

Form 1

Award No. 31523
Docket No. MW-30595
96-3-92-3-359

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

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(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 (James White Construction Company) to perform construction of retaining walls at Mile Posts 20.0 to 22.7, on the Monongahela Secondary at Dravosburg, Pennsylvania, beginning October 22, 1990 and continuing (System Docket MW-1766).

(2) As a consequence of the violation referred to in Part (1) above, Claimants M. D. Spikerman, D. J. Eshenbaugh, D. T. Smith, J. B. Spiering, J. B. Cypher, C. E. Chronick, M. V. Uhring, A. B. Roney, W. G. Devlin, J. Bakos, R. C. Atkinson, W. J. Duffy, R. J. Spehar, L. E. Kowalski, G. E. Little and L. E. Elizeus shall each be allowed eight (8) hours' pay and two (2) hours' pay at their respective time and one-half rates of pay for each day the outside forces performed said work."

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 waived right of appearance at hearing thereon.

By letter dated August 24, 1990, the Carrier gave the Organization the following notice:

"This is to advise that we intend to contract for the construction of 6,930 linear feet of precast concrete retaining wall along our Monongahela Line (MP 20.0 to MP 22.7) Dravosburg, PA.

The project involves construction of two types of retaining wall structures to replace failing Timber Crib retaining walls. The first type consists of H-Piling augured in place with precast concrete lagging sections set between the H-Piles. The second type consists of precast concrete wall units installed by excavating the railroad embankment, installing the wall units, then backfilling.

Construction of these retaining walls must be handled expeditiously because our existing railroad embankment is failing and spilling onto the adjacent PA State Route 837 creating a hazard to vehicular traffic and poses a direct threat to the track structure.

Aside from the immediacy factor, Conrail does not have the necessary auguring, lifting, excavating, compacting, paving and traffic control equipment, nor do we possess the necessary expertise to perform this work.

We suggest we list this matter for discussion at our meeting scheduled for August 30, 1990, at 10 a.m."

Conference between the parties on August 30, 1990 did not change the Carrier's intention to contract out the work. By letter dated September 19, 1990, the Carrier provided information requested by the Organization at the August 30, 1990 meeting. Specifically, the Carrier provided information about cost of the contract (labor and material); start and completion date of the project (September 17, 1990 to be completed by year's end); and information on traffic control. The Carrier also responded to the Organization's other questions as follows:

"3. Q. What is different on this project in comparison to other types of retaining walls installed by our employees?

- A. This project involves the construction of two different types of retaining walls, neither of which have been typically installed by Conrail forces. They consists [sic] of H-pile and concrete lagging type wall and a precast concrete 'L' shaped type wall as opposed to a 'poured in place' type wall typically constructed by Conrail forces. The construction is severely complicated by the close proximity of the adjacent State Highway and the need to drill and install H-pile sections, in rock in some areas, beneath overhead Hi-Voltage power lines which cannot be relocated due to the River, immediately adjacent to the Highway.
4. Q. What is involved in the paving work?
- A. The project involves approximately 1600 SY of paving along the State Highway shoulder adjacent to the Precast 'L' Wall sections. This paving must be done in conjunction with installation of the wall sections since the paving is considered a structural component of the wall construction in these areas."

Claim was filed on November 4, 1990 alleging that the Carrier violated the Scope Rule of the Agreement "when it assigned outside forces to perform construction of retaining wall starting October 22, 1990 ... and did not give the General Chairman advanced written notice of its intention to contract said work."

We find that the Organization has not carried its burden in this case.

First, and clearly, notice was given by the Carrier to the Organization of the Carrier's intent to contract out the work in question. The Carrier's August 24, 1990 notice detailed the retaining wall work contemplated by the Carrier. Contrary to the Organization's argument, we find that the notice also sufficiently encompassed the paving work associated with the project ("Conrail does not have the necessary ... paving ... equipment") so as to put the Organization on notice that paving work was part of the project.

Indeed, the record shows that the Organization was fully aware of the Carrier's intentions concerning paving work as part of the project. As shown by the Carrier's September 19, 1990 letter, the Organization made specific inquiry at the August 30,

1990 conference concerning the paving work ("What is involved in the paving work?"). The Carrier's notice obligations have been met.

Second, the Organization argues that the retaining wall construction work involved in the project was ordinarily and customarily performed by Carrier forces. The Carrier effectively concedes that in the past its forces have constructed retaining walls. In its September 19, 1990 response to the Organization's questions from the August 30, 1990 meeting, the Carrier stated that "... retaining walls ... have been ... installed by Conrail forces." Giving the Organization the benefit of the doubt that Carrier forces have in the past constructed retaining walls, the record does not disclose that the Carrier's forces have performed the type of work involved in this particular project ("H-pile and concrete lagging type wall and a precast concrete 'L' shaped type wall as opposed to a 'poured in place' type wall typically constructed by Conrail forces"). As developed by the correspondence on the property, the record discloses only one specific incident identified by the Organization ("Pictures of a wall constructed by BMW force at Manor, Pa in 1988"). That incident cited by the Organization is not sufficient to refute the Carrier's assertions that the work in dispute was of a different nature than that previously performed by the Carrier's forces.

Third, with respect to the Organization's allegations concerning the contracting out of the paving work aspect of the project, again we find that the Organization has not carried its burden. This aspect of the dispute was initially incidental to the retaining wall work which was the original primary focus of the claim. However, the paving work question remains. Again we find that as developed by this record the Organization has not shown that the specific paving work in question was of the type ordinarily and customarily performed by the Carrier's forces. See Third Division Award 30540 (where the majority found that "[t]here is convincing evidence that the 'hot asphalt' work has not been regularly performed by Carrier forces and is not contractually reserved to them.").

Fourth, with respect to the Organization's arguments in this case relying upon the Berge-Hopkins letter of December 11, 1981, see Awards 30515 and 30540, ("The issue of whether the Berge-Hopkins [letter] is applicable has now been resolved in an Award which is confined solely to this question. Public Law Board No. 1016, Award 66-A, issued on January 18, 1993, found that the Berge-Hopkins letter is not applicable on this Carrier's property."). Those arguments made by the Organization are therefore not persuasive.

Finally, this Board does not have jurisdiction to consider other arguments made by the Organization in this case which are premised on matters outside of the terms of the Agreement.

Based on the record before us, the Organization has not carried its burden in this case. The claim will 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 25th day of July 1996.