

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41421
Docket No. MW-40880
12-3-NRAB-00003-090179

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 (BAT Construction Company) to perform Maintenance of Way work (install drainage tile) in and around the Belden Hill Tunnel in Tunnel, New York on October 30, 31, November 1, 2, 3, 4, 6, 7 and 8, 2006 (Carrier’s File 8-00538 DHR).
- (2) The Agreement was violated when the Carrier assigned outside forces (BAT Construction Company) to perform Maintenance of Way work (install drainage tile) in and around the Belden Hill Tunnel in Tunnel, New York on November 9, 10, 13, 14, 15, 16, 17, 18, 20, 21, 22, 24, 25, 27, 28, 29, 30 December 1 and 2, 2006 (Carrier’s File 8-00539).
- (3) 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.
- (4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants T. Tarchak, R. Vanderpool, K. Chilson and B. Cooper shall now each be compensated for sixty-four (64) hours

at their respective straight time rates of pay and for twenty-six (26) hours at their respective time and one-half rates of pay.

- (5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants T. Tarchak, R. Vanderpool, K. Chilson and B. Cooper shall now each be compensated for one hundred twenty-eight (128) hours at their respective straight time rates of pay and for sixty-two (62) hours 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.

This proceeding addresses two claims which are dated November 8, 2006. The claims were 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 same 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's use of an outside contractor to install drainage tile in and around the Belden Tunnel in Tunnel, New York, beginning on October 30 and continuing thereafter on certain dates through December 2, 2006. The Organization alleges that the Carrier violated Rule 1 (Preamble) Rule 3 (Vacancies and New Positions) Rule 4 (Seniority) Rule 11 (Overtime) Rule 28 (Rates of Pay) and Appendix H.

On October 11, 2006 the Carrier issued the following notice:

“We will be contracting out rock scaling, bolting, gunnite and ditching inside and in the vicinity of the Belden Tunnel, Belden, NY. This is work that is required to maintain the safety of the tunnel and rock slopes. All of our forces are currently working on main line bridge and culvert work. A BMW foreman will be present to protect this work when the contractor is on the property.”

By letter dated October 13, 2006 the Organization requested a conference and lodged its objection to the Carrier’s decision to contract out the work identified in the notice. The conference convened on November 15, 2006.

There is no dispute that the claimed work is scope-covered under Rule 1 and involves only the installation of drainage tile; the expressly identified work in the notice is not before the Board in this proceeding. Having noted the claimed work, the issue for the Board is whether the October 11, 2006 notice encompasses the installation of drainage tile.

A cursory reading of the notice reveals that the installation of drainage tile is not identified as work to be contracted out. According to the Organization, the absence or lack of any such wording demonstrates that the notice does not encompass the claimed work. By contracting out the claimed work without providing notice to the Organization and affording it an opportunity to request a conference and engage in good-faith discussions, the Organization contends that the Carrier violated Rule 1 and Appendix H, as well as other Rules.

The Carrier acknowledges that the phrase - installation of drainage tile – is not in the notice. Nevertheless, it asserts that the notice covers the claimed work, because “it was evident from the Carrier that this was a portion of the work associated with the ditching work to be done inside the tunnel.” In the Carrier’s view, supportive of its argument that installing drainage tile is integral to ditching is on-property Third Division Award 37499 in which planting and seeding of wetland areas was an integral part of the grading work that was contracted out.

The Board recognizes the Carrier’s argument that “[i]t is nearly impossible to add every detail, of every bit of work that a contractor may perform” but the representation in the claim of hours expended for installation of drainage tile - 28 days

and ten hours daily - is an indication that the claimed work was not an incidental undertaking arising as a sideline effort in connection with ditching.

Additionally, the notice is expressly particular about the work subject to contracting out. Even with that level of particulars, a conference serves as an opportunity for disclosure and discussion of self-evident work that the Carrier considers integral to or associated with ditching. Although the Organization and the Carrier are mutually responsible for good-faith efforts in conference, 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 notice such that only it knows the integral and self-evident work to disclose for discussion.

Furthermore, on-property Third Division Award 37499 states that seeding is integral to grading, but the basis upon which that nexus is founded is not contained in the Award rendering its utility in adjudicating this claim problematic. In this claim, by contrast, the Organization persuasively argues that installing drainage tile is not integral to ditching because the work is different, such that doing one does not mean the other follows. Whether the claimed work is incidental or integral, it was not discussed during the parties' conference.

Based on the record established by the parties, the October 11, 2006 notice was not timely and sufficient for the claimed work. Thus the Carrier did not comply with the Agreement when it contracted out the claimed work.

In view of the foregoing, the claim is sustained and the requested remedy is granted. The Carrier's violation of the Agreement caused the Claimants to incur a loss of work opportunities. Numerous Third Division Awards support the Organization's requested remedy. (Third Division Awards 2701, 31386, 32861, 39490)

As noted in Public Law Board No. 6493, Award 24, the Claimants may have been fully employed on the claimed dates, but full employment does not preclude monetary relief because it serves to reinforce contractual obligations for notice, conference and good-faith discussion requirements in Rule 1 and Appendix H. Without a challenge by the Carrier, the hours claimed on each claim date are presumed accurate and will be granted as remedial relief.

AWARD

Claim sustained.

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.