

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39954
Docket No. MW-40274
09-3-NRAB-00003-080088**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**
PARTIES TO DISPUTE: (
**(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 contracted out Bridge and Building Department work of constructing wooden inter-track platforms beginning in 2006 and continuing instead of assigning that work to Mid-Atlantic (formerly Philadelphia) Division Bridge and Building Department employees (System File NEC-BMWE-SD-4626 AMT).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a written advance notice of the plans to contract out said work.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, all B&B Department employees headquartered on the Mid-Atlantic (formerly Philadelphia) Division as of July 26, 2006 (as identified by name in the General Chairman’s appeal letter dated January 22, 2007) shall be compensated at the B&B Mechanic’s rate of pay for an equal share of the total hours worked by the outside forces in the performance of the aforesaid work.”**

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.

On July 26, 2006, the General Chairman filed the instant claim "in behalf of all Bridge and Building employees headquartered on the territory of Amtrak referred to as Philadelphia North." Under the heading, "Statement of Facts," the Organization alleged that "B&B forces build and maintain the wooden inter-track platforms." It further alleged, "Through correspondence with Amtrak's Director of Labor Relations we have been informed that Amtrak has contracted out the work of building these panels to an outside vendor to be delivered to Amtrak and installed by Amtrak B&B forces." The Statement of Claim provided:

"Amtrak violated the current agreement in effect between Amtrak and the BMWED, including but not limited to the scope rule of that agreement, when the work was contracted out without giving the notice required to contract out the work to the Union and/or without having obtained the written permission of the General Chairman to contract out the work as required by Section 1.A. of that rule."

Under the heading, "Resolution Required to Settle Claim," the Organization claimed:

"To settle this dispute, the Union would require that contracting out of the fabrication of the wooden inter-track panels cease immediately. In addition we will require that an amount equal to the total hours worked by the outside contractor multiplied by the Southern District B&B Mechanic rate of pay for the fabrication of

these panels be paid in equal sums to each B&B employee headquartered on the Philadelphia Division on today's date."

The Division Engineer responded that the claim was invalid because it failed to name specific claimants. The Carrier contended that "the vague reference to 'Bridge and Building Employees' defines a variety of crafts and classes of employees on Amtrak, many of which are not represented by the BMW" and that the reference to "Philadelphia North" was insufficiently specific to identify the intended claimant. The Carrier further responded that it had purchased pre-assembled inter-track platforms from a vendor and that such action did not constitute contracting out.

The General Chairman appealed, arguing, among other things, that the claim was filed on behalf of the employees of the Philadelphia Division, which was the former name of the Mid-Atlantic Division. He further argued that because the Division Engineer denied a claim concerning employees of Philadelphia North and not the claim concerning the employees of the Philadelphia Division, the Carrier defaulted and the claim had to be sustained as presented.

The Scope Rule provides, in relevant part:

"In the event Amtrak plans to contract out work within the scope of the schedule agreement, the Director-Labor Relations shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto.

If the General Chairman requests a meeting to discuss matters relating to the said contracting transaction, the Director-Labor Relations or his representative shall promptly meet with him for that purpose. The Director-Labor Relations or his representative and the General Chairman or his representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Director-Labor Relations may nevertheless proceed with said contracting, and the General Chairman may file and progress claims in connection therewith.

1. EXCEPTIONS

- A. Effective March 2, 1987, the following work may not be contracted without the written concurrence, except in cases of emergency, of the appropriate General Chairman.
- (1) Track inspection, maintenance, construction or repair from four (4) inches below the base of the tie up, and undercutting.

* * *

- D. Any question with regard to contracting out work in accordance with the scope of this Agreement may be referred by either party to a Special Board of Adjustment created specifically and solely to hear and render decisions upon such questions. The Special Board of Adjustment shall operate in accordance with the Agreement appended hereto as Attachment 'A'."

The instant case presents issues concerning jurisdiction, procedure and the merits. We shall consider these issues in turn.

The Carrier asserts that the Board lacks jurisdiction over this claim, because it should have been presented to the Special Board of adjustment pursuant to paragraph 1.D. Although Special Board of Adjustment No. 1005 was created and vested with exclusive jurisdiction over disputes concerning contracting out, that Board was closed prior to the filing of the instant claim. Public Law Board No. 6671 was subsequently established to deal with contracting issues. The record reflects that the Organization proposed presenting the claim to Public Law Board No. 6671, and the Carrier refused on the ground that the case involved procedural flaws which Public Law Board No. 6671 did not have authority to resolve. The Carrier proposed presenting the general issue, as opposed to the specific claim, to Public Law Board No. 6671, but the Organization refused. Under these circumstances, we conclude that the claim was properly presented to the Board and that we have jurisdiction to resolve it.

The procedural issues raised on the property reflect nothing more than an immature game of "gotcha" that certainly is not conducive to positive labor

relations. The Division Engineer's contention that the claim improperly could have included employees not represented by the Organization is ridiculous. No reasonable professional would read the claim in that manner. Moreover, the Carrier never denied that the "Philadelphia Division" is the former name of the Mid-Atlantic Division. In any event, the claim provided sufficient information to identify the appropriate claimants.

The General Chairman's appeal contending that Carrier defaulted because the Division Engineer did not deny the claim which was presented on behalf of employees of the Philadelphia Division but instead denied the claim of employees of Philadelphia North is equally ridiculous. The General Chairman's statement of claim clearly stated that it was brought on behalf of employees headquartered at Philadelphia North. The procedural arguments raised on the property were nonsense and we shall devote no further time to them.

Turning to the merits, whether the work of fabricating inter-track platforms was work for which the General Chairman's concurrence was required before it could be contracted out or merely work for which notice and an opportunity to conference had to be provided prior to contracting out is irrelevant because no formal notice and opportunity to conference was given. The critical issue is whether the purchase of ready-made inter-track platforms built to the Carrier's specifications amounts to contracting out. The Carrier urges that it does not, distinguishing its purchase of the ready-made platforms from the purchase of raw materials to be given to a contractor to fabricate. The Organization contends that the relevant inquiry is the work itself and not who purchased the raw materials.

The Carrier relies on Third Division Awards 27184, 28195, 28561 and 32598 in support of its position. The Organization cites Awards from two unnumbered Special Boards of Adjustment between the Organization and the Union Pacific Railroad in support of its position, as well as Third Division Award 37693. Of all of the Awards cited, only Award 37693 arose on this property.

Award 37693 involved fabrication of bridge walkway supports, known as "figure 4s". The record reflected that the fabrication of figure 4s had been performed by B&B Welders and Mechanics, using steel angle ordered from Penn Fabrication. At issue was the Carrier's purchase from Penn Fabrication of 100 fully fabricated galvanized figure 4s. The Carrier argued there, as here, that it had not

engaged in contracting out, but had merely purchased finished goods from Penn Fabrication. The Board rejected the argument. It reasoned:

“There is no doubt that Carrier retains the right to purchase prefabricated goods without violating the scope clause of the Agreement. . . . In this case there is no challenge to its obtaining the angled steel from which the figure 4s were fabricated. It had consistently done so in the past. What is new in this case is the galvanizing process, which had not been performed by BMW-represented employees under the scope of the Agreement previously. The Carrier was obligated to discuss its plans to have such work contracted because it was accomplished as part of the fabrication process. Had that aspect of the work been separated from the fabrication, the Carrier’s arguments might hold more weight.”

As we understand Award 37696, what is critical in drawing the line on this property between contracting and the purchase of prefabricated goods is the existing practice on the property. Thus, in Award 37696, there was no violation when the Carrier purchased angled steel because it had done so consistently in the past. On the other hand, the employees had generally fabricated the steel into figure 4s. Because the galvanizing process was part of the fabrication, the Carrier was obligated to give the Organization notice and an opportunity to conference even though what Penn Fabrication delivered was a finished product and even though the employees had not previously performed the galvanizing. The Board implied that it might have reached a different result if the employees had fabricated the figure 4s and then the Carrier sent them to Penn Fabrication for galvanizing.

Turning to the instant case, the Organization established on the property that the employees historically and customarily fabricated the inter-track platforms. Under the authority of Award 37696, the Carrier was obligated to at least provide formal written notice and an opportunity for a conference before agreeing to have such fabrication performed by an outside vendor.

AWARD

Claim sustained.

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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 30th day of September 2009.