

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 36852  
Docket No. MW-37443  
04-3-02-3-518

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employes  
(CP Rail System (former Delaware and Hudson  
( Railway Company)

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (seeding and soil mat installation for bank stabilization) between Mile Posts A 123.3 and A 124.7 on the Canadian Main Line on June 22 and 25, 2001 instead of Messrs. E. Woodruff, W. Barcomb, B. Mosher, K. Sweatt and L. Terrell (Carrier’s File 8-00201 DHR).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance notice of its intention to contract out the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as required by Rule 1 and Appendix H.**
- (3) As a consequence of the violations referred to in Part (1) and/or (2) above, Claimants E. Woodruff, W. Barcomb, B. Mosher, K. Sweatt and L. Terrell shall now each be compensated for sixteen (16) hours’ pay at their respective straight time rate of pay and for three (3) hours’ pay at their respective time and one-half rates of pay.”**

**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.

According to the record developed on the property, the pivotal issue is whether the seeding and soil mat installation was a discrete individual project requiring a separate contracting notice and conference with the General Chairman or was it essentially incidental work integral to a larger project where proper compliance with the notice and conference requirements was demonstrated.

On February 2, 2001, the Carrier issued a general contracting out notice regarding possible projects for that year. It listed "Slope Work" as Item 6b and "New Siding Construction," with its Canadian Mainline project in question specified as Item 11a. On March 14, 2001, the Carrier sent the General Chairman another notice announcing its plan to contract out the siding construction beginning April 2, 2001.

Letters to the Carrier from the General Chairman dated March 20 and 30, 2001 show that the notice was received and a preliminary conference was held sometime prior to March 20. A more detailed conference was held on March 28. The General Chairman's second letter does not reflect agreement with the Carrier. Indeed, it contended that Carrier forces were entitled to the work and closed by threatening the submission of "... time claims upon commencement of the project."

For whatever reason, which is not revealed in the on-property record, the Organization did not challenge the siding construction project. It apparently waived its claim to the work. No claims were filed within 60 or even 90 days of the April 2, 2001 commencement date.

On June 20 and 25, 2001 contractor forces performed the disputed seeding and soil mat installation work. On July 16, 2001, the Organization filed a claim for the contractor hours expended. As the record developed, it became clear the Organization also alleged a notice violation for this work.

In its September 11, 2001 reply, a date which will also live in infamy for reasons unrelated to this claim, the Carrier asserted that the “. . . work of seeding and installing soil mats on slopes for bank stabilization was an integral part of this grading work and was previously identified in the contracting out letters.” This assertion was never effectively refuted on the property.

In its November 13, 2001 reply to the Organization's appeal, the Carrier essentially reasserted this contention when it said, “The siding construction was a major undertaking and included the work in question.” This was also never effectively refuted by the Organization.

Given this record, the Organization's claim must be denied. It is well settled that unrefuted assertions of material fact become established as fact for purposes of evidentiary analysis. No further proof is necessary. Thus, on this record, we find that the disputed work was incidental to and an integral part of the overall siding construction project for which the Organization had been given notice and the requisite conference was held. The Organization apparently chose to waive its rights. Nothing in the parties' Agreement was cited that required the Carrier to piecemeal the project and deal with each of the constituent phases of the work as separate individual projects.

**AWARD**

**Claim denied.**

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**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 28th day of January 2004.