

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39728
Docket No. MW-38783
09-3-NRAB-00003-050207
(05-3-207)**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(ITB Rail Conference
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 (W. E. Yoder Railroad Construction and JMG Construction) to perform Maintenance of Way work (replacing grade road crossing) at Petersburg Road Crossing in Tuckahoe, New Jersey on December 4, 5, 6 and 9, 2002, instead of Messrs. J. Ganzell, III, M. Ayala, W. Miller, M. McCarthy, G. Lee, H. Johnson, L. Venable, C. Richardson, A. Duffy, W. Rankin, J. Pezzella and W. Baals (System Docket MW-0066).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants J. Ganzell, III, M. Ayala, W. Miller, M. McCarthy, G. Lee, H. Johnson, L. Venable, C. Richardson, A. Duffy, W. Rankin, J. Pezzella and W. Baals shall now each ‘. . . be compensated for 11 hours per day, for the days December 4, 5, 6 and 9, 2002, at the current rate for a Track Foreman, Class I & II Machine Operator, Vehicle Operator and Trackman respectively, for the time that these contractors spent performing this 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 were given due notice of hearing thereon.

The Organization filed the instant claim on behalf of the Claimants, alleging that the Carrier violated the parties' Agreement when it assigned outside forces to perform the work of replacing a grade crossing in Tuckahoe, New Jersey, instead of assigning this work to the Claimants.

The Organization initially contends that a number of Awards have established that road crossing renewal work is scope-covered work. The Organization asserts that the Carrier tried a "new" wrinkle, "new" materials and a "new" method of insuring the safe and stable transition of traffic over one of its grade crossings, but the salient point is that the work essentially was the same irrespective of the method or materials used.

The Organization argues that the lack of crossties in the Star Track crossing design more than compensates for the additional time spent compacting and leveling the sub-grade to precise tolerances. As for the installation of the prefabricated modular concrete panels, the Organization points out that Maintenance of Way forces have installed crossings with modular concrete panels in Baltimore, as well as with wooden panels and various rubberized panels at hundreds of locations. These installations required the use of various hoisting equipment, as well as fastening systems to attach the panels to the underlying crossties. The Organization emphasizes that these other installation methods required more time, material, and

manpower than the “new” Star Track crossing, which is far more simplified and easier to install. The Organization argues that although the Carrier may have established that the Star Track system was new and more sophisticated from an engineering-design standpoint, it failed to prove that the installation of this crossing system involved any special skills or methods that the Claimants did not possess. The Organization therefore asserts that the Carrier failed to establish any basis for removing the crossing renewal work from those whom the Agreement intended to perform the work.

Addressing the Carrier’s “purchase and delivery” defense, the Organization maintains that this was not a “purchase and delivery” situation. It contends that the Carrier instead contracted with two outside contractors for the labor of removing, installing, and paving of the road crossing in Tuckahoe, New Jersey. The Organization insists that the Carrier’s comment that a manufacturer’s representative was present to “supervise” actually supports the Organization’s position that the outside contractors replaced, rather than supplemented, Maintenance of Way forces. The Organization suggests that the manufacturer’s representative could just as easily have “supervised” the Claimants’ performance of the work.

As for the Carrier’s “full employment” defense, the Organization argues that the Board has repeatedly rejected this defense. The Organization asserts that the Claimants lost a valuable work opportunity when their work was contracted to outside forces, and the claim is payable in order to protect the integrity of the Agreement.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that it properly followed the Scope Rule’s procedures for the contracting out scope-covered work. Well in advance of contracting out the disputed work, the Carrier notified the General Chairman of its intent to purchase pre-fabricated modular grade crossing surfaces, including delivery and installation, for various locations, including the crossing involved here. The Carrier thereafter met and fully discussed this contracting project with the

Organization. The Carrier points out that the parties were unable to reach an understanding regarding this contracting project. The Carrier nevertheless proceeded with the contracting, as provided for in the Scope Rule, while the Organization exercised its right to file the instant claim.

The Carrier asserts that there is no dispute that the Carrier's BMW forces never installed this type of pre-fabricated modular road crossing in the past. The Carrier points out that the Baltimore crossing, which the Organization described as similar, actually differs significantly from the Star Track system in that the Star Track system requires strict tolerances in the sub-base preparation and the rail must be installed in such a way as to tie the entire project together. The Carrier acknowledges that its forces have performed some of the work involved in installing standard road crossings, but they never installed any road crossings comparable to the pre-fabricated modular Star Track system.

Pointing to prior Awards involving other non-standard construction work, the Carrier argues that the Organization cannot sustain its burden of proof in this matter. The Carrier insists that its forces never performed certain of the tasks that are associated with installing the Star Track system, including paving with hot asphalt mix. Such work routinely has been contracted to outside firms.

The Carrier asserts that there have been numerous arbitration Awards on the issue of paving road crossings. The Carrier points out that although a few of these resulted in some payment being made, most of these Awards were based on the Carrier's failure to give advance notice and/or did not involve hot asphalt mix paving. The Carrier insists that several of the prior Awards should be dispositive on the issue and support the Carrier's position that if proper advance notice is given and a conference is held, the Carrier has the right to contract out hot asphalt mix paving. This is not work that historically or customarily has been performed by BMW-represented forces on this property.

The Carrier goes on to contend that it does not possess the specialized equipment required for this project. The Carrier asserts that because it now basically performs terminal switching, there is no need for the Carrier to have such equipment as part of its maintenance arsenal. The Carrier emphasizes that the

Organization never refuted that such equipment was neither owned nor readily available for the Carrier's use. The Organization also did not refute the Carrier's defense that the Claimants were not qualified to operate some of this specialized equipment. The Carrier then argues that there are a number of Awards that have upheld the Carrier's right to contract out work when it does not possess the proper equipment or the skilled manpower to complete a project.

The Carrier asserts that it made a business decision to utilize the Star Track road crossings at certain locations, and it purchased these road crossings with delivery and installation included as part of the total cost of the product. The Carrier insists that the Scope Rule does not prohibit the Carrier from making this type of transaction, and the Carrier cites a prior Award in which it was found that when the Carrier purchased a product whose price included installation, it did not violate the Agreement. The Carrier emphasizes that its position is even stronger in the instant case because the disputed work was not ordinarily or customarily performed by the Carrier's BMW forces, and the Carrier did not possess the necessary equipment or skilled manpower to perform this project.

The Carrier then argues that the claim for 11 hours' pay for each Claimant is excessive. The Carrier points out that the Claimants were fully employed during the claim period, and they suffered no monetary loss as a result of the contracting out of the disputed work. The Carrier asserts that a number of prior Awards support the Carrier's position on this issue.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization failed to meet its burden to prove that the Carrier violated the Agreement when it subcontracted work at Petersburg Road Crossing in Tuckahoe, New Jersey, on several dates in December of 2002. The record reveals that the Carrier properly gave the Organization notice of the proposed subcontracting and that the work itself was work that involved specialized equipment, as well as skills that were not available to the Carrier among its own employees.

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Moreover, in Third Division Award 38245, the Board held that renewing road crossings and doing work similar to that which was performed in this case, is work that the Carrier has a right to contract. See also Third Division Awards 30540 and 39693, as well as Public Law Board No. 5938, Award 1.

For all of the above reasons, 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 26th day of June 2009.