

and in Case No. 64, Public Law Board No. 3781.

The Organization's contention that the disputed letter is part of the parties' single Agreement effective February 1, 1982, and is applicable on Conrail property, is controverted by Conrail.

This Opinion and Award does not make Findings, except for the herein Findings, on the claims in the enumerated cases: Nos. 66 through 69, Special Board of Adjustment No. 1016; and No. 64, Public Law Board No. 3781.

## **II. POSITION OF THE PARTIES**

The position of the Organization, as summarized at page 24 of the Organization's submission on all of the cases enumerated hereinbefore, is as follows:

### **"SUMMARY"**

- 1. The Carrier's position is based on new argument and evidence that was never made a part of Case Nos. 66-69 of Special Board of Adjustment No. 1016 or Case No. 64 of Public Law Board No. 3781 during the handling on the property.*
- 2. The December 11, 1981 Hopkins/Berge letter is part and parcel of the December 11, 1981 National Agreement.*
- 3. The Hopkins/Berge letter applies to every carrier that is covered by the December 11, 1981 National Agreement. It is NOT restricted to just those carriers that directly adopted Article IV of the May 17, 1968 National Agreement.*
- 4. Conrail is covered by the December 11, 1981 National Agreement by virtue of the May 5, 1981 Agreement.*
- 5. Appendix "B" of the February 1, 1982 Conrail Schedule Agreement did NOT "terminate" the December 11, 1981 Hopkins/Berge letter on Conrail.*
- 6. The NRAB previously applied the Hopkins/Berge letter to Conrail in Award*

*26314. Notwithstanding a referee hearing, executive session and written dissent, the Carrier never challenged the finding of Award 26314 that the Hopkins/Berge letter applies on Conrail. A better application of the principle of stare decisis could hardly be imagined."*

The Carrier's position on the Question at Issue, as stated at page 12 of the Carrier's submission, is as follows:

*"As demonstrated herein the December 11, 1981 Hopkins-Berge side letter on contracting out is not applicable on Conrail because it concerns the 1968 National Rule and neither that rule nor the side letter were preserved in the February 1, 1982 Conrail single agreement."*

### **III. DISCUSSION AND FINDINGS**

#### **STARE DECISIS**

The threshold consideration presented by the confronting record is the Organization's contention that Third Division Award 26314 (05-13-87) and Third Division Award 27332 (08-30-88) are controlling precedents in this dispute that require a ruling in favor of the Organization position that the disputed Hopkins/Berge letter has been preserved by the parties' February 1, 1982 Schedule Agreement and hence is applicable on the Conrail property. The Carrier acknowledges that the disputed letter is referred to in the two cited Third Division Awards; however, the Carrier submits that the reference to the letter in these Awards is dicta, because the applicability of the letter to the Conrail property was not in contention in the disputes determined by those Awards.

This Board, after review and analysis of the cited Awards, Third Division Awards

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Nos. 26314 and 27332, concludes and finds that these Awards do not establish controlling precedents concerning the Question at Issue in this dispute. The decisions in those Awards do not depend on the applicability or non-applicability of the subject letter to the Conrail property; hence, it is concluded on the record that the reference in these Awards to the Hopkins/Berge letter of December 11, 1981, is dicta and that the reference is not a substantive ruling that can be accorded precedential authority.<sup>2</sup>

Therefore, it is concluded and determined that the Organization's position on the Question at Issue in this case is not supported by Third Division Award Nos. 26314 and 27332.

Similarly, the Board has considered and finds inapplicable to this dispute several other awards cited by the Organization as presenting instances where a Carrier has been considered covered by the Hopkins/Berge letter even though such Carrier never directly adopted the contracting out rule in the May 17, 1968 National Agreement.<sup>3</sup> Third Division Award 28590 (10-16-90), Award No. 1 of Public Law Board No. 4768 (10-23-90), and Awards No. 136 (05-09-89) and No. 142 (11-01-89) of Public Law Board No. 2960.

The Organization's statement that these Awards considered the involved Carrier to be covered by the Hopkins/Berge letter, appears to be correct. However, in none of these Awards is there any showing that the Carrier disputed the application of the

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<sup>2</sup> The Organization expressly acknowledged that the reference to the disputed letter in Third Division Award 27332, is dicta.

<sup>3</sup> The said contracting out rule is contained at page 7 of the May 17, 1968 National Agreement under the heading "ARTICLE IV - CONTRACTING OUT".

Hopkins/Berge letter to the property of the involved Carrier.<sup>4</sup> Therefore, this group of authorities, like Third Division Awards Nos. 26314 and 27332, cannot be given precedential weight in the determination of the confronting Question At Issue.

THE MERITS

Agreements and Agreement Provisions

The Agreement provisions and Agreements that are pertinent to the determination of the question of whether the Hopkins/Berge letter has been preserved under the Conrail-BMWE single Agreement effective February 1, 1982, are as follows: the contracting out provisions in Article IV of the May 17, 1968 National Agreement, the December 11, 1981 National Agreement, the disputed Hopkins/Berge letter dated December 11, 1981, the May 5, 1981 Agreement, and the parties' single Agreement effective February 1, 1982.

The railroads that were combined to form Conrail (Erie Lackawana, Penn Central, etc.) were signatory to the May 17, 1968 National Agreement that contains the Article IV contracting out provisions. Conrail did not exist as a legal entity when the May 17, 1968 National Agreement was signed.

On December 11, 1981, the Organization and the National Railway Labor Conference (NLRC) entered into a National Agreement. The letter in dispute in this

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<sup>4</sup> The responding Carriers in these Awards, Union Pacific Railroad, the Burlington Northern Railroad Company, and the Chicago and Northwestern Transportation Company, were represented by the NLRC in the 1981 negotiations that culminated in the December 11, 1981 National Agreement with the BMWE. Exhibit 2, Carrier Submission.

proceeding, the December 11, 1981 Hopkins/Berge letter, was one of several side letters to the December 11, 1981 National Agreement.

Conrail was not one of the Carriers represented by the NLRC in the negotiations that led to the December 11, 1981 Agreement.<sup>5</sup> However, by Agreement dated May 5, 1981, the Organization and the Carrier agreed to defer certain wage increases provided by the December 11, 1981 National Agreement and Conrail agreed to adopt the provisions of the 1981 National Agreement.

The December 11, 1981 National Agreement did not contain any provisions that related to contracting out, nor did it contain any provisions that incorporated Article IV of the 1968 National Agreement into the December 11, 1981 National Agreement. However, the contracting out provisions are the subject of the disputed side letter to the 1981 National Agreement, the December 11, 1981 Hopkins/Berge letter, which modifies the Article IV contracting out provisions of the May 17, 1968 National Agreement. For example, the Article IV obligations on the Carrier were expanded by paragraph 2, page 2 of the disputed letter reading as follows:

*"The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees."*

In 1981, Conrail and the Organization negotiated a single collective bargaining agreement that superseded the agreements between the various predecessor railroads

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<sup>5</sup> See Exhibit 2, Carrier Submission.

and the Organization. The parties agreed on their single collective bargaining agreement on August 3, 1981 and further agreed that the new single agreement would become effective on February 1, 1982.

The parties' single agreement effective February 1, 1982, does not have a separate rule on contracting out, but the agreement's Scope Rule<sup>6</sup> contains provisions similar to the contracting out provisions in Article IV of the May 17, 1968 National Agreement.<sup>7</sup> The provisions concerning contracting out in paragraphs 2 and 3 of the Scope Rule in the single Conrail-BMWE Agreement, effective February 1, 1982, are similar to the contracting out provisions in paragraphs 1 and 2 of Article IV of the 1968 Agreement; the only significant difference between the contracting out provisions in the Scope Rule in the single Agreement and the Article IV contracting out provisions, is that the Scope Rule in the Conrail Agreement stipulates that the contracting out provisions do not apply in emergencies.

Appendix B of the single agreement effective February 1, 1982, contains language dealing with the agreements between the predecessor railroads and the Organization, that conflict with the agreement effective February 1, 1982. Under Appendix B all such conflicting agreements were terminated by Appendix B with the exception of agreements specifically listed in Appendix B, A. through G.

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<sup>6</sup> The Scope Rule in the parties' Agreement effective February 1, 1982, is reproduced in full at Appendix page 3.

<sup>7</sup> The Article IV contracting out provisions are set out in full at Appendix page 4.

Appendix B, in pertinent part, reads as follows:

*"MEMORANDUM OF UNDERSTANDING IN CONNECTION WITH THE AGREEMENT EFFECTIVE FEBRUARY 1, 1982 BETWEEN CONSOLIDATED RAIL CORPORATION AND THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES"*

*1. The Schedule Agreements of the former component railroads and all amendments, supplements and appendices to these agreements (with the exceptions of those listed below) and all other previous agreements which are in conflict with the Agreement effective February 1, 1982, are terminated."*

Findings

After due assessment and consideration of the foregoing, and the record as a whole, the Board concludes that the record does not establish that the disputed Hopkins/Berge letter dated December 11, 1981, was preserved by the single Conrail-BMWE Agreement effective February 2, 1982, and/or that the said letter is applicable on the Conrail property.

It is further found that contrary to the Organization's assertions, the disputed letter is applicable only to those Carriers that were represented by the NLRC regarding the agreement between the Organization and the NLRC to execute the December 11, 1981 Hopkins/Berge Letter. Conrail was not one of those Carriers<sup>8</sup> and therefore, the Hopkins/Berge letter cannot be said to apply on Conrail property. Moreover, this finding is not altered by the fact that in a May 5, 1981 Agreement, Conrail agreed to apply the December 11, 1981 National Agreement to Conrail property.

Here, it is informative to note that the December 11, 1981 National Agreement

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<sup>8</sup> See Exhibit 2, Carrier Submission.

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did not contain any provisions that related to contracting out, nor did it contain any provisions that incorporated Article IV of the 1968 National Agreement into the December 11, 1981 National Agreement. It is also noteworthy that the disputed Hopkins/Berge letter modified the Article IV contracting out provisions in the May 17, 1968 National Agreement; and that the letter did not add any contracting out language to the December 11, 1981 National Agreement. In view of these considerations, there is simply no basis on which the Hopkins/Berge letter could be construed as bringing the letter's contracting out provisions into the December 11, 1981 National Agreement, and from there, into the parties' single Agreement effective February 2, 1982.

It is therefore found that the disputed Hopkins/Berge letter was not applicable to the Conrail property when it was executed by the Organization and the NLRC on December 11, 1981, or subsequently.

However, even if the letter were applicable on Conrail property at the time of its execution on December 11, 1981,<sup>9</sup> the letter would nonetheless have been terminated by the provisions concerning "termination" and "survival" of previous agreements in Appendix B of the parties' single Agreement effected February 1, 1982. More specifically, and contrary to the Organization's contentions, it is self-evident that the 1968 Article IV contracting out provisions, as modified by the disputed Hopkins/Berge letter dated December 11, 1981, are in conflict with the Scope Rule of the single Agreement effective February 1, 1982; hence, the letter comes within the purview of, and would be terminated

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<sup>9</sup> See the Organization's letter dated August 6, 1991, wherein this contention is made.



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by, the Appendix B text that terminates *"all ... previous agreements which are in conflict with the Agreement effective February 1, 1982."*


In view of the foregoing, and based on the record as a whole, the answer to the "Question At Issue" must be answered in the negative.

**AWARD:**

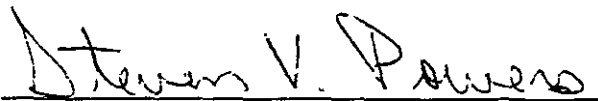
The record as a whole does not establish that the disputed Hopkins/Berge letter dated December 11, 1981, was preserved by the single Conrail-BMWE Agreement effective February 1, 1982, and/or that the said letter is applicable on the Conrail property.

Accordingly, the answer to the herein "Question At Issue" is  
"No".

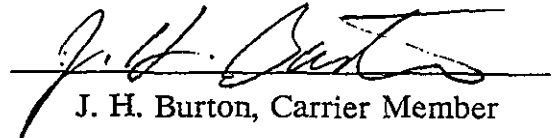
BY ORDER OF SPECIAL BOARD OF ADJUSTMENT NO. 1016



Fred Blackwell, Neutral Member



S. V. Powers, Labor Member



J. H. Burton, Carrier Member

Executed on 4/18, 1993

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