

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36934
Docket No. MW-36184
04-3-00-3-349**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(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 (National Engineering Corp.) to build and install a retaining wall along the Kinsman Connection track at Mile Post 5 on the Cleveland Short Line in Cleveland, Ohio beginning October 5 and continuing through November 13, 1998 [Carrier's File 12(99-629)].**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a good-faith written notice of its intent to contract out the work described in Part (1) above as required by the Scope Rule.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants K. G. Champa, J. D'Orazio, S. J. La Cavera, R. H. Zinni, K. Watts, W. D. Nicklow, P. S. Shea, G. Pongonis and R. Sheridan shall now each be compensated for eight (8) hours' pay at their respective straight time rates of pay and two (2) hours' pay at their respective time and one-half rates of pay per day for each date of October 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, November 2, 3, 4, 5, 6, 9, 10, 11, 12 and 13, 1998.”**

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 Claimants established and held seniority in various classes and groups within the B&B Department on the Cleveland Seniority District, Dearborn Division. On the claim dates, they held regularly assigned positions at Collinwood Yard, located in Cleveland, Ohio.

On August 4, 1998, the Carrier issued the following 15-day Notice informing the General Chairmen of the Carrier's intention to contract out the construction of new retaining walls at Cleveland, Ohio, Milepost 5.0, on Conrail's Short Line:

"As information, we intend to contract for the construction of new retaining walls and associated work at the subject location. The contracted work shall consist of the following:

- * Installation of two (2) new concrete lagging and steel soldier pile retaining wall
- * Installation of a pre-ballast pad

We are contracting this work because our forces do not possess the necessary equipment and/or expertise nor are we required to piecemeal the completion of the work."

In his August 18, 1998 reply, the General Chairman stated:

"This is relative to your letter dated August 4, 1998, post marked August 11, 1998, received in my office August 14, 1998, addressed to both General Chairman Dodd and myself, advising it was your intent to contract out work as outlined in the above subject to include the following:

- * Installation of two (2) new concrete lagging and steel soldier pile retaining wall**
- * Installation of pre ballast pad**

I can not accede to your request. This Organization is opposed to any form of contracting work which has historically been performed by the BMWWE! Yet you continue to insult us with barrages of contracting notices for work that has historically been performed by Maintenance of Way Employees. You continue to contend the BMWWE doesn't possess the necessary expertise and/or equipment to perform this work, however, you make no good faith effort to procure required equipment and afford work to M/W employees.

Further your notice is too vague in that you fail to advise the man power required; start or completion dates for this project. Since M/W forces have performed this same work in the past, your mention of piecemealing the work is moot!

Please furnish the organization a list of equipment vendors that you have contacted in a good faith effort to secure the required equipment (without operators) to perform this work.

Please arrange to list the above for discussion in compliance with the third paragraph of our Scope Rule prior to the commencement of the work as vaguely outlined in your August 4, 1997 letter."

On September 22, 1998, the parties discussed this matter in conference, but failed to reach any understanding concerning the intended contracting, and the work subsequently commenced on October 5, 1998.

In its initial claim, dated December 3, 1998, to the Division Engineer, the Assistant General Chairman asserted:

"On the above dates ten employees from National Engineering Corp., performed the duties of a Foreman, Mechanics and Machine Operators from the B&B Department by building and installing a concrete and steel retaining wall along the Kinsman Connection track to shift the tracks 8' for clearance on the new CSX Mainline. This work consisted of auguring holes and pouring concrete to install steel H piles which will hold pre-cast concrete blocks or barriers to complete a retaining wall."

The Assistant General Chairman's appeal also stated:

"Before you implicate that this does not fall under the Scope of the B&B employees Agreement and that we do not have the expertise to perform this work, let me make you aware that we do have the expertise, as we have performed this work at Haysville Yard in Pittsburgh PA., within the last year."

The Division Engineer's December 29, 1998 denial of the claim stated that the claim lacked merit because the Organization had been served a contracting Notice and that "none of the individuals listed have suffered loss of compensation or benefits." The letter also stated that Claimant Hoyt was medically disqualified for service (according to the record, the Organization subsequently deleted Hoyt's name from the claim).

The Organization then appealed the claim to the Manager-Labor Relations, and requested a conference pursuant to Rule 26(b). The record indicates that the claim was discussed on July 28, 1999. On August 25, 1999, the Director-Employee Relations denied the claim. According to the Carrier, on August 4, 1998, the Carrier had furnished proper advance written notice of its intention to contract out the work. The claim denial letter also stated:

"Carrier's decision to contract the work was sanctioned by the magnitude of the project, which the Carrier is not required to piecemeal, the lack of expertise among Carrier's forces and the unavailability of necessary equipment. The Organization failed to

demonstrate otherwise during notice deliberation or in claim presentation.”

The Carrier also asserted that the Claimants were fully employed at the time the work was performed and in fact worked “substantial amounts of overtime.” It was also the position of the Carrier that the 2,700 man-hours claimed by the Organization were excessive inasmuch as National Engineering Corp.’s records indicated that its forces expended a total of 818.5 hours on the project, and that any remedy in this case should not exceed the payment of 818.5 hours at the applicable straight time rate.

At the subsequent level of appeal, the Organization introduced copies of recent B&B job advertisements and lists of Carrier-owned machinery in support of its contention that the work performed by the contractor was “fundamental B&B work” covered by the Scope Rule. The Organization also submitted a copy of the original claim that included a statement from Foreman K. G. Champa identifying the work performed by the contractor. Champa also asserted that during the one year prior to this claim, “the same type of work” was completed at Haysville Yard, in Pittsburgh, Pennsylvania, by several B&B Department employees under the supervision of Foreman Dole, and that “there is an ongoing project in Pittsburgh at this time that is doing the same work. Joe Lentz’s gang is doing the project.”

The Carrier contended that Champa’s statement was nothing more than a request that the Organization should file a claim and that, as such, it carried no evidentiary value. The Carrier reiterated that it properly contracted out this work because the Claimants “qualified or not, were unavailable to perform the work when it was performed.” The Carrier further gave reasons of “lack of equipment and skill” in support of its rationale for contracting out the work.

The record establishes that the Carrier’s 15-day Notice comported with the parties’ Scope Rule requirements with respect to the notification procedures prior to undertaking any contracting out of work. Again, the Notice specified that the work would involve the “installation of two (2) new concrete lagging and steel soldier pile retaining wall(s)” and the “installation of a pre-ballast pad.” The conference held on September 22, 1998 allowed the parties to engage in good-faith discussions of the Carrier’s proposed contracting, but the Organization was unable to convince the Carrier to proceed with this work using its own B&B forces.

However, the record also demonstrates that from the outset of this claim, the Organization gave the Carrier specific information concerning the work allegedly performed by the contractor. For example, at the initial level of claim handling, presumably based on Champa's statement, discussed above, the Assistant General Chairman described the components of the retaining wall (steel and concrete) and specified the work performed by the contractor's forces (auguring holes, pouring concrete, installation of H piles). Furthermore, during the on-property handling of this claim, the Organization again, through Champa's statement, informed the Carrier that certain B&B Department employees had both recently constructed and were in the process of constructing similar retaining walls in the Pittsburgh area.

The record reflects an absence of any evidence from the Carrier to rebut the Organization's contention that the work accrued to the Claimants under the Scope Rule and Rule 1. Furthermore, the Board finds no evidence to substantiate the Carrier's assertion that it did not possess the necessary equipment for the project, or that the B&B employees did not have the sufficient level of expertise. Rather, the record indicates that the Carrier's decision to contract out the work may have been precipitated by a shortage of its own manpower. The instant case is factually distinguishable from Third Division Award 31523, the Majority finds.

Thus, having thoroughly reviewed this record, the Board concludes that the Organization established by substantial evidence, which remained unrefuted by the Carrier, that the Claimants possessed the skills necessary to perform the contracting work in dispute, and that B&B Department employees had customarily performed that work. Therefore, the claim must be sustained.

With respect to the remedy requested, the Board orders that, based on the record of this case, the Claimants are entitled to an equal share of the 818.5 hours worked by the contractor. In view of all of the circumstances present here, the Board also finds that the 818.5 hours should be paid at the straight time rate.

AWARD

Claim sustained in accordance with the Findings.

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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 22nd day of March 2004.