Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36509
Docket No. MW-35727
03-3-99-3-705

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(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 (Serafini Construction) to perform road building and ditching work in Seneca Yard, New York beginning December 15 through December 19, 1997 (System Docket MW-5230).

(2) The Carrier further violated the Agreement when it failed to provide a proper advance notice of its intent to contract out the Maintenance of Way work described in Part (1) hereof.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Machine Operator E. Townsend and Vehicle Operator L. E. Kolb shall now each be compensated for forty (40) hours' pay at their respective straight time rates 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.

According to the Organization's claim, between December 15 through December 19, 1997, an outside contractor was used to dump and spread rock along track 319 and to perform ditching work along track 320 at the Seneca Yard in Buffalo, New York. The Organization maintains that the Carrier violated the Agreement by assigning this basic BMWE work to outside forces and by failing to give the General Chairman advance written notice of its intent to contract out. The Claimants were furloughed at the time the disputed work was performed. The Organization contends that the Carrier owns the necessary equipment to perform the work and the Claimants were fully qualified to operate that equipment.

There is no dispute that, under the provisions of the Scope Rule, the Carrier is required to notify the General Chairman when it "plans to contract out work within the scope" of the Agreement. The Carrier argues, however, that it has no obligation to serve a 15-day advance notice when the work is not covered under the provisions of the Scope Rule. The Carrier acknowledges that one of the Carrier's Machine Operators performed work in conjunction with the project at issue by spreading the stone that had been delivered by the outside contractor. Nevertheless, the Carrier contends, even if BMWE forces have been used to perform such work on occasion, it does not automatically follow that the work at issue comes within the aegis of the Scope Rule. On the contrary, the Carrier maintains that the Organization failed to demonstrate that it has performed such work to the exclusion of other crafts or outside contractors. For these reasons, the Carrier asserts that the Organization has not met its burden of proof.

The Carrier's reasons for denying the claim are unpersuasive. We find that the disputed work is covered by the Scope Rule's specific terms which make reference to construction, maintenance and repair of roadbeds and culverts as Maintenance of Way work. Rule 1 (Seniority Classes) specifically lists a front end loader and an excavator as the type of machinery operated by employees in the Track Department. In fact, there is no dispute that a BMWE-represented employee was performing at least a portion of the work at issue during the claim period. Moreover, there is precedent on this property which expressly recognizes that the claimed work falls under the coverage of the Scope Rule. See, Third Division Awards 35588, 36284 and Award 157 of Special Board of Adjustment No. 1016.

At minimum, the Carrier should have notified the General Chairman of its intent to contract out. Even if the Carrier is correct that the Organization has not performed this work to the exclusion of other crafts or contractors, the Carrier is nevertheless obligated to provide notification where the work to be contracted out is "within the scope" of the Agreement. Numerous precedent Awards on this property have effectively put to rest any question that exclusivity is the proper test in determining whether notification is required. Third Division Awards 27636, 27012, 27185, 27634, 30844 and 36284; Special Board of Adjustment No. 1016, Award 157.

The Carrier argued for the first time in its Submission that, after the stone was delivered to the work site, the outside contractor was needed to assist in performing the sub-grade work, spreading the new stone and doing the associated ditch work because of the lack of available manpower and equipment. That is precisely the sort of information that would have been discussed by the parties had the requisite notice been given. As the record stands, the Carrier's new defense, never raised on the property, may not properly be considered by the Board at this juncture.

With regard to remedy, the Board notes that the Organization, in its appeal to the Carrier's highest designated officer, amended its initial claim, reducing the number of Claimants from five to two. Accordingly, the claim, as presented to the Board, is sustained.

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 23rd day of April 2003.