Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38146
Docket No. MW-37470
07-3-02-3-553

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman 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 (operate crane to unload panels) at the Saratoga Yard facility located between CPC 35 and CPC 37 on the Canadian Main Line on July 18, 2001, instead of System Equipment Operator K. Wetsell (Carrier's File 8-00208 DHR).

(2) The Agreement was further violated when the Carrier failed to comply with the advance notice requirements regarding its intent to contract out the aforesaid work or make a good faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 1 and Appendix H.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, System Equipment Operator K. Wetsel, shall now be compensated for six (6) hours' pay at his respective straight time 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.

In its claim which was filed on August 1, 2001, the Organization contended that the Carrier violated the Agreement when it engaged an outside contractor to unload track panels at the Carrier's Saratoga Yard facility using a crane. It maintained that the work at issue had been done by BMWE-represented employees in the past and that the Claimant, who is capable of operating such a crane, was also working near Saratoga and should have been used to remove the track panels from the car.

The Carrier responded to the claim by letter dated September 17, 2001. The Carrie disputed that the Claimant was in the vicinity of Saratoga; it maintained that he was working approximately 88 miles from the location at which the unloading took place. The Carrier further asserted that it had in the past used outside companies "to load, unload, transfer and deliver materials and supplies." It concluded that the disputed work was not reserved to BMWE-represented employees under the Agreement.

In its appeal, the Organization cited Rule 1.3, which provides that, except in emergencies, the Carrier will notify the General Chairman in advance, in writing, of its plans to contract out work within the scope of the Agreement. The Organization insisted that the Carrier had previously used outside contractors for the work at issue after according the General Chairman the required notice. It further contended that while the Claimant was not in the immediate vicinity at the time the

work was performed, he had previously been working between M.P. A 21.7 and A 124, so "with a little foresight, he could have been used to handle this task."

In its December 4, 2001 response, the Carrier reaffirmed its position that contrary to the Organization's assertions, the Scope Rule did not reserve the work in question to BMWE-represented employees. It contended that the work had historically been performed by contractors and no notice was required. The Carrier also reiterated that the Claimant and his crane were located 88 miles from the site of the work at issue, and noted that he was fully employed for the duration of the work, he was not monetarily harmed.

As in all contract disputes, the Organization bears the burden of persuasion. In this particular case, the Board is faced with assertions, but neither contractual nor documentary evidence to indicate that the work at issue had been by custom and practice performed by BMWE-represented employees. Nor is there any indication in the record, beyond the Organization's assertion, that the Carrier had, in the past, notified the General Chairman prior to contracting out this particular work. Thus, the Organization failed to successfully contradict the Carrier's assertion that there was a long-standing mixed practice with respect to this work. Accordingly, the Board finds no basis upon which to sustain the claim.

AWARD

Claim dismissed.

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 23rd day of April 2007.