out such fabrication, and an opportunity to discuss the matter. There is no doubt that the Carrier retains the right to purchase prefabricated goods without violating the scope clause of the Agreement (Third Division Award 32058). In this case there is no challenge to its obtaining the angled steel from which the figure 4's were fabricated. It had consistently done so in the past. What is new in this case is the galvanizing process, which had not been performed by BMW-represented employees under the scope of the Agreement previously. The Carrier was obliged to discuss its plans to have such work contracted because it was accomplished as part of the fabrication process. Had that aspect of the work been separated from the fabrication, the Carrier's arguments might hold more weight.

Accordingly, we conclude that by failing to comply with the process for notification and discussion set forth in the Scope Rule in this case, the Carrier denied the Organization an opportunity to retain the fabricating portion of the work for BMW-represented employees, who, the record establishes, had to make adjustments to the figure 4's for them meet the Carrier specifications. Absent a showing that this work could not have been accomplished by the Claimants at a time other than their scheduled working hours, the Carrier's "fully employed" defense cannot defeat their entitlement to a monetary remedy for this loss of work opportunity. See Third Division Award 31996. Because the Carrier raised the excessiveness of the remedy requested on the property, and presented unrebutted evidence that \$8600.00 of the cost of the contract was not attributable to the fabrication process, the Claimants shall be compensated their proportionate share of the balance of \$3400.00.

**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.

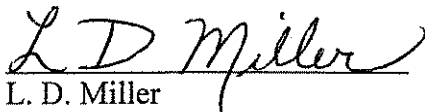
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Carrier Member's Dissent

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In the instant case, Amtrak purchased prefabricated parts, an action which the Board recognized is fully within the carrier's rights. As established in the record, the purpose for purchasing the prefabricated parts was to permit those parts to be galvanized prior to installation by Amtrak forces.

There is no dispute that Amtrak forces had previously performed fabrication of these same parts. However, such recent performance, which the employees readily admit was limited to approximately the past eight years, does not reserve the work to the craft based on the clear and unambiguous language of the scope rule. The employees did not contend or demonstrate that BMW forces fabricated the parts in question as of January 1, 1987, and therefore, the work is not reserved to the craft under the scope rule, Amtrak was not obligated to notify the employees of the intention to purchase those parts under that same scope rule, nor was Amtrak obligated to obtain the organization's concurrence in the purchase of those parts.

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

  
L. D. Miller  
Carrier Member