

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31821
Docket No. MW-31287
96-3-93-3-303**

The Third Division consisted of the regular members and in addition Referee W. Gary Vause 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 (General Contractor Koski Construction Company and its sub-contractors) to perform track construction work (remove trackage, replace sub-grade ballast and drainage, replace and reconstruct the existing ‘3 Belt’ trackage and begin to construct a new set of wider gauge rails for the newly purchased ‘Stacker-Reclaimer’ machine) at the Ashtabula Conrail Coal Dock beginning on August 12, 1991 and continuing through September 16, 1991 (System Docket MW-2477).

(2) As a consequence of the violation referred to in Part (1) above, Claimants C.J. Campbell, C.L. Ferry, S.E. Wardian, D.L. Allen, M.E. Norr, J.P. Agnew, J.A. Keller, F.W. Ryhal, R. Herrera, A.L. Wallace, G.J. Walter, Sr., C.N. Troupe, Jr., D.A. McCullough, C.R. Feterholf, J.V. Shumaker, M. Luc, Jr. and D.P. Rill shall each be compensated at their applicable and respective rates of pay for each and every day the contractor was on the property and they shall receive credit for all other benefits lost as a result of the work being assigned to outside forces.”

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.

Claimants have each established and hold seniority within the Carrier's Track Department and were assigned to their respective positions on the Ashtabula Subdivision on the Carrier's Youngstown Seniority District.

Under date of April 8, 1991, the Carrier gave written notice to the General Chairman of its intent to contract out the construction of a new Stacker-Reclaimer at the Conrail Coal Handling Facility located at Ashtabula, Ohio. The notice provided the following details:

"In order to support the erection and operation of the new stacker-reclaimer, it is also necessary to contract for sitework including installation of 3,700 feet of new crane rail type tracks with concrete ties and supporting engineered stone berms. There is no standard track construction involved in this project. Track work is limited to crane rail type construction on concrete ties and engineered stone berms due to the heavy loadings imposed by the new stacker-reclaimer equipment."

The notice further stated that this type of work has customarily been performed by contractors and that the work could not be piecemealed because of the need to maintain coal handling operations at the facility throughout construction. The notice concluded by stating that detailed staging of the site construction is required as well as close coordination with the stacker-reclaimer erection contractor.

A meeting between the Senior Director-Labor Relations and the General Chairman was held on April 24, 1991. The Senior Director advised the Organization that the new crane rail type tracks being installed by the contractor "would be maintained by Conrail BMWF forces as the previous stacker-reclaimer rail was in the past."

The dock's operations were shutdown during the construction period to allow the contractor to temporarily remove existing trackage (known as 3 Belt), replace sub-grade ballast and drainage, replace and reconstruct the existing "3 Belt" trackage and construct a new set of wider gauge rails for the newly purchased stacker-reclaimer machine.

The Organization claims that the Carrier violated the Scope of the Agreement and Rule 1 on August 12, and continuing through September 16, 1991 when it permitted Koski Construction Company and its subcontractors to perform track construction at the Ashtabula Conrail Coal Dock. The Organization argues that work of the character involved had historically and traditionally been assigned to and performed by the Carrier's forces and was Scope covered, and that the true intent of the notification requirement was not met because the matter was not discussed in good faith with the General Chairman. The Organization argues that the 17 Claimants collectively possessed the necessary skills and qualifications to have completed this assignment and asserts that each Claimant should be compensated at their applicable and respective rates of pay for each day that the contractor was on the property, and paid all other lost benefits and credits.

During the handling of the dispute on the property, the Carrier took the position that the work does not fall within the Scope of the Agreement and that notice of intent to contract the work was provided to the General Chairman in a letter dated April 8, 1991.

In the appeal to the Acting Senior Director - Labor Relations, the Organization alleged that the subcontracting work violated the terms of the Regional Rail Reorganization Act and the terms of the December 11, 1981 Agreement, generally known as the Hopkins/Berge Letter. The Carrier argues that this Board has no jurisdiction over cases involving the Regional Rail Reorganization Act and that the Hopkins/Berge Letter does not apply to this Carrier.

Notice was provided in the Carrier's letter to the General Chairman dated April 8, 1991. Subsequent correspondence in evidence establishes that the meeting between the General Chairman and the Carrier's representative involved discussions which resulted in an agreement that the tracks being installed by the contractor would be maintained by the Carrier's BMW forces.

The Organization's argument that the Carrier violated the December 11, 1981 Letter of Agreement, generally known as the Hopkins/Berge Letter, is without merit. Special Board of Adjustment No. 1016 in Awards 66-69 accepted the Carrier's position on this issue and held that the Hopkins/Berge Letter is not applicable to the Carrier's property.

The Organization failed to prove that this Board has jurisdiction over its claim based on the Regional Rail Reorganization Act. The Carrier and Organization entered into an Agreement dated October 25, 1985 which specifies that disputes involving the Act shall be heard by Special Board of Adjustment No. 978.

The remaining issue in this case is whether the installation of the non-standard, specialized track at the Ashtabula Coal Dock Facility is protected work under the Scope Rule of the 1982 Agreement, and whether the Scope Rule was violated when the Carrier contracted the work to an outside firm.

The parties to the instant case have been involved in numerous cases before the Third Division in which this Board concurred with the position now taken by the Carrier. The Scope Rule is general in nature and the work involved in the instant case is not specifically identified in the Rule. As the moving party, the Organization must demonstrate that such work traditionally and customarily has been performed by BMWWE represented employees. See Third Division Awards 27629, 24508, 26711, 27626. The Organization's attempt to prove a past practice of doing this particular kind of work was not supported by the evidence.

The Organization entered into evidence two written employee statements with its appeal letter to the Senior Director, but neither proves that BMWWE represented employees were responsible for the installation of a new specialized track project of the type or magnitude involved in this case. Although both statements make general assertions that this type of work has always been performed by BMWWE represented employees, the specific examples given in the two employee statements described repair and maintenance activities unlike the project involved in this case.

The Carrier has taken the position throughout the handling of this case, both on the property and before this Board, that this project was unique and required specialized skills and equipment, and that the stacker-reclaimer machine was unlike any other machinery on the Carrier's system.

The Organization provided no evidence that BMWWE represented employees have ever installed track of the nature involved in this case, or that they have been responsible for the construction of a track project of this magnitude at the Ashtabula Docks or elsewhere within the system.

Third Division Awards support the Carrier's argument that it need not break up a major project into piecemeal craft work. See, e.g., Third Division Awards 26850, 28739, 28891 and 29187.

Based upon our consideration of the record, and consistent with our prior decisions, this Board cannot find sufficient evidence to support the contention that the Agreement has been violated. Therefore the claim is denied for lack of proof.

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 December 1996.