

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39729
Docket No. MW-38784
09-3-NRAB-00003-050211
(05-3-211)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers 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 Train and Engine service employees to perform Maintenance of Way work (operate the Bridgeport Movable Bridge) at Bridgeport, New Jersey beginning on May 28, 2003 and continuing, instead of Philadelphia Division Bridge Operators G. Bell, J. Pezzalla and R. Dalton (System Docket MW-0067).**
- (2) As a consequence of the violation referred to in Part (1) above, the settlement resolution shall now be:**
 - ‘1.) That the aforementioned claimants will be compensated for 8 hours pay per day, starting with May 28, 2003, and continuing in accordance with Rule 26 (f) as a continuing claim, at the current rate for a Bridge Operator, for the time that these T&E employees spent performing this work.**
 - 2.) That the use of T&E employees to perform work which has been performed by BMW employees in the past, be stopped immediately and that this work**

will be assigned to employees under the jurisdiction of the BMWWE as it states in the current Agreement that is in effect.’”

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 Organization filed the instant claim on behalf of the Claimants, alleging that the Carrier violated the parties' Agreement when it assigned Train and Engine Service employees the work of operating the movable bridge at Bridgeport New Jersey, instead of assigning this work to the Claimants.

The Organization initially contends that it is clear that the character of the work involved in this dispute (the operation of the Bridgeport Moveable Bridge in Bridgeport, New Jersey) is encompassed within the scope of the Agreement. The Organization asserts that it was the parties' intent, when they negotiated the Agreement, that the work of operating bridges would accrue to an employee holding seniority as a Bridge Operator. Pointing to a number of Awards, the Organization argues that some job titles are sufficiently clear so as to reserve work to the employees holding seniority as such.

The Organization maintains that there can be no question that work of the character here is encompassed within the scope of the Agreement. Moreover, it is fundamental that work of a class belongs to those for whose benefit the contract was

made, and that delegation of such work to others not covered thereby is in violation of the Agreement.

The Organization emphasizes that the Carrier did not dispute the fact that the operation of the Bridgeport Moveable Bridge is work that historically and customarily has been performed by Maintenance of Way Bridge Operators. Based on the clear and unambiguous language of Rules 3 and 4, there can be no question that the Carrier violated the Agreement when it assigned UTU-represented Train & Engine Service employees to operate the Bridgeport Movable Bridge as of the claim dates. The Organization points out that even the UTU recognized that this work did not belong to the employees it represented. The Organization insists that there can be no debate that the work in question is squarely within the scope of the Agreement, and that the parties intended that this work is to be performed by the Claimants. Numerous Awards have held that work of a class belongs to those for whom the contract was negotiated.

The Organization contends that because Maintenance of Way Bridge Operators are separate and distinct from Train & Engine Service employees, and because these are separate and distinct classes/crafts, there is a distinct line of demarcation in the work accruing to each.

Addressing the Carrier's argument that technological advancement had served to eliminate the work of operating the bridge manually, allowing it to be positioned via remote control, the Organization emphasizes that the bridge still was being operated and only the method had changed, when the technological advancement worked smoothly. The Organization insists that although the work of operating this bridge may have been significantly decreased by the introduction of the remote control, it still was the work of operating the bridge. This work remained under the scope of the Agreement and contractually reserved to the Claimants, and the Organization points to a number of Awards in support of this position.

The Organization additionally relies on a large number of prior Awards in arguing that the proper rate of pay for a lost work opportunity is the rate of pay that the employee would have received absent the Agreement violation. The

Organization insists that the Claimants suffered a definite loss of work opportunity and a substantial loss of earnings. There can be no question that the Claimants suffered a very real and tangible loss in this case, and the Carrier's assertion that the claim is excessive is nothing but a blatant attempt to escape monetary liability. The Organization maintains that the remedy requested is entirely proper in that the instant claim merely seeks to make the Claimants whole for the Carrier's violation of the Agreement.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the record clearly demonstrates that following the installation of the fully automated and computerized bridge control system at the Bridgeport Moveable Bridge, there no longer was any need for a Bridge Operator to open and close the bridge for train traffic. The Carrier asserts that the implementation of the automated system eliminated the work previously performed by the Bridge Operator at Paulsboro who had to travel to Bridgeport to manually open and lower the bridge.

The Carrier argues that this case is a prime example of the Carrier implementing new technology for the purpose of increasing its operational efficiency and to eliminate unneeded tasks that hampered the effective use of its resources. The work previously performed by the Paulsboro Bridge Operator when he traveled to Bridgeport no longer is being performed by anyone. The Carrier points out that the only "human" element in the new process is that a member of the train crew enters a four-digit code in the keypad attached to the radio to transmit an electronic signal to the automated bridge control, instead of calling the Paulsboro Bridge Operator to travel to Bridgeport to manually operate the bridge.

The Carrier asserts that there was no transfer of work in this matter. The train crew member does not perform any work previously performed by the Bridge Operator. The Carrier contends that the train crew member simply announces the train's arrival at the bridge to the computerized control system, and then that system does the rest. The Carrier emphasizes that a number of prior Awards have held that the Carrier has the managerial right to eliminate work through

technological advances, and that the elimination of such work does not constitute a transfer of work to employees not covered by the Agreement. The Carrier contends that the train crew member continues to perform the basic functions that he or she has performed in the past, except that instead of communicating with the Paulsboro Bridge Operator, the train crew member communicates directly with the computer system that controls the bridge.

The Carrier then argues that the work at issue, the inputting of a four-digit code on a keypad, never has been performed by Bridge Operators or by any other class of employees under the Carrier-BMWE Agreement. The Carrier asserts that this simple task takes only seconds to perform, and it does not fall within the scope of the current Agreement. The Carrier asserts that the nature of this work does not justify the use of a Bridge Operator to perform such tasks, nor does it justify the payment of eight hours' pay to three employees, as sought by the Organization.

The Carrier points out that numerous Awards have declined claims where the nature of the work performed was minimal at best. The Carrier submits that the undisputed fact that the work of punching in a four-digit code into a keypad located on the train's radio takes only seconds to complete means that this work certainly falls under the definition of "de minimis." The Carrier asserts that even if there were some evidence that the disputed work ever had been performed by Bridge Operators, and there is none, the minimal task involved here would not give rise to a valid claim.

The Carrier then asserts that the claim as presented is excessive. The Carrier emphasizes that all three Claimants are fully employed and are occupying positions that pay a considerably higher rate than the Bridge Operator rate of pay. The Carrier insists that it is obvious that the Claimants have not been monetarily disadvantaged by the change in operation at the Bridgeport Moveable Bridge. Moreover, given that the work in dispute takes only seconds to perform, there is no rational basis for the amount claimed, nor is there any logical or contractual basis to assign this work to BMWE-represented employees.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization failed to meet its burden to prove that the Carrier violated the Agreement by having train and engine service employees operate a movable bridge in Bridgeport, New Jersey, instead of assigning a Bridge Operator to perform that work.

The record reveals that the Carrier installed a new automated bridge which allows the train crews to enter a code onto a keypad that activates the automated bridge. Consequently, with the new automated bridge, the trainmen are entering a code instead of calling for a manual bridge adjustment.

Numerous Boards have held that once there is new automated equipment that is installed that eliminates some aspects of work, the Carrier has a right to readjust its workforce to work with that new automated equipment. See First Division Award 26484 and Third Division Awards 30239, 30811, 31967, 35456, and 35513.

The Organization must present sufficient evidence to meet its burden of proof in cases of this kind. In this case, the Organization failed to meet that burden and, therefore, the claim must be denied.

AWARD

Claim denied.

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 26th day of June 2009.