

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40226
Docket No. MW-39449
09-3-NRAB-00003-060113
(06-3-113)**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (fascia repair) on the Depot at Hastings, Minnesota beginning on July 26, 2004 and continuing through August 2, 2004 (System File C-33-04-C080-11/8-00228-104 CMP).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance notice of its intent to contract out said work as required by Rule 1 and failed to enter good faith discussions to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as set forth in Appendix I.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants L. Wieting, Jr., E. Arnold, P. Lubeck and M. Norby shall now each be compensated at their respective straight time rates of pay for a proportionate share of the forty (40) man-hours expended 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.

By letter dated February 19, 2004, the Carrier advised the General Chairman of its intent to utilize outside forces in the performance of work at six locations, including Hastings, Minnesota. The Carrier stated that remodeling work at the Hastings location would include the "installation of new structural and non-structural building components to meet space requirements of additional personnel." The parties met in conference, but ultimately the work was contracted out.

The parties raised a number of issues in this case, but there is a threshold issue concerning Scope Rule coverage which determines the outcome here. The Organization contends that the fascia repair work in question is reserved to BMW-represented forces. It submits that the Carrier failed to comply with the notice and conference provisions of the Agreement before contracting out the scope-covered work. The Carrier, on the other hand, contends that fascia repair is not covered under the Scope Rule and, therefore, the notice and conference obligations of the Agreement did not arise. Nonetheless, the Carrier points out that it gave notice for the project and met with the Organization in conference, thereby satisfying any good faith obligations it may have.

The record contains evidence of the types of remodeling work performed by BMW-represented employees in the past. Notably absent is the task of fascia repair. There is insufficient evidence to conclude that this work was historically, traditionally, or customarily performed by Carrier forces.

In the absence of evidence that the work is reserved to BMW-represented forces by either Agreement Rule or past performance of the disputed work, we must conclude that it does not fall within the scope of the Agreement. The Note to Appendix I contains very specific language and reads, in pertinent part, as follows:

“NOTE: In the event Carrier plans to subcontract out work within the scope of this agreement, the Carrier 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 15 days prior thereto.”
(Emphasis added)

The Organization had the burden of proof. It had to establish that the work arguably belongs under the scope of the Agreement. It did not do so here. That being the case, the Board cannot find a violation of the Agreement. The Carrier must comply with notice and conference obligations only when work is contracted out “within the scope of this agreement. . . .” Because the Organization failed to make the required threshold showing of reservation of work, we must conclude, consistent with many Awards on this property which have examined the same Agreement language, that the claim must be denied. See e.g., Third Division Awards 36425, 33478, 32351, and 31889.

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 21st day of December 2009.