

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36575
Docket No. MW-36175
03-3-00-3-372**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Soo Line Railroad Company (former Chicago, Milwaukee,
(St. Paul and Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Ron Lenz) to perform routine Engineering Services Crane Subdepartment work (operate machine to remove spoiled ballast from the roadbed) in conjunction with the installation of a road crossing at State Highway 173 in Illinois on September 18, 19 and 20, 1998 (System File C-27-98-C080-05/8-00228-035 CMP).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out said work as required by Rule 1.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant C. E. Beamon shall now be compensated for thirty-six (36) hours' pay at his applicable time and one-half 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.

The Claimant established and held seniority in various classes in the Track, Roadway Equipment and Machine Subdepartments, including Track Department Machine Operator. On the claim dates, he was a regularly assigned Machine Operator operating a front end loader in Soo Yard.

It is not disputed that on the claim dates the Carrier engaged Ron Lenz Excavating, a contractor, to perform the services of removing spoiled ballast from a road crossing at State Highway 173 in Illinois. The parties agree that an employee of the contractor operated a Hydro-hoe excavator to accomplish the work, and that the contractor's employee worked 14 hours on September 18, ten hours on September 19, and 12 hours on September 20, 1998, for a total of 36 hours.

The Organization asserts that the work performed by the contractor is contractually reserved to the Claimant and has been "customarily, historically and traditionally" performed by Maintenance of Way forces pursuant to Rule 1 - Scope, Rule 4 - Department Limits and Rule 46 - Classification. The Organization also argues that the Claimant was qualified, available, willing and possessed the requisite seniority to perform the work. Furthermore, the Organization purports that the Carrier failed to provide the Organization with a proper notification of its intention to contract out the disputed work, as required by paragraph two of the Scope Rule and Appendix I thereto. The Organization states that such failure resulted in the instant Agreement violation and that the Claimant, therefore, is entitled to the compensation claimed as a result of his lost work opportunity. Finally, in support of all aspects of its claim, the Organization cites Third Division Awards 35326, 35378, 35571, 36225, and 36227 involving contracting issues between these same parties.

In its defense, the Carrier submits that it properly contracted for the Hydro-hoe excavator to assist a grade crossing construction gang, and urges that the claim must be denied for several reasons. The Carrier asserts that the Claimant was not entitled to the work in dispute because he failed to inform the Carrier of his availability for the work, a requirement placed upon him by Rule 8(c). Under Rule 8(c), the Claimant would have been required to notify the Division Engineer of his availability before he could have received any preference for the work. The Carrier avers that grade crossing

work accrues to employees of traveling gangs and that the Claimant was a yard employee residing in Milwaukee, Wisconsin, while the disputed work occurred in Illinois. Therefore, the Carrier asserts that the Claimant did not stand for the work given his "timecard" location and the location of the grade crossing work in dispute. In support of its position that the instant claim must be defended on the premise that the Organization failed to show that the Claimant was even eligible to grieve, the Carrier cites several Awards involving the Soo Line, including Third Division Awards 19103 and 29219, and First Division Award 25035.

Citing additional precedent, the Carrier argues that it did not violate the Organization's notice rights under Appendix I to Rule 1 because the Organization failed to prove that the Carrier's practice of supplementing crossing gangs with a contracted Hydro-hoe excavator operator infringed upon the Organization's rights. The cited Awards include Third Division Awards 28574 and 28786. Finally, the Carrier contends that if a violation is found to have occurred here, the Claimant would be entitled to no more than 28 hours at the straight time rate of pay, based on Third Division Awards 24173, 24280, 31388, 35042 and 35378.

During its review of the extensive record, the Board's attention was drawn to 12 statements submitted by senior employees within the Maintenance of Way craft who stated that they had consistently used heavy equipment to perform work described within the claim.

The Board finds that the supplied statements provide ample evidence that the disputed work is scope-covered, and that such work indeed had been performed by BMW-represented employees on a customary basis. The NOTE to the Scope Rule reads:

"In the event the Carrier plans to contract out work within the scope of this agreement, the Carrier 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 15 days prior thereto."

Moreover, Appendix I reaffirmed the parties' understanding "that advance notice requirements be strictly adhered to," and that "the advance notices shall identify the work to be contracted and the reasons therefor."

In the instant case, it is clear that the Carrier did not supply the Organization with a 15-day notice of its intention to contract out the Hydro-hoe. Given the circumstances of this case, the Carrier's failure to furnish a 15-day notice of its intention to contract out for work covered by the Scope Rule requires issuance of an Award sustaining the merits of this claim. See Third Division Awards 35378, 35571, 36225 and 36227 involving this same Organization and Carrier.

The Board believes that the Carrier's reliance on Rule 8(c) is misplaced under the facts and circumstances of this claim. RULE 8 - BULLETINS POSITIONS OR VACANCIES does not address the issues in this claim, viz., subcontracting and associated advanced notice. Thus, the Claimant's compliance with Rule 8(c) is not relevant to his qualifications as a valid Claimant. Moreover, the Carrier has not refuted the Organization's contention that the Claimant possessed the necessary seniority and qualifications, and has not otherwise established that the Claimant was not available. Finally, the Board rejects the Carrier's contention that the Claimant's usual work location precluded the Claimant from being considered available for the grade crossing work at issue here.

Finally, with respect to the Carrier's argument that Third Division Awards 28574 and 28786 provide unequivocal support for the Carrier's position that it was not required to provide the Organization with a 15-day contracting notice before undertaking the work of removing spoiled ballast with contractor forces, the Board points out that differences in the cases do exist. Award 28574 held that the Organization did not demonstrate in the record that, in the past, its employees performed the disputed work of operating a heavy dump truck. Award 28786 determined that the work in dispute involved water line repairs within shop buildings under the jurisdiction of the Chief Mechanical Officer, not the Division Engineer.

Regarding the monetary damages to be awarded in this case, in view of the fact that the Claimant worked his regular eight-hour day on September 18, 1998, he is entitled to only six hours' pay on that date. For the claim dates of September 19 and 20, 1998, he is entitled to ten hours and 12 hours, respectively, for a total of 28 hours at the applicable straight-time rate of pay. In support of this Award for straight-time damages, see Third Division Awards 35378, 36225 and 36227.

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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 16th day of June 2003.