

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38988
Docket No. MW-38269
08-3-NRAB-00003-040197
(04-3-197)

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference

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 (Amtrac Construction) to perform new track construction work in the South Philadelphia Yard beginning October 30, 2000 and continuing through February 9, 2001 (System Docket MW-0021).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work and discuss the matter in good faith as required by the Scope Rule.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. W. Poole, J. E. Feuerer, C. N. Cromwell, L. M. Afonso, J. F. Hunter, A. G. MacBain, W. T. Brown, E. J. Mason, M. J. McCarthy, O. Spence and J. J. Rizzo shall now each be compensated eight (8) hours' pay per day at their respective straight time rates for each day worked by the outside forces beginning October 30, 2000 through February 9, 2001.”

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 protests the Carrier's use of a contractor to construct new tracks in the South Philadelphia Yard, which work is claimed by the Organization to be scope covered. The Organization also asserts that it was not given proper notice of the contracting of the work as required by the Scope Rule of the Agreement.

The Carrier asserts that it gave proper notice to the Organization and also asserts that the Board does not have jurisdiction over this dispute because the work involved was a necessary part of the construction work needed to implement the CSX-NS acquisition of Conrail.

Article I, Section 1(h) of the January 14, 1999 Arbitrated Implementing Agreement (issued pursuant to Article I, Section 4 of the New York Dock Conditions pursuant to Finance Docket No. 33388, Decision 89 of the Surface Transportation Board which approved the Conrail Transaction) provides:

"(h) Contractors may be used without notice to augment CSXT, NSR, or CRC forces as needed to perform construction and rehabilitation projects such as initial new construction of connection tracks, sidings, mainline, yard tracks, new or expanded terminals and crossing improvements initially required for implementing the

Operating Plan and to achieve the benefits of the transaction as approved by the STB in Finance Docket No. 33398."

Thus, it appears that this contracting dispute falls under the Arbitrated Implementing Agreement. Therefore, as argued by the Carrier, the Board lacks jurisdiction to consider the claim. See First Division Award 25983:

"The Board reviewed the claim. It arose out of claims involving implementation of an Implementing Agreement under New York Dock. The Board has traditionally refused to accept jurisdiction of disputes that involve New York Dock Implementing Agreements. The claim listed here i[s] therefore, dismissed. The Board lacks jurisdiction to do otherwise."

See also, Third Division Award 36276:

"These issues all involve interpreting provisions of the November 2, 1998 Implementing Agreement. Because the Implementing Agreement was negotiated under the auspices of Article I, Section 4 of the New York Dock Conditions, the parties must utilize the dispute resolution mechanism in Article I, Section 11 of the New York Dock Conditions to resolve this dispute. See Third Division Awards 29317 and 29660. Because the Board lacks jurisdiction to adjudicate the issues raised by the instant claim, we must dismiss the claim."

Further, see Third Division Award 24804 ("This Board has no authority to review an arbitration award issued pursuant to the New York Dock Conditions.").

The Organization argues that the disputed work did not appear on the list of projects planned for outside contractors furnished by the Carrier, this is therefore not a dispute arising under Article I, Section 1(h) of the January 14, 1999 Arbitrated Implementing Agreement, but is a contracting dispute falling under the Scope Rule of the Agreement; and the Board has jurisdiction to consider this dispute. However, given the substantial jurisdictional question raised by the Carrier; the language in

Article I, Section 1(h) of the January 14, 1999 Arbitrated Implementing Agreement; and the clearly established precedent that the Board has no jurisdiction to consider disputes arising under implementing agreements established pursuant to New York Dock, the question of whether the work in dispute fell within the purview of Article I, Section 1(h) of the January 14, 1999 Arbitrated Implementing Agreement can only be decided by a duly authorized board constituted pursuant to New York Dock.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of March 2008.