Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37815
Docket No. MW-37891
06-3-03-3-303

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation (Amtrak) –
(Northeast Corridor

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Don's Truck Service) to perform repair work on a P&H Crane (Amtrak Equipment No. A57001) at the Roadway Equipment Shop, Wilmington, Delaware on May 6, 7 and 8, 2002, instead of Repairman M. Rude (System File NEC-BMWE-SD-4220 AMT).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its plans to contract out said work.

(3) As a consequence of the violation referred to in Part (1) above, Claimant M. Rude shall now '. . . be compensated eleven (11) hours at the appropriate M/W Repairman 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.

This claim seeks compensation on behalf of the Claimant, a furloughed Repairman, for the repair work performed by Don's Truck Service on P&H Crane No. A57001 at the licensed inspection station on defects found in the Department of Transportation (DOT) mandated inspection. The Organization agrees that the actual inspection work is not scope-covered, but asserts that the subsequent repair work is, and requires notice to the General Chairman prior to contracting. The Carrier asserts that inspection-related repairs are part of the inspection and have been routinely performed by inspection station personnel to ensure that the equipment meets DOT requirements, and are not within the scope of the Agreement. There is no dispute that no notice was given concerning this work.

The Organization argues that the routine equipment repairs involved in this case include replacing axle seals and wheel bearings, an air compressor and hoses, diagnosing and repairing a complaint about engine power, and repairing a fuel leak, all work that is generally recognized as BMWE Roadway Equipment repair work by the Scope Rule. It notes that the absence of notice and a conference prevented any discussion concerning whether special skills or circumstances existed to support contracting the work, and is fatal to the Carrier's position, citing Third Division Awards 17224, 19624, 20338, 29567, 31033; Public Law Board No. 3781, Award 7. The Organization asserts that the Carrier's failure to obtain written concurrence of the General Chairman in this case violates the Scope Rule, relying on Third Division Award 30684; Public Law Board No. 6671, Awards 1, 2 and 3. The Organization contends that it is not required to prove that the work in question was exclusively reserved to Repairmen by Rule or system-wide practice, citing Third Division Awards 36015, 36175, 36517. It argues that a monetary award is appropriate not only because the Carrier failed to meet its notice obligation, but because the Claimant was furloughed, is an entirely proper Claimant, and that the work involved was not de minimis, relying on Third Division Awards 31449, 33638 and 35990.

The Carrier initially contends that the Organization amended its claim on appeal by seeking the overtime rate rendering it procedurally invalid, despite its reversion to the original remedy request before the Board, citing Third Division

Awards 15847, 29272 and 36020. With respect to the merits, the Carrier argues that the Scope Rule does not apply to DOT inspections, which requires a licensed and certified inspector, and that related repairs needed to meet the DOT requirements for certification are considered part of the inspection process and have historically been performed by licensed inspectors. It asserts that it is not required to piecemeal this work to send back to Repairmen who were originally responsible for working on the equipment to assure it could pass inspection the few defects found by the inspectors, citing Third Division Awards 12317, 28739 and 29187. The Carrier also contends that the Organization failed to prove that the work is reserved exclusively to the classification of M/W Repairman, a showing required in order to prevail, relying on Third Division Awards 25523, 26236, 28263, 28794, 30605 and 31254. Finally, the Carrier argues that the work was de minimis in nature and that it was not required to recall the Claimant from furlough for 11 hours when there was no position for him to remain in.

Initially we find that the temporary reference to seeking overtime pay in one appeal is not a fatal procedural defect in this case, because the claim progressed to the Board is the same as the one initially filed on the property. A careful review of the record convinces the Board that the Organization sustained its burden of establishing that the specific repair work in issue, e.g. replacing axle seals and wheel bearings, an air compressor and hoses, diagnosing and repairing a complaint about engine power, and repairing a fuel leak, is work that is ordinarily and customarily performed by BMWE-represented Repairmen. In fact, the Carrier admits that this is the type of work that should have been properly performed by them prior to the crane being sent for inspection. Thus, even absent a showing of exclusivity, the work in dispute falls within the Scope and Work Classification Rules of the Agreement, requiring notice of the Carrier's intent to contract out, which is missing in this case. See, e.g. Third Division Awards 28486, 29567; Public Law Board No. 6671, Awards 1, 2 and 3. While the Carrier's assertion that it was accepted practice to have inspection-related repairs performed by the licensed inspectors was not specifically rebutted by the Organization, it was also not supported by any evidence which is required to establish this affirmative defense. The absence of a conference where the piecemealing issue could have been discussed must be held to be the fault of the Carrier in this case. Thus, because we find that a furloughed employee can be an appropriate claimant in a contracting case of this sort, and that the Carrier violated the Scope provisions of the Agreement, we will sustain the claim seeking payment at the pro rata rate. See Third Division Awards 31449 and 33638.

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 21st day of June 2006.