

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36695
Docket No. MW-36216
03-3-00-3-412**

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 Employees
(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 (Midwest Mole Company) to perform Maintenance of Way work (digging and removing dirt and ballast from ditch line and installing culvert pipe) along the single Main Track between Mile Posts PLE 35 and PLE 41 in Wampum, Pennsylvania beginning February 22, 1999 through April 22, 1999 and continuing instead of furloughed Foremen B. W. Mason and P. J. Palkovich and furloughed Trackmen J. L. West and B. J. Donnelly [Carrier's File 12(99-0710) 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, Claimants J. L. West and B. J. Donnelly shall each be compensated for (10) ten hours' pay at their respective straight time rates of pay for each date of February 22, 23, 24, 25, 1999 and Claimants B. W. Mason, P. J. Palkovich, J. L. West and B. J. Donnelly shall each be compensated for ten (10) hours' pay at their respective straight time rates of pay for each date of March**

1, 2, 3, 4, 8, 9, 10, 11, 15, 16, 17, 18, 19, 22, 23, 24, 25, 29, 30, 31, April 1, 5, 6, 7, 8, 12, 13, 14, 15, 19, 20, 21, and 22, 1999 and continuing until the disputed work assignment is completed or the Carrier removes said 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.

The Organization contends that the Carrier contracted out work in violation of the Scope Rule when it allowed outsiders to rebuild culverts using a jack and bore method on the Baltimore Service Lane, Pittsburgh Subdivision, Three Rivers Seniority District, at Wampum, Pennsylvania. It argues that the notice was improper and violated Addendum 13. In addition, the instant work was previously performed by BMW-represented employees. The Organization further argues that because the work was performed on the Claimants' seniority district between Mile Post PLE 35.0 and PLE 41.0 and the Claimants were fully qualified, the Carrier violated the parties' Agreement.

The Carrier contends that it issued a timely notice to the Organization pertaining to the contracting out. Because all employees were fully employed and not available to perform the work, it properly moved ahead with the project. The Carrier argues that the disputed work does not accrue to the Maintenance of Way Trackman or Track Foreman classifications, but to the Bridge and Building Sub-department employees. As such, the Claimants were improper. Not only does the Carrier argue that the Claimants were improper due to holding no seniority in the B&B Sub-department, it also argues that the Claimants hold no seniority where the work was performed on the Three Rivers East District.

As for the issue of the Carrier's notice of its intent to contract out the work, that notice was dated January 15, 1999 and states that the "project consists of the installation of 48" diameter steel culvert pipe using the jack and bore method of installation." The notice indicated that the work would be performed at Mile Posts PLE 35.7, 37.2, 38.5 and 39.9. It stated that the work was projected to begin on or about February 8, 1999 and noted that the Carrier "does not have adequate equipment or forces available to complete this project in the time frame required."

There is much in the Notice of Intent and in the actual record that was not a source of dispute between the parties. The Board need not consider issues such as the "jack and bore method" or that the dispute involved work on a "single main track," or issues of proper equipment, because these issues were not discussed on the property. Discussions in Submissions come too late for our consideration.

Two central issues were joined on the property that need resolution: proper notice and improper Claimants. The Board studied the third issue, wherein the Organization argued that the Claimants possessed seniority on the Three Rivers West District, while the Carrier maintained that the work was performed on the Three Rivers East District. The Board concludes that the work was on the West District. Accordingly, only the two issues indicated are disputed and unresolved.

Considering first the central issue of Notice, the facts of record show an illogical and probably incorrect date. The Notice dated January 15, 1999, by facsimile and mail scheduled the conference for January 15, 1999. The Board concludes that the Carrier properly submitted a Notice of Intent to contract out and scheduled a conference. The Carrier would hardly submit a letter on January 15, 1999 scheduling a "conference for January 15, 1999 in this office, beginning at 9:00 a.m. to discuss this matter further" The Organization's response of January 24 following its January 22, 1999 receipt of the notice never argues that the conference was an ambush. It states:

"You scheduled the conference January 15th which left it impossible for anyone from this office to meet with you. Nonetheless, I will respond to your notice and request that we meet at a mutual date and location to discuss this matter."

The Board notes that the original conference was missed by the Organization, whenever it was scheduled. We note that the Organization's letter of January 24, 1999

shows no record of a Carrier response. The next factual evidence is the Carrier's response of September 17, 1999 which states that a proper notice dated January 15, 1999 "was both FAXED and sent U.S. Mail" requesting a meeting that "did not occur." The Carrier noted that the "... Organization chose not to reschedule the conference or to contact the Carrier representative by telephone to discuss the matter."

The Carrier also made note of the fact that the Organization received the notice on January 22, 1999, "so that a full two weeks were available" before the planned start of the project on February 8, 1999. Lastly, the Organization responded on October 21, 1999 maintaining that it was the Carrier's fault for not scheduling a requested conference following the Organization's letter of January 24, 1999. Both the Carrier arguing that the Organization was at fault for failing to "contact the Carrier representative by telephone to discuss the matter" and the Organization arguing that the Carrier was at fault because it "failed to respond by either written or verbal communication" to the Organization's letter, convince the Board that this is not a case of willful, negligent or flagrant violation.

The Board concludes that the Carrier served a proper notice. There is no dispute that the Organization was aware of the contracting out long before the project began and waited until the day after it began to raise the issue. We cannot conclude from this record that a Notice received on January 22, 1999, more than 15 days prior to the beginning of the project represented a lack of "good faith" or improper notification. The lack of a conference under these circumstances cannot be ruled a violation (Third Division Award 30287).

Further, the Board finds that the Carrier's initial notice maintaining that "there are currently no B&B employees furloughed" appears to be central. As early as the Division Engineer's June 18, 1999 letter (without rebuttal in the Organization's August 16, 1999 letter) it argued that this work belonged to Bridge Department employees and not the Claimants. It made that point explicit in further rebuttal stating that:

"This work does not accrue to the Maintenance of Way sub-department, and is not covered in either the Trackman or Track Foreman classification of work, but is work that is performed by the B&B Mechanics (Bridge Sub-department). Therefore, the four named claimants are improper claimants."

The Organization's evidence, rebuttal, and employee statements do not persuasively refute this point. The Organization argues that forces work together and that they are capable of doing the work, but does not explicitly deny the Carrier's allegation.

After full consideration of all facts, the Board finds that the Carrier did provide proper advance notice of its intent to contract out and that the issue of conference under these circumstances cannot be considered a lack of good faith. The Board also concludes that the claim lacks merit and must be denied.

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 18th day of August 2003.