

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37051
Docket No. MW-36201
04-3-00-3-399**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(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 spread ballast over new bridge deck) on the Highway 41 bridge on the West Allis spur line in Milwaukee, Wisconsin on September 22 and 23, 1998 (System File C-30-98-CO80-07/8-00228-036 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 twenty-three and one-half (23 1/2) 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.

In this claim, filed on behalf of Machine Operator C. E. Beamon ("Claimant") the Organization asserts violations of the Scope Rule and failure/refusal to comply with the good-faith notice and conference requirements of the Note to the Scope Rule, including Appendix 1, the so-called Berge-Hopkins Letter of Understanding dated December 11, 1981. It is not disputed that on Tuesday and Wednesday, September 22 and 23, 1998, Lenz Excavating LLC, a subcontractor retained by the Carrier, spread fresh rock (ballast) over the deck on a newly constructed Highway 41 railroad bridge located in Milwaukee, Wisconsin, on the West Allis spur line. Machine Operator Beamon, an employee in the Carrier's Engineering Services Crane Sub-department, apparently also worked on that project, transporting the ballast with his regularly assigned front-end loader.

Review of the record evidence shows that the Organization made out a prima facie case in support of its claim that the Carrier violated the Agreement by subcontracting Agreement-covered work without notice/conference. In handling on the property, the Carrier asserted, "according to the Carrier notes, this project was discussed with the BMW in advance and the Organization was advised that a contractor would be doing all the work up to but not including actually building the track itself on the property." However, the Carrier proffered no evidence at all when challenged by the General Chairman as to the accuracy of that allegation. The Carrier similarly failed to substantiate bare assertions of other affirmative defenses, i.e., need for specialized equipment and lack of dominion and control over the work. Moreover, on the latter point, in handling on the property the Organization presented a receipt for the subcontracted work clearly showing the customer name as "C. P. Rail, c/o Pat Poeschel" and providing Roadmaster Poeschel's company address.

Issues such as equipment availability and efficiency, employee skills, etc., are the very types of matters that are intended for discussion in the conferences

mandated by the contracting out of work Rule. It is a seminal principle that a Carrier who fails/refuses to provide such mandated notice and conference opportunity may not raise such issues ex post facto. See Third Division Awards 25967 and 30977. Had the Carrier complied with Article IV and provided the required advance written notice, the General Chairman would have had the opportunity to request a meeting to discuss the matter and the parties could have engaged in good-faith discussions during which they may have identified an alternative to the use of outside forces. Given the blatant violation of the notice/conference requirement, this claim is sustained.

AWARD

Claim sustained.

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 June 2004.