Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36294
Docket No. MW-36438
02-3-00-3-707

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)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Downing and Earle, Inc.) to perform paving work in the Wilmington Yard area at Wilmington, Delaware on June 14, 15, 16, 17, 18, 21, 22, 23, 24 and 25, 1999 (System File NEC-BMWE-SD-3980 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 Parts (1) and/or (2) above, B&B Foreman M. Lancianese and B&B Mechanics M. Bremer and D. Provence shall each be compensated for eighty (80) hours at the pro rata rate for each Claimant."

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.

There are two issues before the Board in this case. First, whether the Board has jurisdiction to hear this claim raising an allegation of a violation of the parties' Scope Rule or whether Special Board of Adjustment No. 1005 has exclusive jurisdiction to deal with such allegations. Second, the issue on the merits is whether the Claimants are owed additional compensation for time worked by a contractor performing paving work between Buildings 12 and 13 in the Wilmington Yard during the claim period.

There is no dispute that the Carrier used an outside contractor to pave the South Transfer Roadway at its Wilmington, Delaware, maintenance facility in June 1999, without advance written notice to the Organization. The Organization submitted employee statements averring that four contractor employees worked for ten days on the project. The Carrier contended that the contractor only used three employees, and a Foreman to occasionally organize and supervise the job, and that they worked only three days completing the project. It submitted a statement from the contractor verifying that on June 14, 15 and 16, 1999 three of its men worked eight hours each on the South Transfer Roadway. During the progression of the claim on the property, the Carrier admitted that no advance notice was given to the Organization, and paid each Claimant 24 hours at their pro rata rate for the time worked by contractor employees. The Organization felt the payment did not satisfy the claim, seeking a total of 240 hours based upon its evidence that ten days were expended by contractor employees performing the disputed paving work.

With respect to the jurisdictional issue, the pertinent provision of the Scope clause of the parties' Agreement reads:

> "Any question with regard to contracting out work in accordance with the scope of this Agreement may be referred by either party to a Special Board of Adjustment created specifically and solely to hear and render decisions upon such questions. The Special Board of Adjustment shall operate in accordance with the Agreement appended hereto as Attachment 'A.'

Attachment A

For the purpose of establishing a Special Board of Adjustment under Section 3 of the Railway labor Act, as amended:

IT IS AGREED:

A. There is hereby established a Special Board of Adjustment which shall be known as Special Board of Adjustment 1005, hereinafter referred to as the 'Board.'

B. The Board shall have jurisdiction only of disputes or controversy arising out of the interpretation, application, or enforcement of the Scope Rule provision of the Schedule Agreement, as revised September 2, 1986, between the parties hereto.

* * *

F. Either party to this Agreement may initiate a dispute to the Board following the required meeting to discuss matters relating to the contracting transaction and the Board shall hold hearings on each dispute or controversy submitted to it. . . ."

The Organization argues that jurisdiction does not lie with SBA 1005 in this case, because the Carrier did not meet the requirement that it hold a contracting conference prior to awarding the work. It asserts that in prior cases where the issue of the jurisdiction of the Board to hear contracting cases under this Agreement arose, the Organization never argued the prerequisite contained in Paragraph F, as it does herein. It relies upon Third Division Award 31996 as affirming this Board's jurisdiction to determine contracting issues between the parties. The Organization contends that the Carrier cannot have it both ways, by raising a jurisdictional argument before this Board and then not referring the matter to SBA 1005.

With respect to the merits, the Organization argues that the Carrier's "proof" that three contractor employees worked on three of the claim dates does not rebut its eyewitness accounts that four contractor employees were seen on ten specific claim dates doing the paving work in issue. It asserts that, based upon the size of the project,

it would have been impossible for three employees to have completed the job in just three days. The Organization avers that it requested a copy of the contract and billing data from the Carrier during the handling on the property, and did not receive it, negating any reliance upon such information by the Carrier at this late stage.

The Carrier initially contends that the issue of the jurisdiction of SBA 1005 has already been determined on this property, and that the Board has found that it has no jurisdiction to hear disputes related to allegations of a violation of the scope clause due to the existence of SBA 1005 which the parties specifically empowered to deal with such matters. See Third Division Awards 31481, 31482, 31484, 31485, 32156, 32157, 32159, 32161, 32220, 32221 and 32222. The Carrier notes its scathing dissent in Third Division Award 31996, indicating that the Referee did not consider or comment upon any of this prior precedent in finding that its jurisdictional argument was "not persuasively established on this record." It requests that this claim be dismissed for the reasons stated in the well-reasoned Awards dealing specifically with this issue.

As to the merits, the Carrier argues that it has proven that the contractor only worked three employees for three days to accomplish the paving work in issue, and that the Claimants have been compensated for any loss associated with such work due to lack of notice. The Carrier avers that the claim is excessive, pointing to supporting documentation from a reputable costing publication indicating that a four-man crew does 1900 square feet of 6" thick paving per day, and the fact that the job was 5500 square feet of 6" thick paving materials. The Carrier asserts that no reputable paving company would take ten days to do this amount of work, noting that it gave the Organization the final progress billing showing the entire contract cost to be about $17,000, including profit and materials. The Carrier contends that the Organization failed to sustain its burden of proving that the hours claimed were accurate.

The Board must first address the issue of its jurisdiction to decide the claim alleging a violation of the parties' scope clause. To do so, we must consider the rationale under which these prior cases were decided. Third Division Award 31481, decided in May 1996, was the first case dealing head-on with the issue of whether the existence of SBA 1005 deprives the Board of jurisdiction to entertain a claim involving a violation of the scope provision of the parties' Agreement. The dispute involved a part of the Carrier's $65,000,000 rehabilitation of the 30th Street Station in Philadelphia, Pennsylvania. Therein, the Organization argued the absence of mandatory language in the Agreement requiring submission of these disputes to SBA

1005. The Board reasoned that, due to the language of the Scope Rule, the parties had agreed that all questions relating to its interpretation would be resolved by SBA 1005. The Board adopted this rationale in Third Division Awards 31482, 31484 and 31485 without additional comment.

Third Division Award 32156, decided in August 1997, dealt with a dispute about one hour of work arguably part of the Carrier's same 30th Street Station project. The Board saw no reason to deviate from, or distinguish, the rationale of Third Division Award 31481, noting with passing reference the existence of Third Division Award 31996 (decided in May 1997) finding the Board had jurisdiction to decide the scope violation claim. Third Division Awards 32157, 32159 and 32161 adopted this finding without further comment.

Finally, Third Division Award 32220, decided in September 1997, again dealt with the Carrier's 30th Street rehabilitation project, and an allegation that the disputed contracting was part of the original notice and conference. The Board, guided by the principle that procedures established and accepted by parties for resolving disputes should be respected, found that the Scope Rule language and Paragraph B of the SBA 1005 Agreement, cited above, evinces such a procedure, and adopted the rationale of Third Division Award 31481 in dismissing the claim. The Board distinguished Third Division Award 31996 by finding that the jurisdiction of SBA 1005 was persuasively established by the Carrier in that case. Third Division Awards 32221 and 32222 adopted this finding without further comment.

In Third Division Award 31996, relied upon by the Organization, the Board made only passing reference to the Carrier's argument that primary jurisdiction in SBA 1005 deprives the Board of concurrent jurisdiction as "not persuasively established on this record." As noted above, the Carrier filed a dissent noting that the Board, normally respectful of establishing stability in labor relations and predictability in contract interpretation, must not have received or considered the prior Awards because no comment was made about them.

This is the current state of prior Board precedent with respect to the issue of jurisdiction concerning alleged scope violations on this property. The Board notes that, with the exception of Third Division Award 31196, all cases dealt with the Carrier's massive 30th Street rehabilitation project, and allegations that the particular work in issue was neither covered by the prior admitted contracting notice, contracting

conferences held with respect to that project, or the ultimate agreement reached between the parties concerning the number of hours of work that would be reserved to the employees as a result of such discussions. In each case the Organization contended that the work in dispute was not part of the project, and the Carrier disagreed. All cases dealt with a situation where the scheme for notice and conference in contracting situations contemplated by the scope provision had been arguably complied with.

While the language in both the scope provision and Paragraph F of the SBA 1005 agreement is permissive ("may") with reference to referral of contracting disputes to SBA 1005, as argued by the Organization previously and impliedly rejected by the rationale of the Board in the above-cited cases, none presented the same situation as the one before the Board in this case. In this case, unrelated to the large 30th Street project, the Carrier admittedly did not satisfy its contracting notice and conference requirements contained in the Scope Rule, and actually paid the claim in the amount it believed to have been worked by the contractor. This dispute is only about the amount of that payment, not about whether the scope provision's notice and conferencing requirements were, in fact, violated. Thus, this is not an issue as to the "interpretation, application or enforcement of the Scope Rule provision," which is the limitation of the agreed-upon jurisdiction of SBA 1005. It is merely a dispute about the number of hours the Organization proved the contractor worked on the project in issue and the amount of compensation owed to the Claimants.

Additionally, Paragraph F of the SBA 1005 agreement sets forth the parameters under which either party may initiate a dispute to SBA 1005. It states that a dispute may be initiated to SBA 1005 by either party "following the required meeting to discuss matters relating to the contracting transaction. . . ." That provision was never previously argued by the Organization to the Board as a basis for rejecting the exclusive jurisdiction of SBA 1005 under the facts of prior cases, where the work in dispute was arguably covered by contracting conferences held to discuss the 30th Street project. There was admittedly no contracting conference held in the instant case. As argued by the Organization, the absence of such a prerequisite for referral to SBA 1005, cannot deprive the Board of its jurisdiction, because the parties would be left without recourse. We are unpersuaded that the Carrier fulfilled the conference requirement of Paragraph F in this case by holding a claims conference. The language of Paragraph F clearly requires that a meeting be held "to discuss matters relating to the contracting transaction," not the merits of a subsequently initiated claim. We are confident that in drafting the SBA 1005 agreement, the parties contemplated that such

Board would only be faced with contracting disputes which the parties had previously discussed at a contracting conference. Because the instant case does not fall under such umbrella, it is further distinguished from the prior Awards finding the Board without jurisdiction to entertain those contracting disputes.

In holding that, under the specific facts of this case, the Board has jurisdiction to entertain the claim and decide it on its merits, we are neither overturning the rationale set forth in the prior Awards, nor choosing a path that we feel to be destructive of labor relations stability or predictability of contract interpretation. Regardless of whether we believe that the Board has concurrent jurisdiction with SBA 1005 to hear certain types of contracting disputes, the fact remains that the parties admitted that no contracting dispute has ever been referred to SBA 1005. Under the guidelines adopted by the parties for referral of such cases to SBA 1005, we find that the instant case is properly before the Board for a determination of the merits for the reasons set forth above.

On the merits, after careful consideration by the Board, we are of the opinion that the Organization did not sustain its burden of proving that the contractors' employees actually spent ten days performing the disputed paving work. We note that the Carrier contested the Claimants' statements as to the length of time they saw the contractors' employees working with (1) a written signed statement from the contractor that it had three employees performing work for eight hours on three specific dates in June 1999, (2) documentation establishing the average amount of similar paving work that could be performed by a crew of four (which the Claimants assert were present) on a daily basis (1900 sq. ft.), (3) the size of the job (5500 sq. ft.), and (4) the total cost of the contract ($17,325) which includes labor, materials, equipment and profit, and which would have cost over $18,000 in labor alone if contractor employees worked for ten days. These facts established on the property call into question the excessiveness of the claim and, at the very least, establish an irreconcilable dispute of fact, that cannot be resolved by the Board. Because the Organization has the burden of establishing all elements of its claim, the Board must deny further compensation to the Claimants based upon lack of sufficient proof.

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 28th day of October 2002.