

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37169
Docket No. MW-36264
04-3-00-3-495

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen 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 (B&B Excavating Company) to perform Maintenance of Way work (build roadway, dig drainage ditches, install plastic pipe and concrete catch basins) between Mile Posts 7 and 9 on the Cleveland Short Line in Cleveland, Ohio beginning on May 11 and continuing through June 5, 1998 [Carrier's Files 12(99-543) and 12(99-644)].
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out the work described in Part (1) and (2) above as required by the Scope Rule.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants K. G. Champa, F. R. Hoyt, R. H. Zinni, K. Watts, J. D'Orazio and S. J. LaCavera 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, 15, 18, 19, 20, 21, 22, 26, 27, 28, 29, June 1, 2, 3, 4 and 5, 1998, and credit toward vacation and all other benefits.”

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.

Under date of March 19, 1998, Senior Director-Labor Relations J. H. Burton notified the BMW General Chairmen in Pennsylvania and Ohio as follows:

“File: 013.27.04-1690 Installations of Ballast Pads, Cleveland & Berea, Ohio

Gentlemen:

Solely as information, we intend to contract for the necessary grading, drainage and ballast pad construction to support the track construction at Berea, Ohio and on various locations along the Short Line in Cleveland, Ohio. The contractor will distribute, grade and compact the ballast on Conrail property. This work is for the construction of a second track for the Short Line and for the construction of a second track at Berea. Conrail forces will perform all track construction.

We do not possess the necessary equipment and qualified operators to do the grading work required to meet the project schedule. In any event, the Carrier anticipates that it will recall furloughed BMW employees before the time we award the contract.”

Pertinent to this case, General Chairman P. K. Geller, Sr. responded by letter dated March 31, 1988, as follows:

"Reference your letter dated March 19, 1998 addressed to both Mr. Jed Dodd, General Chairman and myself, received in my office March 23, 1998 relative to the above subject.

I believe you are aware I am opposed to your request contending this work is not covered by the Scope and the M/W hasn't performed this work. The Scope is clear that work previously performed on the former territory will not be removed from them. Moreover, I must point out that the work to be performed in this instance is clearly covered by the Scope. One cannot argue that maintenance and repair of tracks and right-of-ways, roads, parking facilities, drainage repairs and crossings are not railroad Maintenance of Way work. Also the installation of ballast pads.

Also, you contend that the BMW does not possess the necessary equipment and qualified operators to perform the grading work. It is my position that the carrier has not provided any evidence to support to support these statements. The equipment required for this work is available on the property and if there is equipment which you contend you do not have, please advise so that we can contact a vendor to rent or lease equipment required to perform this BMW work. The carrier has failed to provide any evidence that our forces are not skilled for this assignment."

There is disagreement between the parties concerning the Carrier's compliance with the notice and "notice deliberation" conference requirements of the Scope Rule. However, the notice is not fatally deficient and our review of the evidence reveals an exchange of correspondence in April 1998 confirming such notice and conference. Thus, we are persuaded that Part 2 of the claim must be denied and we turn our attention to the positions of the parties on the merits issue of the claim, as presented on the property.

The accuracy of the following description of the specific work at issue in this case, set forth in the claim letter, was never disputed or contradicted in handling on the property:

"On the above dates six employees from B&B Excavating Co. performed the duties of a Foreman, Mechanics, and Machine

Operators. They performed this work with a bulldozer, front end loader and a backhoe. This work consisted of installing 12" plastic pipe and concrete catch basins in the tunnels and along the main line track for the new track that is to be installed."

The question presented for determination is whether performance of that work on the claim dates by employees of B&B Excavating Company, under subcontract with the Carrier, violated the contractual rights of the Claimants under the Scope Rule of the controlling Conrail/BMWE Agreement. From the probative evidence and authoritative precedents in the case record before us in this matter, we are persuaded that question must be answered in the affirmative.

The respective positions and arguments presented by the parties in this case are not matters of first impression. Indeed, the drain pipe and catch basin work in dispute in this case is virtually indistinguishable from that considered and discussed by the Board in a sustaining decision in Third Division Award 37046 (cited by the Organization) whereas the denial decision in Third Division Award 30845 (cited by Carrier) concerned "so-called sub-ballast work." In Third Division Award 37046 the Board found that the Carrier failed altogether to give notice or hold a conference and had this to say about Scope Rule coverage of the specific work at issue:

"The specific work performed by the contractor as described by the Organization was the installation of water drainage lines between and parallel to the tracks in the receiving yard and road railer tracks and installation of distribution boxes to connect the various lines in Rochester Yard. The work required the contractor to use two dump trucks, two Machine Operators (backhoe and front-end loader), a Foreman and two Laborers.

*** * ***

The Scope Rule covers "... work generally recognized as Maintenance of Way work, such as ... construction, repair, and maintenance of water facilities. ... Rule 1 of the Agreement lists the operation of front-end loaders and backhoes as work, covered by the Agreement. Further, Rule 1 encompasses the operation of vehicles, which we find includes dump trucks. ... Therefore, the kind of work involved in this dispute - installation of water drainage lines and distribution boxes to

connect the various lines through the use of front-end loaders, backhoes, and dump trucks - is work 'within the scope of this Agreement.'

* * *

The Carrier's argument that the Organization must show that Maintenance of Way employees exclusively performed the work in contracting out disputes is not persuasive and has long been rejected.

* * *

The Carrier's argument that the Organization has not shown that it has performed the precise work at issue also does not change the result. . . . The type of work in dispute is work 'within the scope of this Agreement.' That is as far as our inquiry can go.

* * *

There is no evidence that the project involved in this matter was of such character that BMW-represented employees could not perform the tasks or that such specialized equipment was involved. In this case, the contractor used dump trucks, a backhoe, and a front-end loader. That is the kind of equipment that the covered employees routinely use."

Nothing in the decision of the Board in Third Division Award 37046, in which the specific work at issue, the parties and the contract language are identical with the issue, parties and language in the present case, persuades us that it was wrongly decided or that its findings should not be considered dispositive of the present claim. We have often pointed out with only marginal success that the penchant of these parties for forum shopping and seemingly endless re-litigation of matters which should be settled by a soundly reasoned "final and binding" arbitration decision has served no useful purpose and generated much mischief.

Specifically, this claim is sustained because the water drainage line and catch basin work subcontracted by the Carrier over the objection of the Organization was "within the Scope of the Agreement" and the Carrier failed to provide any evidence to support its bare assertions of affirmative defenses i.e., that the project involved in

this matter was of such character that BMW-represented employees could not perform the tasks and/or that any specialized or unavailable equipment was required or used.

As for the appropriate remedy, we find Third Division Award 37046 to be on point, persuasive and dispositive:

“[I]n these kinds of disputes, make whole remedies are granted to employees for lost work opportunities even though those employees may have been working. See Third Division Awards 32335, 31594 and 30944.”

Based on all of the foregoing, the Carrier is directed to compensate each Claimant an equal and proportionate share of all straight time and overtime hours expended by the outside forces in performance of said work at his/her respective rate of pay.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of September 2004.