

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36795
Docket No. MW-36263
03-3-00-3-491**

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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 (Great Lakes Construction Company) to perform Maintenance of Way work (demolish and remove a bridge and fill gap cause by removal with ballast and tamp with compactor) at the bridge at Mile Post 0.45 on the Cleveland Short Line in Cleveland, Ohio beginning on April 22 and continuing through May 8, 1998 [Carrier's File 12(99-642)].**
- (2) The Agreement was violated when the Carrier assigned outside forces (Great Lakes Construction Company) to perform Maintenance of Way work (burning out anchor bolts and removing steel structures and concrete support bases) at the Catenary Structures between Mile Posts 0.0 and 5.0 on the Cleveland Short Line in Cleveland Ohio on May 11 and continuing through May 15, 1998 [Carriers File 12(99-643)].**
- (3) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out said work or discuss the matter in good faith as required by the Scope Rule.**

- (4) As a consequence of the violation referred to in Parts (1) and/or (3) above, Claimants K. G. Champa, F. R. Hoyt, J. D'Orazio, S. J. La Cavera and R. H. Zinni shall now each be compensated for eight (8) hours' pay at their appropriate straight time rates of pay for each date of April 22, 23, 24, 27, 28, 29, May 4, 5, 6, 7, and 8, 1998.
- (5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants K. G. Champa, F. R. Hoyt, R. H. Zinni and K. Watts shall now each be compensated for eight (8) hours' pay at their appropriate straight time rates of pay for each date of May 11, 12, 13, 14 and 15, 1998."

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 combined two claims in this docket. Between April 22 and May 8, 1998, the Carrier employed Great Lakes Construction, to "demolish an old roadway bridge" at MP 0.45 on the Cleveland Short Line. The contractor then filled the gap with stone. During the period of May 11 - 15, 1998 Great Lakes Construction removed "old steel Catenary Structures" between MP 0.0 and 5.0 on the Cleveland Short Line.

In each claim the Organization asserts that its employees have "historically" done this work. Specifically, the Assistant General Chairman contended that:

"This claim is for eight hours each day at the Claimants appropriate straight time rates of pay when the Carrier violated the Scope, Rule 1, Rule 3 of our 1996 Agreement and Article XV of the 1996 National Agreement when it called and used an outside contractor on April 22, 23, 24, 27, 28, 29, May 4, 5, 6, 7 & 8, 1998 at Mile Post 0.45 on the Cleveland Short Line in Cleveland, Ohio.

On the claim dates, it was determined by the Carrier Supervision to use this outside concern to perform duties that are consistent with the functions of M of W employees prescribed in our Agreement. Rather than calling the Claimants who were ready, willing, qualified and able to perform these duties, the Carrier Supervision used this outside contractor.

The Carrier violated the Scope Rule of our Agreement when it failed to give the General Chairman advanced written notice that this work was to be performed by an outside concern, which alone makes this a valid claim."

In its denial of the claims, the Carrier contended that the work undertaken by Great Lakes Construction was demolition of catenaries, "which is not typically undertaken by B&B forces." The Carrier went on to note that the Organization was provided notice that the work would be contracted, per the Agreement between the parties.

At the outset, we note that the Division Engineer erroneously stated that notice had been served regarding the contracting in both claims noted supra. In the circumstances however, we concur with the Carrier's contention that notice was not required for the demolition work because there is not even a colorable showing that it was covered by the Scope Rule or by custom, practice or tradition thereunder, thereby rendering that portion of the claim invalid.

Turning to the merits issue, in order to prevail in this dispute it was incumbent upon the Organization to: (1) cite specific language within the applicable Scope Rule that reserves demolition work to the Claimants; or, (2) demonstrate that

BMWE-represented employees had by customary and historical practice performed the disputed work. The Organization was unable to shoulder that burden on the record before the Board. Rather, the record evidence supports the Carrier's contention that the work which Great Lakes Construction performed on the dates at issue "was of the type not typically undertaken by B&B forces," and that same has "historically been contracted out on Conrail."

Premised upon the foregoing, this 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 29th day of December 2003.