

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37824
Docket No. MW-38489
06-3-04-3-462

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))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces (Swanson Railroad Contractors) to perform Maintenance of Way Track Subdepartment work (remove and replace switch panels and related work) in the Chicago Coach Yard on May 16, 17, 19, 20, 21, 22, 23, 27, 28 and 29, 2003, instead of Track Department employees (Carrier's File BMW-497 NRP).
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman proper advance written notice of its plans to contract out said work or make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 24.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, all Track Department employees with an active employment relationship during the above-referenced period shall now . . . be paid an equal amount of the total manhours expended by the Contractor in performing this work as listed and further described on attachment A to this claim. This is to compensate them for the loss of work they suffered

account of the Carrier neglecting to use them for work that should have went to them in the first place. ****"

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 protests the Carrier's decision to augment its forces by using a contractor to remove and install five new switch panels at the Chicago Coach Yard as part of its 2003 Capital Improvement Program. The Carrier's February 4, 2003 notice of intent to contract out this work asserts that sufficient forces are not available to perform this and ongoing work within a reasonable time frame because the work had to be started as quickly as possible for safety reasons citing the four derailments which had occurred due to the age of the track within the prior 12 month period, and sets forth the specific work to be performed on this project by its Track Department employees, contractor employees and the costs associated with each. A conference was held on March 24, 2003, and correspondence between the parties following that meeting makes clear the Organization's contention that its forces could be scheduled to perform this scope-covered work and the Carrier's position that the work had to be performed quickly, there were insufficient forces to perform work of this magnitude in a timely fashion and that the alternative of hiring inexperienced laborers for a limited duration project was not reasonable. As a result of these exchanges, the Carrier agreed to remove the installation of 1000 track ties from the proposed contract and to assign that work to its employees.

The instant claim, filed on July 2, 2003, protests the contracting of this work on behalf of Track Department employees who were active at the time and could have been made available to perform the work, without naming individual Claimants, but attaching a list of the number of contractor employees used on each claim date, the hours they worked and the equipment they used. During the claim processing there was no allegation made by the Organization that the Carrier failed to give adequate notice or hold a conference where it did not make a good faith attempt to resolve the issue. The parties focused on whether (1) the work was exclusively performed by employees under the Scope Rule, (2) the failure to identify claimants was a procedural defect, (3) the contracting in issue violated Rule 24 and the Organization complied with its terms, and (4) whether the Carrier forces could and should have been assigned to perform all of the work in issue.

The Organization initially relies on Third Division Award 37022 in arguing that the addition of a notice allegation to this claim does not amount to a procedural defect depriving the Board of jurisdiction to decide the merits because the Carrier has not been disadvantaged. It points to the good faith promises of the December 11, 1981 Letter of Understanding as having been violated when the Carrier failed to use its employees to the extent practicable, citing Third Division Awards 29979, 30944, 30976, and 32699. The Organization asserts that there is no real dispute that the work in issue is scope-covered and fundamental track work reserved to BMWE-represented employees, as evidenced by the Carrier's admission that its forces would be assigned to its performance. It relies upon Public Law Board No. 6671, Awards 1, 2 & 3 in arguing that the Carrier's reasons for contracting - exclusivity, full employment, and lack of available manpower - are invalid to remove work from the scope of the Agreement. The Organization contends that the Carrier's failure to maintain its track due to deferred maintenance scheduling does not create an emergency situation, nor does inadequate staffing, citing Third Division Awards 28998, 29856, 30022, and 32500. The Organization asserts that the Claimants are readily identifiable, and need not be named in order for the claim to be properly before the Board, citing Third Division Awards 30778 and 31373. The Organization posits that the Carrier failed to meet its burden to prove that the Claimants did not suffer a loss of work opportunity, relying on Third Division Award 27614, and requests that the requested monetary relief be ordered.

The Carrier initially contends that the Organization's amendment of its claim on appeal by the addition of a notice and lack of good faith allegation renders it procedurally invalid, citing Third Division Awards 15847, 29272, and 36020. It notes that the claim before the Board is substantially different than that argued on the property, and that it is undisputed that a proper notice was served and conference was held, which resulted in some of the proposed work being redirected to BMW-represented employees. The Carrier asserts that it is improper for the Organization to rely on the 1981 Letter of Understanding which was never mentioned on the property and to which it is not a party. With respect to the merits, the Carrier argues that it fully complied with Rule 24, established valid bases for using contractor forces to supplement its work force - safety and efficiency required prompt completion, insufficient manpower to do the work in the time required, alternatives considered not viable - and that the Organization failed to prove exclusivity of performance as required to make out a Scope Rule violation, citing Third Division Awards 25523, 26236, 28263, 28794, 30605, and 31254. Finally, the Carrier contends that the Organization failed to establish any loss of work opportunity for the class of claimants described, as they were all fully employed on the claim dates.

A careful review of the record convinces the Board that the thrust of the Organization's argument lies in its allegation of a lack of good faith by the Carrier in dealing with this contracting issue, because it believes that the reasons asserted by the Carrier to support the need for contracting are insufficient to undermine the undisputed nature of this fundamental track work and its protection under the Scope Rule. That being said, the Board is of the opinion that, unlike the situation in Third Division Award 37022, this is not a case where the addition of a notice violation for the first time on appeal does not disadvantage the Carrier or change the essential nature of the claim. The lack of good faith allegation is contained in paragraph 2 of the claim, which, in its entirety, is an amendment to that presented and discussed on the property. It was clear throughout the processing of this claim on the property that the Carrier's Rule 24 notice and conference obligations were not an issue, because the undisputed facts not only reveal a notice and conference, but subsequent correspondence and a reduction in the amount of contracting from that initially proposed. Additionally, there was no mention of the 1981 Letter of Understanding on the property, upon which the Organization relies to support its contention that the Carrier failed to live up to its good faith obligation to reduce the

incidents of contracting. Regardless of whether the Carrier is bound by such letter, the Organization changed the essential nature of the dispute by adding this allegation for the first time on appeal. Under such circumstances, the Board is compelled to find that the claim is procedurally defective and requires dismissal. See Third Division Awards 15847 and 29272.

AWARD

Claim dismissed.

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 21st day of June 2006.