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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36694
Docket No. MW-36213
03-3-00-3-408**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(CSX Transportation, Inc. (former Three Rivers
(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 (Amtrac Railroad Construction) to perform Maintenance of Way work (surface track, regulate ballast, load ties, heat stress rail, install anchors, field weld and related track work) at locations between Mile Posts PLM 47.7 and PLM 50 in the Newell Yard and on main line track between Mile Posts PLM 47.7 and PLM 51.5 in Newell, Pennsylvania beginning January 26, 1999 through March 25, 1999 and continuing [Carrier’s File 12(99-0586) TRC].**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman a proper advance written notice of its intent to contract out the work in question in accordance with Addendum 13 or discuss the matter in conference in good faith prior to contracting out said work as required by the Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foremen P. Burns, A. J. Mordecki, L. L. Brumley, Class A Operators R. N. Brumley, H. J. Korn, T. Mattie, T. L. Koon, Welder Helper A. P. Colecchi and Welder F. B. Hone shall each be compensated ‘ . . . for (10) ten hours**

each day at the Claimants appropriate straight time rates of pay, (1.5) one and a half hours each at the Claimants appropriate time and one half rates of pay for January 26, 27, 28, 29, February 1, 2, 3, 4, 8, 9, 10, 11, 16, 17, 18, 22, 23, 24, 25, 1999, on February 15, 1999 (11.5) eleven and one half hours at their appropriate time and one half rate when they worked Presidents Day, March 1, 2, 3, 8, 16, 17, 18, 22, 23, 24 & 25, 1999 and continuing until this project is completed. This will be an ongoing claim until this work is completed, or until the Carrier removes this contractor from the property.”

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 March 26, 1999, Assistant General Chairman T. J. Nemeth filed a claim on behalf of nine Claimants alleging that the Carrier contracted with Amtrac Railroad Construction of Ohio, to perform scope protected work. He alleged that the outside contractor violated the Agreement “by surfacing track, regulating ballast on track, heat stressing rail, loading old ties in gondola cars, installing anchors, field welding” and other historically reserved work. He argued that the Carrier violated not only the Scope Rule, but also Rule 24, paragraph (e-1), Addendum 13 and Article XV of the 1996 National Agreement. (The Board notes that the Organization made no further mention of Article XV of the 1996 National Agreement during its progression of the claim.)

The Board notes that the importance of Assistant General Chairman T. J. Nemeth's letter, *supra*, is not what occurred subsequently, but what evolves from preceding issues. The Carrier responded to his March 26, 1999 letter on May 26, 1999 noting that all Claimants were under pay and employed and further, that the notice about this work had been discussed in "April, 1998." Assistant General Chairman Nemeth responded by letter of July 25, 1999 saying there was no proof of any "intent to contract" notice and further that even if everyone was working, it was lost opportunity because scheduling could have permitted the work to be performed by the employees. The Carrier responded on September 16, 1999 with two points. On the issue of notice, it provided the required notice on May 6, 1998 and heard nothing following the required notice and conference period of 15 days. Nevertheless, when the notice was subsequently discussed with General Chairman P. K. Geller, a Carrier Officer agreed to recall six employees who were furloughed. The Carrier also stated clearly that:

"The magnitude of this project and the fact that it was new track construction, the company lacked required equipment, and the fact that the time required for this construction would preclude Three Rivers seniority district employees from performing their normal track maintenance duties were all significant issues for consideration."

The Carrier also noted that all Claimants were fully employed and worked overtime, lost no work opportunity, and were not affected by the new track construction. Lastly, in the Carrier's September 16, 1999 letter, the Carrier argued that its proof contradicted Assistant General Chairman Nemeth's allegations which contained "incorrect information."

This case turns on the facts of record and most critically on the Organization's letter of September 24, 1999, which included a May 28, 1998 letter written by the Organization following the conference regarding the May 6, 1998 notice. The Organization forwarded to the Carrier its set of questions and answers discussed during that three way conference. A full reading of the letter indicates that the project was considered to be "a 'day one project' meaning the work was to be completed prior to September 1, 1998 when the Conrail Carve-up was to be placed in effect." (For the record, the Board notes that "Split Date" was

subsequently postponed to June 1, 1999.) Even further, in point No. 7, there is the statement made by T. J. Nemeth written as “. . . T. J. Nemeth responded that the contracting crews had 20 men working 10 hours each day 6 days a week and that the contractors had already exceeded the 700 hours.” If correct, then the project was underway prior to the conference to consider the notice of contracting out.

The Board's study of the full record notes that this point No. 7 is attached to a May 15, 1998 request for a conference “prior to the work commencing.” It is attached to the final Organization letter of September 24, 1999, which states that the Carrier had begun the work long before the May 6, 1998 notice, as the “work commenced January 26, 1998.” In studying the dates, the Board concludes that this date must have referred to January 26, 1999, the first date of the claim at bar. The claim at bar was raised on March 26, 1999 for dates in January, February, March and continuing in 1999 by Assistant General Chairman T. J. Nemeth. If the original notice discussing contracting out in May 1998 had sufficient proof that in January, February, March and continuing in 1998 that contractors were performing the disputed work in 1998, this would have constituted a violation and should have been so filed. It does not stand persuasively before the Board, although we are acutely aware that the work was allegedly to be completed prior to September 1, 1998.

The Board is not persuaded that this one comment by the same individual who generated this 1999 claim is sufficient proof of any Carrier violation. Further, if there was proof as indicated in the September 24, 1999 letter that the Carrier had failed to present a notice of intent to contract out, that would be a violation, but there was not. There is ample proof in this record that there was a conference over this project, with furloughed employees recalled and that the project was justified within Agreement language given magnitude, lack of equipment, new track construction and time requirements. Accordingly, the claim is denied for insufficient proof of a Carrier violation of the Agreement or any cited Rules.

AWARD

Claim denied.

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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 18th day of August 2003.