

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 41443  
Docket No. MW-40905  
12-3-NRAB-00003-090197

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 (Ed Garrow & Son) to perform Maintenance of Way work (operate excavator) in connection with bank stabilization in the vicinity of Mile Post A105, Ticonderoga, New York on the Canadian Main Line on September 11, 12, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, October 2 and 3, 2006. (Carrier’s File 8-00537 DHR).**
- (2) The Agreement was further violated when the Carrier failed to provide an advance notice of 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.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant R. Lindsay shall now be compensated for one hundred twenty-eight (128) hours at his respective straight time rate of pay and for thirty-two (32) 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.

The claim, dated November 2, 2006, was timely handled in the usual manner on the property up to and including the highest designated officer of the Carrier.

Between September 11 and October 3, 2006, the Carrier contracted with an outside contractor to operate an excavator in order to stabilize an embankment at or near Mile Post A105 on the Canadian Main Line near Ticonderoga, New York. The Organization asserts violations of Rule 1 (Preamble) Rule 3 (Vacancies and New Positions) Rule 4 (Seniority) Rule 11 (Overtime) Rule 20 (System Equipment Operators) Rule 28 (Rates of Pay) and Appendix H.

According to the Organization, the claimed work 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 . . . other structures, tracks . . . and roadbed" that is customarily, historically and traditionally performed by BMW-represented employees. The Claimant, a qualified System Equipment Operator, was available to perform the work in question.

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 set forth in Third Division Award 36852 wherein the Board held:

"It is well settled that unrefuted assertions of material fact become established as fact for purposes of evidentiary analysis."

Because the claimed work is scope-covered, compliance with the notice and conference requirements prescribed in Rule 1 is required for the contracting transaction. Notice was not issued by the Carrier because, it asserts, this was an “emergency” situation, which exempts it from the notice requirement.

Third Division Award 24440 defines “emergency” as the “sudden, unforeseeable, and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt.” Rule 1.3 states that “[e]mergencies applies to fires, floods, heavy snow and like circumstances.”

There is no evidence in this record establishing “like circumstances” for an “emergency.” Outside forces, consisting of one operator, performed excavation primarily during regular work hours without any halt, disruption or even delay to rail traffic. In other words, the track remained in use at all times. Also, there is insufficient evidence that the Carrier made any effort to use the Claimant in lieu of outside forces as a means to reduce the incidence of contracting out.

Placing these finding within the context of the definition, the Board concludes there was no emergency. Because there was no emergency, the Carrier’s decision not to issue advance notice to the Organization that the scope-covered work in question would be contracted out violates the parties’ Agreement.

In view of the controlling Rules violations, the Board sustains the claim and, without a challenge by the Carrier, the hours claimed on each claim date are presumed accurate and will be granted as remedial relief.

The Board did not consider the Carrier’s new arguments - flooding, mixed practice, or past practice - in rendering its findings and conclusions.

#### AWARD

Claim sustained.

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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 16th day of October 2012.