

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36796
Docket No. MW-36265
03-3-00-3-496**

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(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 (Milford Construction Company) to perform routine Maintenance of Way work (grading, spreading and tamping stone and ballast) in connection with building a roadway under east 152nd Street bridge at Mile Post 174.11 on the Chicago Main Line in Cleveland, Ohio on May 27, 1998 [Carrier's File 12(99-499)].**
- (2) The Carrier further violated the Agreement when it failed to furnish the General Chairman with a proper advance notice of its intent to contract out said work and discuss the matter in good faith as required by the Scope Rule.**
- (3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants K. G. Champa, F. R. Hoyt, R. H. Zinni and K. Watts shall now each be compensated for eight (8) hours' pay at their appropriate 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.

On June 4, 1998, the Organization submitted the following claim on behalf of the individuals noted supra:

"This claim is for eight (8) hours each day at the Claimants appropriate straight time rates of pay when the Carrier violated the Scope, Rule 1, Rule 3 of our 1996 Agreement and Article XV of the 1996 National Agreement, when it called and used an outside contractor known as Milford Construction Co., on May 27, 1998. . . . On the above date, four employees from Milford Construction Company performed the duties of a Foreman, Mechanics and Machine Operators by building a roadway at the above location with a front end loader, backhoe road grader and roller. This work consisted of grading, putting out new stone and ballast, and tamping it. This was done on the North side to divert traffic while a Fire Hydrant Line was being relocated. This is work that should have been offered to the employees of the Carrier's own B&B Department. The Carrier violated the Scope Rule of our Agreement when it failed to give the General Chairman of this Organization advanced written notice that this work was to be performed by an outside concern, which alone makes this a valid claim."

On July 15, 1998, the Carrier denied the claim, asserting that although the work undertaken by Milford Construction Company was road construction "not typically undertaken by B&B forces," the Carrier had given proper notice to the General Chairman. The Carrier further noted that: ". . . the B&B forces in Cleveland have been offered whatever overtime they would be willing to undertake. . . . None of the individuals listed have suffered loss of compensation or benefits."

In a September 14, 1998 reply to the Carrier's denial, the Assistant General Chairman noted that the Carrier did not "dispute the merits of the claim," but rather had argued only that the contracting to Milford Construction Company had been done "in accordance with" the Agreement.

With respect to the Carrier's assertion that the Claimants suffered no loss of compensation or benefits and were offered "whatever overtime they were willing to undertake," the Assistant General Chairman maintained that "such an assertion is simply acknowledgement that Carrier violated the Agreement and is attempting to reduce its monetary liability." The Assistant General Chairman further maintained that the Carrier had created "a future loss of work opportunity" when it contracted out the disputed work. Finally, the Organization contended that even though the Claimants were working at the time of the "violation," the "NRAB has consistently ruled that a monetary remedy can be sustained to protect the integrity of the Agreement."

In its final denial of the claim, the Carrier asserted that the disputed work "is not Scope covered and has not been traditionally and historically performed by Maintenance of Way forces, thereby negating the need for notification of same. The Carrier went on to note that there were no furloughed employees on the claim date, and, therefore, the Organization's citation of Article XV of the Agreement was "irrelevant." Finally, the Carrier asserted that the Organization claimed an eight hour day for each of the four Claimants "without making any correlation with the hours actually expended by the contractor," rendering the claim "purposely vague and ambiguous."

This case presents a dispute over the Carrier's assignment of Milford Construction Company to build a roadway at the above location, in lieu of the

Claimants. It is not refuted that the work at issue involved equipment such as a front-end loader, backhoe, road grader and a roller. Nor is it disputed that the project involved grading, putting out new stone and ballast, and tamping same. The Organization contends that the performance of this work was in connection with "roadbed repair work," which accrues to BMW-employees. For its part, the Carrier asserts that the work merely involved construction of a "temporary access road" so that traffic could be diverted while a Fire Hydrant Line was being relocated.

The record supports the Carrier's representation of the nature of the work. Such work is not specifically covered by the language of the Scope Rule. In order to prevail in this dispute it was incumbent upon the Organization to: (1) cite specific language within the applicable Scope Rule that reserves the disputed work to the Claimants; or, (2) demonstrate that BMW-employees had by customary and historical practice performed the disputed work. In the circumstances, the Organization was unable to shoulder that burden of proof, and therefore, this claim 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 29th day of December 2003.