

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39490
Docket No. MW-38309
09-3-NRAB-00003-040239
(04-3-239)

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employes**
(**Delaware & Hudson Railway Company**)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Pollard Excavating) to perform Maintenance of Way work (operate equipment in connection with road grading, widen roadway, put down asphalt, remove and install barriers and related work) at Kenwood Yard beginning on July 15, 2002 and continuing instead of System Equipment Operator D. Jordan (Carrier’s File 8-00301 DHR).**
- (2) The Agreement was further violated when the Carrier failed to comply with the notice requirements regarding its intent to contract out the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as required by Rule 1 and Appendix H.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, System Equipment Operator D. Jordan shall now be compensated for eight (8) hours per day at his respective straight time rate of pay and for all overtime hours at his respective time and one-half rate of pay for each date that the outside forces performed the aforesaid work beginning on July 15, 2002 and continuing.”**

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.

By letter dated June 24, 2002, the Carrier advised the Organization's General Chairman as follows:

"RE: Contracting Kenwood Intermodal Road Surface

* * *

Due to the poor road conditions in the Kenwood Intermodal Terminal the terminal operator will be undertaking road-grading work to resolve the urgent problem that is causing delays and damage to vehicles and equipment in the intermodal facility.

The work is urgently required to sustain train-truck intermodal operations and BMWE staffs are not able to fully support the scope of work requirements."

By letter dated June 28, 2002, the Organization protested the Carrier's decision to contract out the work and asked the Carrier to "[k]indly contact the System Office . . . at your earliest convenience to arrange a mutually agreeable date, place and time to conference this notice."

By letter dated July 12, 2002, the Carrier advised the Organization:

“RE: Contracting Kenwood Intermodal

* * *

In clarification of my letter of June 24, 2002, concerning Kenwood Yard, the following is a description of the work to be performed by contractor/s:

1. Remove rip-rap barriers and install new jersey barriers at various locations to protect tracks from trucks and trailers.
2. Widen roadway and put down asphalt.
3. Move existing trailer and or replace. Which will include plumbing, phones.
4. Establish new material yard North Greet St. on east side if funding is available: which will include grading, fence installation, install lights and movement of track material from Kenwood Yard to new facility.

Please feel free to call should you have any questions or concerns.”

The Organization received the Carrier’s July 12 letter on July 15, 2002. According to the Organization’s letter of July 17, its General Chairman spoke with the Carrier on July 15 and was advised that the Carrier’s designated official would be out of town until July 18 and arrangements were discussed about conferencing contracting out notices on July 19 or 22, 2002. In its July 17 letter, the General Chairman requested the Carrier to “[p]lease contact me at my home office on which day we could conference these contracting out notices.

Conference on various contracting out notices including the work involved in this dispute was held on July 19.

The contractor began performing the disputed work in this matter on July 15, 2002.

The relevant Rules provide:

“1.3 In the event the Carrier plans to contract out work within the scope of this Agreement, except in emergencies, the Carrier shall notify the General Chairman involved, 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. ‘Emergencies’ applies to fires, floods, heavy snow and like circumstances.

1.4 If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier shall promptly meet with him for that purpose. Said Carrier and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the Carrier may nevertheless proceed with said contracting and the Organization may file and progress claims in connection therewith.

1.5 Nothing in this Rule shall effect the existing rights of either party in connection with contracting out. Its purpose is to require the Company to give an advance notice and, if requested, to meet with the General Chairman or his representative to discuss and, if possible, reach an understanding in connection therewith.”

The Carrier failed to meet its notice obligations under the above quoted Rules.

First, the contracted work falls “. . . within the scope of this Agreement . . .” as stated in Rule 1.3. The described work is classic maintenance-of-way work.

Second, if the June 24 letter from the Carrier is deemed to be the notice to the Organization, in its June 28, 2002 letter, the Organization asked the Carrier to “[k]indly contact the System Office . . . at your earliest convenience to arrange a mutually agreeable date, place and time to conference this notice.” From this record, the Carrier did not contact the Organization as requested. But under Rule 1.4, “[i]f the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier shall promptly meet with him for that purpose.” There was no “prompt . . .” meeting as requested. The Carrier did not respond to the Organization’s request to meet.

Third, if the July 12, 2002 letter from the Carrier is deemed to be the notice to the Organization, it is untimely. Rule 1.3 provides that "... the Carrier shall notify the General Chairman involved, 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." The contractor began the work on July 15, 2002 - less than the 15 day notice requirement period found in Rule 1.3.

Fourth, if the July 12, 2002 letter is a clarification of the Carrier's June 24 letter, the notice remains untimely. From this record, after receiving the Carrier's July 12 notice, the Organization again attempted to arrange a conference, only to be told that the Carrier's representative was out of town and would not be available for conference until July 19 - the date the conference was held. But the work commenced on July 15. Therefore, because the Carrier delayed the conference until after the work commenced, for this particular contracting transaction, the Carrier rendered the notice and conference provisions of Rules 1.3 - 1.5 meaningless.

The claim therefore has merit. As a remedy, the Claimant shall be made whole as requested in the claim for the lost work opportunities.

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 2nd day of February 2009.