

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 38202  
Docket No. MW-37720  
07-3-03-3-76

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employes  
(CP Rail System (former Delaware and Hudson  
( Railway Company)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Pollard Excavating) to perform Maintenance of Way work (operate dozer and roller) in, around and between the tracks at Kenwood Yard starting on or about November 26, 2001 and ending on or about “December 13, 2001 instead of System Equipment Operator D. Jordan (Carrier’s File 8-00229 DHR).
- (2) The Agreement was further violated when the Carrier failed to comply with the notice requirements regarding its intent to contract out the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as required by Rule 1 and Appendix H.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, System Equipment Operator D. Jordan shall now be compensated for eight (8) hours per day at this respective straight time rate of pay and for all overtime hours at his respective time and one-half rate of pay for each date that the outside forces performed the aforesaid work beginning on or about November 26, 2001 and ending on or about December 13, 2001.”

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.

By letter of October 29, 2001 the Carrier notified the Organization of its intention to engage a contractor "to assist MOW forces at Kenwood Intermodal Area." The Organization responded on November 6, 2001. In that letter, the Organization stated its position that the Carrier had employees in the Track Department and System Equipment Operators who were capable of performing the work in question. The Carrier replied to the Organization letter on November 26, 2001. In that letter, it stated that while BMW-E-represented employees would "do all track work," it would "not have equipment nor staff to do work beyond the track work."

The Organization filed the instant claim on December 28, 2001. In that claim it alleged that the Carrier had violated various Articles in the Agreement when it contracted out work to be performed in Kenwood Yard in Albany, New York. Specifically, the Organization objected to the use of an outside contractor to do bulldozer and steamroller work, which it maintained was normally performed by System Equipment Operators. In particular, the Organization contended that the Carrier had violated Rule No. 1 – the Scope Rule – and Appendix H of the Agreement. Appendix H reads, in pertinent part, as follows:

"The carriers assure [the BMW-E] that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees."

The Carrier denied the claim on February 25, 2002. The Carrier contended that the Organization had received ample notice of the work to be done, that the BMW had, in fact, done all the track work in the project at issue and that the contractor had merely been assisting in the work in which BMW-represented employees were involved. The Carrier also pointed out that the Claimant had been working during the period at issue and thus suffered no financial loss as a result of the project.

In its appeal the Organization restated its position that the Carrier had violated the Agreement, and noted particularly an attached statement to its claim in which the Claimant pointed out that he was not only capable of operating the machines used by the contractor at Kenwood, but that he was the Operator that did the grading and compacting when the Intermodal facility at Kenwood Yard was originally built. That appeal was subsequently denied and the claim was processed in the usual manner including conference on the property.

There is no dispute on this record that the Claimant was fully qualified as a System Equipment Operator and was capable of operating both a bulldozer and a steamroller. Further, the Carrier acknowledges that the Claimant was, in fact, involved in the original building of the Kenwood Yard. The Organization argues that the Carrier should have rescheduled the Claimant to perform the work and/or permitted him to perform the work during regular and weekend overtime hours.

It is apparent from this record that the Claimant was qualified to perform the work at issue. Moreover, given the history of the construction of the Kenwood Yard, it is also clear that the work at issue in this claim is generally performed by BMW-represented employees. While the Carrier asserted that it was not possible to assign the Claimant the work at issue, it has provided only that assertion and has not successfully countered the Organization's position that the specific work of operating a bulldozer and steamroller should have been assigned to the Claimant under the provisions of Article 11.8 of the Agreement. That Article states:

"Employees will, if qualified and available, be given preference for overtime work, including calls, on work ordinarily and customarily performed by them during the course of their work week or day in the order of their seniority."

Based upon the foregoing, the Board finds that the Parties should make a joint review of the Carrier's records and determine what part of the work performed by the contractor on the dates named in the above claim involved the work that should have been allocated to the Claimant, i.e., bulldozer and steamroller work. That review should include the Claimant's availability for straight time or overtime. Once the Claimant's available hours are determined, he should be reimbursed to the extent of his determined availability, at the straight and/or overtime rate as appropriate.

AWARD

Claim sustained in accordance with the Findings.

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 18th day of May 2007.