

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41107
Docket No. MW-40950
11-3-NRAB-00003-090242**

The Third Division consisted of the regular members and in addition Referee Sherwood Malamud when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union 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 (Reliable Construction) to perform Maintenance of Way work (renew windows and interior flooring, exterior painting and replace roof) at the Depot at Eastport, Idaho beginning on October 1, 2007 and continuing (System File D-0752U-222/1492518).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman an advance written notice of its intention to contract out said work and failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Geiss and D. Weigel shall now each be compensated at their respective and applicable rates of pay for an equal and proportionate share of the total straight time and overtime man-hours expended by the outside forces in the performance of the aforesaid work beginning October 1, 2007 and continuing.”**

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 Claimants, Building Carpenters J. L. Geiss and D. B. Weigel, assert the Carrier violated the Agreement when it contracted with Reliable Construction to replace flooring, windows, paint exterior walls and install a new roof on the Eastport, Idaho, Depot on the Spokane Subdivision. Contractor forces (two employees) expended a total of 232 hours on the project. The Claimants maintain the work is reserved to employees in the Bridge and Building Sub-department pursuant to Rule 8, which provides that:

“The work of construction, maintenance and repair of buildings . . . will be performed by employees in the Bridge and Building Subdepartment.”

The Carrier argues that building remodeling is not work customarily performed by its employees. By way of precedent, it cited Third Division Awards 28610, 30198 and 30869. In Award 30869, the Carrier placed in evidence a list of 235 examples of remodeling projects it previously had contracted out. According to the Carrier, it has established a long-standing consistent past practice of contracting out remodeling work. As such, under Rule 52(b) it is not subject to the notice requirements of Rule 52 (a). Furthermore, the Organization failed to establish that BMW-represented employees are engaged in the removal of asbestos laden materials.

The Organization claims that the contractor did not take any special precaution to remove non-friable floor and roofing materials. The asbestos

abatement constituted only a small portion of the project. Either all or the bulk of the work should have been performed by the Carrier's forces. It is work reserved to BMW-represented employees under Rules 8 and 9.

The Organization also argues that the Carrier failed to provide any notice. It notes that it has no record of having received a notice. That is the reason it did not request a conference. It points out that the notice is not addressed to a General Chairman. It is a form notice. The Organization argues that the notice was not provided to the Organization, but added as an afterthought in the processing of the claim. Further, the Organization challenges the sufficiency of the notice. It does not specify the reason for the contracting. It does not conform to commitments articulated in the 1981 Berge/Hopkins letter.

The Carrier contends that it provided timely notice. The Organization did not request a conference. It is not required to provide a notice. It customarily contracts out remodeling projects.

After a review of the record, the Board finds that the Organization failed to establish that BMW-represented employees handle asbestos laden materials. Although the Carrier need not bifurcate a project (Third Division Award 30869) the removal of asbestos laden material constituted a smaller portion of the project.

On the other hand, the Carrier has not established a practice that work of renewing and installing windows and exterior painting of buildings was work customarily contracted out so that under Rule 52 (b) the Carrier need not meet the notification requirements of Rule 52 (a). Because there is a colorable claim that the work at issue is scope-covered work, under Rule 52 (a) the Carrier was obligated to provide the Organization with notice of the planned contracting out (Third Division Award 32862 - Benn).

The Carrier argues that it provided notice to the Organization through Service Order No. 38272. The Organization denies that it received the notice on or about the date of the notice, September 14, 2007. The notice is not addressed to any individual. It is in general form, with "@" symbols where names and other information are to be filled-in. The Organization's Chairman denies receipt of the notice in a timely manner. The Carrier bears the burden of proof that it fulfilled the contractual notice requirement. The general format of the notice leads the Board to conclude that the Carrier failed to establish that the notice placed in

evidence on the property should be given effect. In addition to its non-receipt by the Organization, it is dated October 1, 2007, i.e., just 16 days prior to the date the contractor began to work on the project. Because the Carrier failed to meet its burden of proof it violated the notice requirement of Rule 52 (a).

What remains to be determined is the appropriate remedy. During the pendency of this Award, the Organization supplemented the record with recently adopted Awards. In Third Division Award 40964 between these parties (Referee Newman) the Board concluded that the Carrier failed to comply with the notice requirement and observed:

“With respect to the appropriate remedy, regardless of whether the Carrier could have legitimately contracted out this work or proven the need for specialized equipment for which the Claimants were not trained had they met their notice and conferencing obligations, and absent evidence of an emergency or situation that had to be completed by a certain time, we are in accord with Board precedent that this represents a lost work opportunity for the Claimants, regardless if they were fully employed, and that they should be compensated for that loss. See Third Division Awards 29472, 30823, 32861, 36015, and 37572.”

In other Awards involving these very same parties, where the Claimants were fully employed and none were on furlough and there was no showing that the Claimants suffered a loss, no monetary damages were awarded (See Third Division Awards 31288 - Benn and 31171 - Newman).

Both lines of Awards are well supported by precedent and reason. When should each apply? The Board concludes, here, that the absence of notice precludes any conversation. As a result even opportunity is removed by the failure to provide a notice. The Board’s function is to protect the negotiated process (Third Division Award 32862 - Benn). For the above reasons, the Board sustains the claim.

AWARD

Claim sustained.

Form 1
Page 5

Award No. 41107
Docket No. MW-40950
11-3-NRAB-00003-090242

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 October 2011.