

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33439
Docket No. MW-32700
99-3-95-3-634**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Monon Railroad)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1) The Carrier violated the Agreement when it assigned or otherwise permitted outside forces to perform Maintenance of Way work (unloading and installing ties) on the two (2) setout tracks at Sullivan, Indiana beginning February 17, 1994 and continuing [Carrier’s File 12(94-0611) CEI].

(2) As a consequence of the violation referred to in Part (1) above:

(a) Foreman T. A. Neidig, Machine Operator A. L. Weisheit and Trackmen B. A. Quirk and T. J. Jarrell shall each be allowed pay at their respective straight time and time and one-half rates for an equal proportionate share of the total number of man-hours expended by the outside forces on February 17 through March 6, 1994, and

(b) Foreman T. A. Neidig, Machine Operator R. M. Coberly and Trackmen B. A. Quirk and T. J. Jarrell shall each be allowed pay at their respective straight time and time and one-half rates for an equal proportionate share of the total number of man-hours expended by the outside forces on March 7 through March 18, 1994 .”

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.

Proper determination in this matter turns on an understanding of the chronology of events that led to the claim being filed by the Organization on April 29, 1994. By letter dated October 7, 1993 the Director Employee Relations gave General Chairman L. L. Phillips requisite 15-day advance notice that the Carrier intended to contract for site work and construction of two 35 car pick-up/set off tracks at Sullivan, Indiana, on the CE&D Subdivision, C&EI Seniority District, Chicago Division. In compliance with Rule 60 (Contracting Out) that letter described the work and stated further that it was necessary to contract out due the Carrier not having adequate equipment laid up and forces laid off, sufficient both in number and skill with which the work might be done.

When no response was received from the General Chairman within the 15-day period following receipt of the notice, Carrier subcontracted the work to Beck Construction, which commenced grading and other earth-moving work on October 25, 1993. Some ten days later, by letter of November 4, 1993 the General Chairman finally responded to the October 7, 1993 notice and belatedly requested a contracting out conference. Two weeks later, on November 19, 1993, the General Chairman discussed the situation by telephone with the Manager Employee Relations. Conceding that the job was already underway and that no BMWE-represented employees were then currently furloughed, the General Chairman took the position that the Organization would not object to the contractor's continued performance of the earth moving and fill construction work, but would object if the contractor's employees laid rail ties or switches. At the conclusion of that telephone conference, the General Chairman and the

Manager Employee Relations arrived at an oral understanding to "take another look at this at another time if people became furloughed."

The work on the two 35 car pick-up/set off tracks at Sullivan, Indiana, continued without further controversy until April 1994, when the instant claim was filed. In the meantime, when it became apparent in early 1994 that BMW forces were going to be furloughed, a four-man gang (AFE Gang 6KF7) was authorized. The jobs were bulletined on January 7, 1994 and Foreman T. A. Neidig, Machine Operator A. L. Weisheit, Trackman B. A. Quirk and Trackman T. J. Jarrell were awarded the jobs on January 28, 1994. The record indicates that these Claimants (and also on some claim dates Mr. R. M. Coberly) all worked alongside the Beck Construction employees without incident until April 29, 1994, when the General Chairman filed the present claim with Division Engineer Tucker, reading as follows:

"We are hereby submitting a claim in favor 4 men on the Extra Gang (AFE) 6KF7 that was working in Sullivan, Indiana on the two setout tracks.

We are submitting this claim due to contractor working at this location with the Extra gang and at different times working on the weekends that the Extra gang should have been working. The contractor was laying out ties and spacing ties that had been protested by the Organization and was to be done by the Extra Gang.

On October 7, 1993 Carrier CSX Transportation sent notice to contract out two 35 car set out tracks at Sullivan, IN on the CE&D Subdivision, CE&I Seniority District, Chicago Division.

By letter dated November 4, 1993 I responded to Mr. Allred's notice asking him for a conference on this matter, File: 3041-12 CHI 93-23.

November 19, 1993 I had a conversation with Mr. Dave Young Manager Employee Relations concerning the contracting out of this work. I agreed to let the contractor do the earth moving and making the fill but would not agree to let the contractor lay any rail ties or switches. I also told Mr. Young that there will be people furloughed soon and we would have to look at this at another time if people became furloughed.

People were furloughed and agreement was made to advertise jobs for bid to put these people back to work. Bulletin was dated January 7, 1994. Awards for AFE Gang 6KF7 were January 28, 1994.

The contractor remained on the job and was still performing the work that had been agreed to let them do, however starting on the date of February 17, 1994 the contractor's men began unloading ties and spacing them on the fill that they had just made. This was never agreed to by the Organization and we are asking that the following men be paid at respective rates of pay for the loss of work they should have done. Each man is to be paid 8 hours per day for all days mentioned below, except for the weekends that the contractor worked and we are asking that this time be paid at the time and one/half rate of pay.

Men to be paid are: T.A. Neidig ID# 186876, Foreman, A.L. Weisheit ID# 186687, Machine Operator, B.A. Quirk ID# 187317, Trackman, and T.J. Jarrell ID# 188294, Trackman. Days for these 4 men to be paid are: February 17, 18, 19, 20, 21, 22, 23, 24, 25, 28, 1994 and March 1, 2, 3, 4, 5, 6, 1994. There are 10 more days to be paid for the men mentioned above except for a change for the Machine Operator. Remove A.L. Weisheit and add R.M. Coberly ID# 187847. The Days to be paid are, March 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 1994.

As a violation of the contractor doing work that they were not allowed to do we are asking that all the time be paid. Please advise of pay period when said payment will be made."

Division Engineer Tucker denied that claim by letter of June 27, 1994, reading, in relevant part, as follows:

"This is in reference to your time claim dated April 29, 1994 concerning a contractor working at Sullivan, IN. during February and March 1994.

Our investigation of your claim reveals that Beck Construction did grading work and [in] addition had to stabilize the roadbed by using a large amount of heavy stone. The work of placing ties on the roadbed was

also done by Beck Construction. Our forces did not have equipment to perform this work.

In view of the above, along with the number of positions claimed and time claimed being excessive, your claim is denied in its entirety."

The matter remained unresolved through subsequent appeals until it was referred to this Board for final disposition.

The record persuades us that Carrier's Labor Relations Officers and the General Chairman all acted in evident good faith in October-November 1993 to find a mutually agreeable resolution of a potentially divisive contracting out situation. In keeping with the spirit and intent of the Hopkins-Berge Letter Agreement of December 11, 1981, these Parties arrived at a creative "win-win" solution by an informal arrangement to uncontested performance of the roadbed "dirt work" by the contractor, with performance of the "track work" to be done by BMWWE-represented forces, who thereby avoided furlough.

We find that for the most part both Parties acted in compliance with the informal understanding they reached on November 19, 1993. However, the record does show that the Organization had valid grounds for complaint on April 29, 1994, because the Division Engineer frankly admitted that Beck Construction employees did perform some of "the work of placing ties on the roadbed" in February and March 1994, contrary to the understanding reached on November 19, 1993. On the other hand, Carrier's objections that the claimed damages are unsubstantiated appear well-founded and have not been effectively rebutted by the Organization. Ignoring the admitted violation or awarding excessive or punitive damages are equally repugnant, because to do either would have a chilling effect on future efforts to reach such mutually agreeable Hopkins-Berge accommodations. The Board wishes to avoid discouraging such creative approaches to the vexing problems surrounding contracting out/Scope Rule issues, which spawn so many claims in this industry. Based on all of the foregoing, therefore, we shall partially sustain Part (a) of the claim and award the named Claimants eight hours each date at the overtime rate for the dates of February 19-20 and March 5-6, 1994, but deny Part (b) of the claim.

AWARD

Claim sustained in accordance with the Findings.

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 August 1999.