

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41422  
Docket No. MW-40904  
12-3-NRAB-00003-090188**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
PARTIES TO DISPUTE: (  
(CP Rail System/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 failed to assign Track Foreman G. Hobbs to perform the on-site foreman duties (pending the bulletin assignment of Foreman Demianovich) at the Laflin Siding in Laflin, Pennsylvania on October 7, 2006 through October 29, 2006 and instead assigned said duties to ARASA Employee G. Edwards (Carrier’s File 8-00535 DHR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant G. Hobbs shall now be compensated for one hundred twenty (120) hours at his respective straight time rate of pay and for one hundred fifty (150) hours at his respective time and one-half rate 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.

This claim was handled in a timely manner during the usual course of the parties' on-property exchanges including up to the highest designated officer of the Carrier.

The claim involves the alleged failure by the Carrier to assign the Claimant to perform Foreman duties - providing on-track protection for contractors - set forth in an advertised position pending the award and assignment for that position and, instead, assigned the duties in question to Construction Inspector Edwards, an American Railway and Airway Supervisors Association (ARASA) -represented employee. The Organization asserts violations of Rule 1 (Preamble) Rule 3 (Vacancies and New Positions) Rule 4 (Seniority) Rule 11 (Overtime) and Rule 28 (Rates of Pay).

According to the Organization, the claimed work is within the scope and coverage of Rule 1. It makes that assertion based on the fact the Carrier advertised a Foreman position to perform the duties. There is no dispute, moreover, that the assignment of such duties to a BMW-represented Foreman was discussed during a contracting-out conference on October 3, 2006, during which the Carrier assured the Organization that such duties would be performed by a BMW-represented employee. The Carrier's claim denial confirms this assurance in writing.

The Board finds that the claimed work is scope-covered and, furthermore, that ARASA Edwards' Construction Inspector position is not subject to or covered by the BMW Agreement. Numerous Awards, including on-property Third Division Award 33852, have concluded that a supervisor performing scope-covered work is improper.

In its defense, the Carrier states that the ARASA Construction Inspector was on site only until the advertised BMW Foreman position was filled and awarded. This defense is not a persuasive reason to deviate from the precedent in on-property Award 33852. The other defense raised by the Carrier involves its assertion of a mixed practice. In this vein, the Board notes that the Carrier is responsible for establishing its affirmative defense. The basis for the Carrier's mixed practice defense stems from its assertion that non-Agreement personnel have performed the claimed work in the past; however, the Carrier's only evidentiary example is the instant claim

in which the ARASA-represented Construction Inspector performed the duties in question. Accordingly, the Carrier's defense cannot be not credited.

The on-property precedent coupled with the unpersuasive and unsubstantiated Carrier defenses leaves the Board no alternative but to sustain the claim. Due to the Carrier's violation of the Agreement, the Claimant incurred a loss of work opportunity. The remedy for this loss of work opportunity coincides with the on-property remedy set forth in Public Law Board No. 6493 (Award 24): "The calculation of liquidated remedial monetary damages for the Claimant is remanded to the Parties; with retention of jurisdiction by this Board should they be unable to arrive at a mutually agreeable remedy."

**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 5th day of September 2012.