

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39693
Docket No. MW-38388
09-3-NRAB-00003-040348
(04-3-348)**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers 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 (W.E. Yoder Railroad Construction and J.M.G. Paving Company) to perform crossing removal and related renewal work at the Mantua Grove Road Crossing on the Shell Branch in Thorofare, New Jersey on September 16 and 17, 2002 (Carrier File MW-0052).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the work described in Part (1) above or discuss the matter in good faith as required by the Scope Rule.**
- (3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants J. Poole, J. Ganzell, J. Castaldi, B. Baals, M. McCarthy, D. Cereny, G. Lee, J. Huber, R. Cona, C. Richardson, M. Ayala, W. Rankin and J. Pezzella shall now each be compensated for ‘. . . 20 (twenty) hours of pay worked by the contractor at the appropriate overtime 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.

The Organization filed the instant claim alleging that the Carrier violated the parties' Agreement when it improperly utilized outside contractors to perform crossing removal and related renewal work, instead of utilizing the Claimants. The claim further alleges that the Carrier failed to give the General Chairman proper advance notice of the contracting.

The Organization initially contends that this matter involves two clear and unmistakable violations of the Agreement in that the Carrier violated both the work jurisdiction provision and the provision requiring proper advance notice/meeting. The Organization asserts that the Carrier's failure to provide proper advance notice and meet with the Organization in good faith to discuss the contracting constitutes a direct violation of the spirit and intent of the Scope Rule. The Organization argues that because the Carrier failed to comply with the Scope Rule, its decision to contract out the work in question was a violation of the Agreement.

The Organization emphasizes that because of the Carrier's decision, the Claimants were forever deprived of the opportunity to perform the subject work and enjoy the monetary benefit accruing there from, in accordance with the Agreement. The Organization points out that the track repair and maintenance work in question was of the character that clearly is encompassed within the Scope of the Agreement and has been traditionally, historically, and customarily performed by Carrier forces. The Carrier plainly is wrong in asserting that the

work in question does not accrue to Maintenance of Way forces. The Organization points out that Carrier forces historically have performed total crossing rehabilitation work throughout the Carrier's system. The Organization asserts that there can be no question that work of the character involved here is encompassed with the Scope of the Agreement.

The Organization insists that it is hornbook principle that work of a class belongs to those for whose benefit the contract was made. The Organization asserts that it is well established by numerous Awards that delegation of such work to others not covered thereby is in violation of the Agreement. The Organization contends that the many written statements from employees relating to other paving claims corroborates that work of the type at issue customarily, historically, and traditionally has been assigned to and performed by Carrier forces throughout its system. The Organization characterizes these statements as overwhelming, unrefuted evidence that Maintenance of Way forces on this property have traditionally performed all types of asphalt application work in connection with the rehabilitation of road crossings.

Pointing to a prior Special Board of Adjustment Award, the Organization goes on to contend that the question of whether the application of asphalt materials in connection with the "full paving" rehabilitation of road crossings already has been definitely decided in the Organization's favor. This Award established, back in 1991, that paving work, including the full paving of road crossings, accrues to this Carrier's Maintenance of Way forces in accordance with the specific language of the Scope Rule. In this Award, the Board also found that the Carrier's failure to provide advance written notice of its contracting plans was a violation of the Scope Rule, and the Board flatly rejected the Carrier's position regarding the application of the so-called exclusivity test to disputes over the contracting out of work, as well as the Carrier's argument that compensation was not due furloughed employees because they allegedly were "not available" for service. The Organization contends that a number of Awards support its position here.

Moreover, the Carrier failed to fulfill its contractual obligation to provide written notice of its plan to contract out such work and to meet with the Organization to discuss the matter in good faith. The Organization asserts that the Carrier's notice failed to include required specific information about its contracting

plans. The Organization additionally points out that during the parties' subsequent meeting, the Carrier was shown that Maintenance of Way forces could do the work in question. The Organization insists that the mere providing of advance notice and the holding of a meeting does not give a Carrier carte blanche to proceed with contracting. In every such instance, the Carrier bears the burden of justifying its decision to contract out such work.

Addressing the Carrier's assertion that the work was performed by an outside contractor pursuant to an alleged long-standing past practice, the Organization insists that the Carrier failed to produce a shred of evidence in support of this position. The Organization also argues that the Carrier plainly dropped its "warrantee" defense during the on-property handling of this matter. As for the Carrier's implication that special skills were necessary to perform the work at issue, the Organization insists that the issue is what skill did the contractor's employees possess that the Claimants did not. The Organization argues that because the manufacturer did not install the crossing and the work occurred on-property, the Carrier's argument on this point cannot reasonably be construed to defeat the instant claim.

Turning to the Carrier's allegation that the Claimants are not entitled to a monetary award because they were "fully employed," the Organization insists that the Carrier is wrong. A number of Awards have upheld the principle that working claimants are entitled to receive monetary awards to ensure enforcement of the Agreement and to compensate them for lost work opportunities.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that it fully complied with the Scope Rule's notice and meeting requirements in connection with the contracting at issue. The Carrier asserts that although the parties were unable to reach an understanding regarding this contracting project, the Carrier proceeded with the contract as provided for in the Scope Rule. The Carrier argues that during the handling of this matter on the property, the Organization never claimed that the Carrier violated the notice and/or conference provisions of the Scope Rule. The Carrier emphasizes that the Organization's claims that the Carrier failed to furnish notice or discuss the

contracting are totally devoid of merit and without any factual basis whatever. Moreover, the Organization's attempt to interject this issue now is carelessness, at best, or a disingenuous attempt to obfuscate the record to disguise the weakness of its position, at worst.

The Carrier contends that the Organization bears the burden of proving that the disputed work historically and customarily has been performed by BMW-represented employees on this property. The Carrier points out that there is no dispute that BMW forces never installed this type of pre-fabricated modular road crossing in the past. The Carrier acknowledges that its forces have performed some of the work involved in installing standard road crossings, but it emphasizes that they never installed any road crossing comparable to the pre-fabricated, modular system at issue.

The Carrier asserts that a small and incidental portion of the disputed work involves the application of a hot asphalt mix. The Carrier insists that its forces never performed hot asphalt paving on the Shared Assets property, and the Organization never refuted this. Such work routinely has been contracted to outside firms.

The Carrier argues that a number of Awards support its position that it provided proper advance notice, satisfied the conference requirement, and has the right to contract out hot asphalt mix paving. Moreover, the hot asphalt mix paving clearly was incidental to the installation of the road crossing. The Carrier asserts that the record establishes that the work in question has not historically or customarily been performed by Carrier forces on this property.

The Carrier goes on to contend that it does not possess the specialized equipment or skilled personnel to perform the disputed work. Moreover, the special equipment is of a type that is not needed for rail operations, so there is no valid reason for the Carrier to have this equipment in its arsenal. The Carrier emphasizes that the Organization has not refuted the fact that the Claimants are not qualified to operate some of this specialized equipment.

The Carrier asserts that a number of Awards on this property have upheld the Carrier's right to contract out work when it does not possess the proper equipment or skilled manpower to complete the work.

The Carrier then points out that the Agreement does not prohibit it from making the type of business transaction at issue here. The Carrier emphasizes that it made a business decision to utilize this type of road crossing at certain locations, and it was able to purchase the road crossings with delivery and installation as part of the total cost of the product.

The Carrier additionally argues that the instant claim is excessive. It points out that the Claimants were fully employed during the claim period, and they suffered no monetary loss as a result of the contracting at issue. Accordingly, the Carrier asserts that the Claimants are not entitled to the penalty payment claimed in this case. The Carrier emphasizes that it would be improper for the Board to award a penalty payment that is not provided for in the Agreement.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it assigned outside forces to perform crossing removal and related renewal work on the Shell Branch in Thorofare, New Jersey, on September 16 and 17, 2002. The Organization also failed to prove that the Carrier violated the Agreement by failing to furnish the General Chairman with proper advance written notice of its intent to contract out the work. Therefore, the claim must be denied.

First of all, the record reveals that the Carrier did serve advance notice on the Organization. The parties had an opportunity to discuss the proposed subcontracting, and the Carrier went ahead with the work. The Board cannot find any violation of the Rules in that regard.

With respect to the subcontracting of the work, the Organization failed to come forward with sufficient evidence to prove that BMW-represented employees had installed the special prefabricated product called "Star Track" which is

connected to the track without traditional ties. The record reveals that that type of work involved new technology and innovative construction which was beyond the skill limits of BMW-employees. There was also no showing that the Carrier had the necessary equipment to meet the specifications to perform the work.

Finally, in recent Third Division Award 38245, we found that the Organization failed to sustain its burden of persuasion that the contracting out of this same type of work was in any way violative of the Agreement.

For all of the above reasons, the claim must be denied.

AWARD

Claim denied.

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 26th day of May 2009.