

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41419
Docket No. MW-40878
12-3-NRAB-00003-090163**

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 assigned outside forces (Tioga Construction Company) to perform Maintenance of Way work (operate front end loader) in connection with repair of the Nicholson Tunnel at Factoryville, Pennsylvania beginning on April 5, 2007 and continuing through May 7, 2007 (Carrier’s File 8-00561 DHR).**
- (2) The Agreement was violated when the Carrier assigned outside forces (Tioga Construction Company) to perform Maintenance of Way work (crown repair and related work) at the Nicholson Tunnel in Factoryville, Pennsylvania on April 5 and 6, 2007 (Carrier’s File 8-00562).**
- (3) The Agreement was violated when the Carrier assigned outside forces (Tioga Construction Company) to perform Maintenance of Way work (crown repair and related work) at the Nicholson Tunnel in Factoryville, Pennsylvania on April 9, 10 and 11, 2007 (Carrier’s File 8-00563).**
- (4) The Agreement was violated when the Carrier assigned outside forces (Tioga Construction Company) to perform Maintenance of Way work (crown repair and related work) at the Nicholson**

Tunnel in Factoryville, Pennsylvania on April 12, 2007 through May 7, 2007 (Carrier's File 8-00564).

- (5) The Agreement was further violated when the Carrier failed to comply with the 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 Maintenance of Way forces as required by Rule 1 and Appendix H.**
- (6) As a consequence of the violations referred to in Parts (1) and/or (5) above, Claimant A. Gasper shall now be compensated at his respective and applicable rates of pay for all straight time and overtime hours expended by the outside force in the performance of the aforesaid work beginning April 5, 2007 and continuing through May 7, 2007.**
- (7) As a consequence of the violations referred to in Parts (2) and/or (5) above, Claimants J. Demianovich, D. Kovaleski and D. Goodrich shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for ten (10) hours at their respective time and one-half rates of pay.**
- (8) As a consequence of the violations referred to in Parts (3) and/or (5) above, Claimants J. Demianovich, D. Kovaleski, D. Goodrich and T. Vanderpool shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay and for three (3) hours at their respective time and one-half rates of pay.**
- (9) As a consequence of the violations referred to in Parts (4) and/or (5) above, Claimants J. Demianovich, D. Kovaleski, D. Goodrich, T. Vanderpool, K. Chilson and R. Ossig shall now each be compensated at their respective and applicable rates of pay for all straight time and overtime hours expended by the outside forces in the performance of the aforesaid work beginning on April 12, 2007 and continuing through May 7, 2007."**

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 proceeding addresses four claims; two claims are dated May 30, 2007 and the others are dated June 1 and June 5, 2007. Each claim was handled in the usual manner during on-property exchanges including up to the highest designated officer of the Carrier. The claims involve the same contractor, same location and similar issues and arguments; the parties consolidated the claims for the purpose of Board adjudication.

The consolidated claims, hereinafter referred to as the claim, involve the Carrier having contracted with outside force to perform crown repair and related work, including the operation of a front end loader, between April 5 and May 7, 2007 at the Nicholson Tunnel in Factoryville, Pennsylvania.

The controlling Rules for this claim, the Organization asserts, are Rule 1 (Preamble) Rule 3 (Vacancies and New Positions) Rule 4 (Seniority) Rule 11 (Overtime) Rule 13 (Work On Assigned Rest Days and Holidays) Rule 28 (Rates of Pay) Rule 44 (Interpretations) Rule 57 (Duration) and Appendices H and N.

The Organization asserts that the claimed work (tunnel crown repair, drilling holes, installing steel arches and grouting) is within the scope and coverage of Rule 1.1 because it is "work generally recognized as Maintenance of Way work, such as inspection, construction, repair and maintenance of water facilities, bridges, culverts, buildings and other structures[.]" According to the Organization, BMWF-represented employees customarily, historically, and traditionally perform the claimed work.

The Board finds that the Organization's un rebutted assertion is a fact of record. Crediting this un rebutted assertion is consistent with decisional authority in Third Division Award 36852: "It is well settled that unrefuted assertions of material fact become established as fact for purposes of evidentiary analysis." Thus, the claimed work falls under the scope and coverage of Rule 1.

On March 9, 2007 the Carrier issued the following notice to the Organization:

"As part of the tunnel rehabilitation project previously undertaken by the installation of the steel arches in the area 1, we will be contracting the crown repair work in the Nicholson Tunnel . . . at mileage 656.0 This work must be undertaken for the safety of railway employees working in the tunnel as well as for a safe fluidity of the trains passing through the tunnel. Due to the specialized equipment and personnel required for the drilling and grouting portions of this work, CPR will be contracting this project.

The work will be executed in two phases located in the area 1 of the tunnel:

- * Phase 1: Proceed with the crown apex tunnel liner repair (steel plates installation and grouting);
- * Phase 2: drill roof drains through the existing brick liners.

The work is anticipated to start the month of April 2007 and be completed by the end of the year 2007. All work will be done under the Safety Rules For Contractors, and B&B Foreman will be on site for protection at all times when the contractor is on property."

The Organization acknowledged timely receipt of notice, but objected to contracting out scope-covered work because Carrier forces were qualified and available to perform the work.

On April 3, 2007 the parties met in conference and discussed crown repair in the Nicholson Tunnel and equipment, including rental of it, such as overhead percussion drilling, telescopic camera, and hydraulic platforms for use in executing

the work. The Organization states that the Carrier did not engage in good-faith discussions because, from the outset, the Carrier stated that it would contract out this project.

In filing its claim (June 2007) the Organization states that “a notice, merely by meeting the fifteen day requirement . . . does not in and of itself make a good faith attempt to reach an understanding[.]” The notice did not identify use of a front-end loader; Claimant A. Gasper could have operated the loader.

The Organization further detailed the Carrier’s violations of Rules 1, 3, 4, 11, 13, 28, 44, 57 and Appendices H and N. The Organization disagreed with the Carrier’s assertion that employees were not qualified; the Organization noted the Carrier’s responsibility to train them under Appendix N. Finally the Organization pointed out that 50 days after it made its request for contracts with outside forces the Carrier denied the request.

The Carrier’s claim denial (July 23, 2007) states that it met the requirement in Rule 1.3 (15-day notice) so it can contract out because good-faith discussions occurred in conference where no feasible alternatives surfaced. As for the front-end loader aspect of the claim, there is no requirement to identify every piece of equipment that may be used by the contractor in the notice. Every effort is made to reduce outsourcing by considering time constraints, machinery and equipment requirements, and availability of Carrier forces which, in this instance, were fully employed. Also new hires continue as a means to reduce the incidence of contracting and increase the use Carrier forces. Attempts to rent special equipment were not successful. The Carrier determines whether employees are qualified based on employee records.

On September 23, 2007, the Organization appealed the matter and reiterated arguments set forth in its claim, such as receipt of timely notice, notice, and conference as a pretext for good-faith discussions. Employees’ statements attest to their having worked in or around Nicholson Tunnel. Under Rule 1 this work cannot be removed from them and under Rule 3 employees have a right to apply for this work. The Carrier having contracted out this work caused the Claimants to incur a loss of work opportunity. Furloughed employees could have been retained to perform this work.

On November 6, 2007 the Carrier denied the appeal. It reiterated arguments set forth in its claim denial. It asserted that there may have been B&B employees furloughed, but they were working elsewhere in other classes of service within the

Engineering Department if they desired; the Carrier states this is not disputed by Organization.

Because the claim involves contracting out, compliance with notice and conference requirements under Rule 1 are assessed as well as Appendix H. The Board finds that the notice was timely and conference promptly convened. The Organization acknowledged that discussions involved the work identified in the notice.

Apparent from this record are the diverse and divergent views held by the parties about Rule 1 and Appendix H. Discussions occurred in good faith notwithstanding these differing views and the absence of any understandings between the parties about contracting out.

Although the Board finds that the Carrier met the prerequisites in Rule 1 for contracting out crown repair, the lack of notice about the front-end loader does not conform to Rule 1, so that part of the claim is sustained. The record shows that the Carrier discussed some equipment needed - telescopic camera, percussion drill, hydraulic platforms - to execute the project to completion. The Carrier contends that it makes every effort to reduce outsourcing by considering, among other parameters, equipment. Thus, equipment is not an after-thought, but one of the primary considerations when outsourcing. The argument from the Carrier that it is not practicable or possible to itemize every piece of equipment in the notice or through discussion is not persuasive in this context when equipment is one of the Carrier's primary considerations in its effort to reduce contracting out.

As the custodian of records in the normal course of its business operations the Carrier is inherently familiar with the plans and details underlying the outsourcing notice such that it knows the equipment to disclose during discussion. In the circumstances presented by this claim, the Organization established a prima facie finding that a front-end loader was not noticed or discussed and the Carrier did not submit sufficient argument or evidence to rebut the Organization's contention. Thus, that part of the claim involving the utilization of the contractor's front-end loader is sustained and the remedy granted as requested by the Organization.

AWARD

Claim sustained in accordance with the Findings.

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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.