

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31827
Docket No. MW-31305
96-3-93-3-274**

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 or otherwise permitted outside forces (Nyleve Corporation Company) to perform repair work on the Pattenburg Tunnel, Pattenburg, New Jersey beginning August 5, 1991 and continuing (System Docket MW-2422).

(2) As a consequence of the violation referred to in Part (1) above, the 16 Claimants * listed below shall each be allowed ten (10) hours' pay, at their respective straight time rates, for each day worked by the outside forces beginning August 5, 1991 and continuing until the violation ceases.

* Mr. D. Brulia	Mr. W. Slingland
Mr. C. Muffley	Mr. J. Zenz
Mr. D. Sell	Mr. K. Rothermel
Mr. G. Sell	Mr. S. Takacs
Mr. G. Sanchez	Mr. D. Kurak
Mr. R. Zerfuss	Mr. R. Matushoneck
Mr. J. Skraban	Mr. W. Abraham
Mr. D. Day	Mr. C. Hansler"

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 March 14, 1991, the Carrier furnished the Organization notice of its intent to contract out specified work in connection with the rehabilitation of the Musconetcong Tunnel, Pattenburg, New Jersey, on the LeHigh Line of the Philadelphia Division of the LeHigh Seniority District. There is no dispute that the Carrier complied with the notice requirements of the Agreement.

The Claimants were assigned to their respective positions and were performing service for the Carrier within the New Jersey Division at the time the work in question was performed by the outside forces.

The Carrier's letter of notice explained that the project required specialized equipment which the Carrier did not possess, and which Carrier forces were not skilled to operate. It also explained that time constraints prevented the Carrier from piecemealing any small portion of the project for which Carrier Maintenance of Way forces were equipped and/or qualified.

The Organization asserted that its members had performed this work in the past and attached a statement from members that they had performed concrete work in the same tunnel in 1988. The Organization took the position on the property that the Carrier violated the December 11, 1981 Hopkins/Berge Letter of Agreement.

The Carrier denied the appeal and reiterated its earlier statement of reasons. The Carrier added that the monetary claim was excessive as Claimants were fully employed at the relevant times and therefore not monetarily aggrieved.

The issue in this case is whether the Carrier violated the Agreement by contracting out work to outside forces to perform the tunnel repair work.

The Organization argues that work of the character involved in the instant case is encompassed within the Scope of the Agreement and has customarily and historically been performed by Carrier forces; the Carrier's contentions regarding equipment availability are erroneous; and the Carrier's piecemeal argument is without merit.

The Carrier argues that the disputed project involved special skills and equipment not possessed by the Carrier or its employees. Therefore, the contracting was allowed by the Agreement, and the employees failed to show any violation of the Agreement. The Carrier further argues that it was not required to piecemeal a small portion of the disputed project to provide work for its BMW force; that the statement submitted by the Organization does not support its case; and the Organization's contention that the Carrier violated the December 11, 1981 Hopkins/Berge Letter fails, as this Carrier was never a party to that Letter. Should the Board disagree with the Carrier and find that the Agreement was violated, it is the Carrier's position that no monetary award would be due the Claimants because no Claimant suffered any monetary loss or loss of work due to the disputed contracting.

The Carrier argues that it followed the letter of the Scope Rule, which reads in pertinent part as follows:

"SCOPE

In the event the Company plans to contract out work within the scope of this Agreement, except in emergencies, the Company shall notify the General Chairman involved in writing as far in advance as is practicable and in any event not less than fifteen (15) days prior thereto. "Emergencies" applies to fires, floods, heavy snow and like circumstances.

If the General Chairman, or his representatives, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative shall make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the Company may nevertheless proceed with said contracting and the organization may file and progress claims in connection therewith."

The record reflects that the Carrier did give proper notice and a conference was held with the General Chairman.

The record also shows that the Carrier did not possess the proper equipment or the skilled manpower to complete the disputed tunnel rehabilitation project. The position that contracting is proper in cases where the work requires specialized equipment and skills has been upheld by many Third Division Awards. See, e.g., Third Division Awards 26850, 28891, 29024, and 29558.

Once the Carrier asserted this affirmative defense, the burden was on the Organization to show that the necessary equipment was available for rental without an Operator, and to identify where it was available. The Organization did not offer any evidence to show that any BMWWE represented employee is licensed to operate the necessary special equipment (e.g., the high-pressure water demolition equipment described in the Carrier's notice) or that any represented employee is qualified to use any of the equipment specified.

The statement submitted by the Organization in this case does not support its position because it only describes unsuccessful concrete work performed by BMWWE represented employees three years earlier, and does not demonstrate their entitlement to work on the entire disputed project.

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

The Organization's contention that Carrier violated the December 11, 1981 Hopkins/Berge Letter fails because this Carrier was never a party to that letter. This conclusion is supported by the holding of a Special Board of Adjustment in a case involving the same parties to the instant dispute:

"The record as a whole does not establish that the disputed Hopkins/Berge Letter dated December 11, 1981 was preserved by the single Conrail-BMWWE Agreement effective February 1, 1982, and/or that the said letter is applicable on the Conrail property." (Special Board of Adjustment No. 1016, Award 66-A.)

Based upon the facts established in the record, and in keeping with our prior decisions regarding contracting of work, 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.