

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41498
Docket No. MW-41400
13-3-NRAB-00003-100338**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(The Alton & Southern 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 to perform Maintenance of Way and Structures Department work (installing rail and related work) at the ‘School House Curve’ location on July 17 and 19, 2009 (Carrier’s File 1522142).**
- (2) The Agreement was further violated when the Carrier failed to provide a proper advance notice of its intent to contract this work or make a good-faith effort to reach an understanding concerning the aforesaid contracting as required by Rule 44 and the December 11, 1981 Letter of Understanding.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants W. McKenzie, E. Angel, K. White and D. Hayes shall now each be compensated for eight (8) hours at their respective straight time rates of pay for the work performed by outside forces on July 17, 2009 and Claimants W. McKenzie, J. Bland, E. Angel, K. White, V. Anderson, M. White, C. Pratt, K. Wengert, K. Elliott, I. McCray, J. Sims, D. Johnson, S. Williams, K. Hulsey, S. Maloata, D. Hayes, D. Hulsey, P. Boien, D. Patterson, P. Lee, C. Severs and D.**

Chamberland shall be compensated at their respective and applicable rates of pay for an equal share of the total man-hours worked by the outside forces on July 19, 2009."

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 Carrier initially argues that the claim set forth hereinabove is procedurally defective because the Organization added additional allegations to the claim that were not part of the on-property handling. Specifically, the claim now includes a reference to the December 11, 1981 Letter of Understanding (LOU). In support of its position, the Carrier cites a number of Awards and argues that it could not defend against the LOU contention during the handling on the property.

The Board reviewed the procedural bar argument raised by the Carrier. The Carrier's cited Awards address issues such as an entirely new issue (Third Division Award 28466) or new or changed dates (Third Division Award 23892). However, in the instant matter, an examination of the claim as handled on the property and the claim now before the Board reveals that they are not substantially different. The addition of the reference to the 1981 LOU does not constitute a substantial variance. (See Third Division Award 28566.) That being said, the reference to the 1981 LOU need not be considered by the Board in analyzing the instant claim.

The Organization argues that the Carrier violated Rule 44 because it did not notify the General Chairman of its intent to subcontract certain work as required

by the Rule. The Carrier responds that it notified the Vice General Chairman through a notice of subcontracting. Although the Organization had previously notified the Carrier that subcontracting notices were to be sent to the General Chairman, the Carrier asserts a past practice of notifying the Vice General Chairman.

Rule 44 provides in pertinent part:

“(a) In the event the Carrier plans to contract out work within the scope of this Collective Bargaining Agreement, the Carrier will 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.”

The Carrier further contends that, because it had been mailing subcontracting notices to the Vice General Chairman, a past practice had been established and the Organization cannot now argue otherwise. In the August 24, 2009 letter addressed to the Vice General Chairman, the Director of Track Maintenance stated:

“In addition to our notice of March 26, 2009, notices were sent to you on October 21, 2003, June 9, 2004, March 3, 2005, April 7, 2007 and January 2, 2008. Each one was handled without objection by you. It is now improper for you to now contend that this notice was improperly sent to you. If you desire the notices to be sent to General Chairman McCoy rather than yourself, please advise and we shall comply for all future notices.”

On January 2, 2008, the Carrier notified the Vice General Chairman of four projects for which it proposed to use outside contractors in the forthcoming year.

The Vice General Chairman’s response of January 7, 2008 to the Director of Labor Relations provided, in relevant part in the first full paragraph:

“This is in reference to your letter dated January 2, 2008, and received in our office on January 7, 2008 regarding the above

subject. For future reference, please address and send Contract Out Notices to Mr. T. R. McCoy Jr., General Chairman, BMWED, 9300 Runyan Road, Catlettsburg, KY, 41129.”

Despite the clear notice from the Organization that “Contracting Out Notices” were to be sent to the General Chairman, the subcontracting notice in the instant matter was not sent to the General Chairman. Even if there had been an accepted practice of notifying the Vice General Chairman, the Organization put the Carrier on notice that the proper Organization representative for receipt of Rule 44 notices was the General Chairman. The Carrier’s citation to Third Division Award 40090 is not persuasive because the issue of the propriety of the Carrier’s notice was not at issue.

The Organization could not have stated in clearer terms that subcontracting notices were to be sent to the General Chairman following the January 7, 2008 letter. Consequently, the Carrier should have notified the designated Organization representative. The Carrier violated Rule 44(a) when it failed to notify the designated Organization representative – the General Chairman. Therefore, the claim must be sustained.

AWARD

Claim sustained.

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 19th day of February 2013.