

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34986
Docket No. MW-32361
00-3-95-3-204**

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien 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 (Steel Processing Services, Inc.) to perform Maintenance of Way work [remove and/or stockpile jointed rail, plates and other track materials (OTM)] on the Cherry Tree Secondary Track from Mile Posts 0.0 to 14.0 and Mile Posts 20.0 to 22.0 beginning May 17 through June 28, 1993 (System Docket MW-3213).**
- (2) The Agreement was violated when the Carrier assigned outside forces (Steel Processing Services, Inc.) to perform Maintenance of Way work [remove and/or stockpile jointed rail, plates and other track materials (OTM)] on the Cherry Tree Secondary Track from Mile Posts 0.0 to 14.0 and Mile Posts 20.0 to 22.0 beginning July 26 through August 9, 1993 (System Docket MW-3214).**
- (3) The Agreement was violated when the Carrier assigned outside forces (Steel Processing Services, Inc.) to perform Maintenance of Way work [remove and/or stockpile jointed rail, plates and other track materials (OTM)] on the Cherry Tree Secondary Track from Mile Posts 0.0 to 14.0 and Mile Posts 20.0 to 22.0 on August 10 through 16, 1993 (System Docket MW-3215).**
- (4) The Agreement was violated when the carrier assigned outside forces (Steel Processing Services, Inc.) to perform Maintenance of Way work [to sort, classify and/or stockpile the other track**

materials (OTM) previously removed from the Cherry Tree Secondary Track from Mile Posts 0.0 to 14.0 and Mile Posts 20.0 to 22.0] at Mile Post 6.2 on August 9, 10, 11, 12 and 13, 1993 (System Docket MW-3216).

- (5) The Agreement was further violated when the Carrier failed to give the General Chairman prior written notice of its plan to contract out the work referenced in Parts (1), (2), (3) and (4) above to outside forces as required by the Scope Rule.**
- (6) The claim as presented by Vice Chairman D. J. Tredent on July 15, 1993 to Division Engineer R. J. Rumsey (System Docket MW-3213) shall be allowed as presented because the claim was not disallowed by Division Engineer R. J. Rumsey in accordance with Rule 26 (a).**
- (7) As a consequence of the violations referred to in Parts (1), (5) and/or (6) above, Messrs. T. J. Peters and D. W. Huffman shall each be allowed ten (10) hours' pay per day at their respective straight time rates, with credits for vacation and other benefits for each of the days worked beginning May 17 through June 28, 1993.**
- (8) As a consequence of the violations referred to in Parts (2) and/or (5) above, Messrs. T. J. Peters, J. P. Daugherty, D. W. Huffman and M. E. Stocum shall each be allowed ten (10) hours' pay per day at their respective straight time rates and all overtime expended by the outside forces in the performance of said work, with credits for vacation and other benefits for each of the days worked beginning July 26 through August 9, 1993.**
- (9) As a consequence of the violations referred to in Parts (3) and/or (5) above, Messrs. D. W. Huffman and J.P. Daugherty shall each be allowed ten (10) hours' pay per day at their respective straight time rates and all overtime expended by the outside forces in the performance of said work, with credits for vacation and other benefits for each of the days worked beginning August 10 through 16, 1993.**

- (10) As a consequence of the violations referred to in Parts (4) and/or (5) above, Messrs, D. W. Huffman, J. P. Daugherty, M. P. Perry, J. E. Armagost and R. D. Battaglia shall each be allowed ten (10) hours' pay per day at their respective straight time rates and all overtime expended by the outside forces in the performance of said work, with credits for vacation and other benefits for each of the days worked beginning August 9 through 13, 1993."

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.

On or about May 16, 1993 the Carrier entered into a contract with Steel Processing Services, Inc. to remove track from the right-of-way on the Cherry Tree Secondary Track between Mile Post (MP) 0.00 and 14.0 and MP 20.0 and 22.0. The contract was entered into on an "as is, where is" basis with the contractor keeping the scrap rail and other material that it removed from the right-of-way. The contractor began removing the scrap rail on May 17, 1993 and completed the contract on August 13, 1993.

On July 15, 1993, the Organization submitted time claims on behalf of Welder Helper J. Peters and Vehicle Operator D. W. Huffman. It was the Organization's position that Conrail violated the Scope Rule and Rule 1 of the prevailing Agreement beginning on May 17, 1993, when it permitted Steel Processing Services, Inc. to perform work that belonged to Maintenance of Way Employees. The Organization also argued that Conrail failed to give the General Chairman the requisite notice of this contracting out of Scope covered work. The Organization requested that the two

Claimants be allowed ten hours of compensation at their applicable rates of pay for each day that the contractor was performing Maintenance of Way work encompassed by the Scope Rule.

On September 7, 1993, Division Engineer R. J. Rumsey denied the claim contending that there was no violation of the BMW Agreement because the contract with Steel Processing Services, Inc. was entered into on an "as is, where is" basis.

On September 23, 1993, the Organization submitted three additional claims on behalf of Welder Helpers, Vehicle Operators and Trackmen. Conrail denied those claims and they were subsequently progressed to the Board for resolution.

It is now well established on the Board that the removal of scrap rail and other track materials from the shoulder of the track which has been purchased by an outside contractor/vendor does not come within the Scope Rule of the BMW Agreement. Accordingly, the notice that the Carrier must give the appropriate BMW General Chairman when it plans to contract out work within the Scope of the Agreement is inapplicable to these transactions.

For the foregoing reason, the scrap rail and other track material removed and retained by Steel Processing Services, Inc. on the Cherry Tree Secondary Track from May 17 to August 13, 1993 was not encompassed by the Organization's Scope Rule. However, any of that track or material retained by Conrail for its future use was encompassed by the Organization's Scope Rule and removal of this track and other track material should have been assigned to Maintenance of Way Employees unless this work was de minimus. The claims will be remanded to the parties to determine how much scrap rail and other track material, if any, was retained by Conrail from this rail removal project.

The Organization further contends that the Division Engineer did not deny the claim it submitted on July 15, 1993 until September 27, 1993 beyond the 60-day time limit set forth in Rule 26. Therefore, the claim must be allowed, according to the Organization.

The evidence reveals that on September 7, 1993 Division Engineer R. J. Rumsey denied the July 15, 1993 claim. For some reason, the Organization did not receive this denial until September 27 when a copy of the September 7, 1993 denial was faxed to

it. However, the Board has no reason to conclude that the September 7 denial of the July 15, 1993 claim was not sent to the Organization. That decision was rendered within 60 days from the date the claim was filed. Consequently, there was no violation of Rule 26 notwithstanding the Organization's contention to the contrary.

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 20th day of September, 2000.