

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 36513  
Docket No. MW-35794  
03-3-99-3-793

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

(Brotherhood of Maintenance of Way Employees  
**PARTIES TO DISPUTE:** (  
(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 (Puline Contracting) to perform Maintenance of Way work (grading the roadbed behind the tie gang) on the Chicago Line from Mile Post 68 to Mile Post 87 on May 4, 5, and 6, 1998 (System Docket MW-5262).
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman prior written notice of its plan to assign said work to outside forces.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Class 2 Machine Operator D. L. Arner shall be allowed thirty (30) hours' pay at his Class 2 Machine Operator's 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.

This claim challenges the use of an outside vendor to supply and operate a road grader on May 4, 5 and 6, 1998. The Organization asserts that the road grader was used to grade roadbed after a tie gang had finished their work. The Organization maintains that the repair and maintenance of roadbeds is work that specifically accrues to its craft under the Scope Rule and has been performed in the past by BMWWE members. Further, the Carrier was required to provide advance notice in accordance with the Scope Rule, which states in pertinent part:

"In the event the company plans to contract out work within the Scope of this Agreement, except in emergencies, the company shall notify the General Chairman involved, 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. 'Emergencies' applies to fires, floods, heavy snow and like circumstances."

The Carrier's principal defense is that roadbed work was not performed at all. Instead, the Carrier asserts that the outside contractor regraded the access road running parallel to the track. The Carrier contends that this type of work falls outside the scope of the Agreement and therefore it was not required to provide advance notice to the Organization before contracting out.

A review of the on-property correspondence shows that this is not just a case of assertion versus counter assertion. The Organization submitted the signed statement of a BMWWE employee who attested to having seen the outside contractor grading the roadbed on the dates in question. There are also signed statements from employees stating that such work has been performed routinely by them in the past. By contrast, the Carrier failed to substantiate its bare assertion with any probative evidence. Given this state of the record, we must conclude that the Organization is correct when it argues that the work at issue is scope covered, both by virtue of practice and the express language in the Scope Rule ("work generally recognized as Maintenance of Way work, such as . . . construction, repair and maintenance of . . . roadbed, and work which, as of the effective date of this Agreement, was being performed by these employees . . .").

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That being so, at minimum, the Carrier should have notified the General Chairman prior to contracting out the work.

The remaining question is one of remedy. The Carrier maintains that the Claimant was on duty and under pay elsewhere. However, we agree with the many cases which hold that the Claimant lost his rightful work opportunity to perform the work and is entitled to monetary compensation as a result. See, Third Division Awards 19924, 30912, 30944, 31594, 32335 and Public Law Board No. 3781, Award 7.

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 23rd day of April 2003.