

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42299  
Docket No. MW-41229  
16-3-NRAB-00003-100089**

**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 (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 (culvert installation/repair and related work) in the vicinity of Mile Post 517.38 in Cobleskill, New York beginning on October 1, 2007 and continuing through October 7, 2007 (Carrier’s File 8-00596 DHR).**
- (2) 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.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants B. Allmendinger and J. Hurlburt shall now 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 October 1, 2007 and continuing through October 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.

On November 12, 2007 the Organization filed a claim stating that an outside contractor installed a new culvert at or near Mile Post 517.38 in Cobleskill, New York during the period of October 1 through 7, 2007. The Organization became aware of this situation after the work had been completed.

The Carrier denied the claim on December 24, 2007 stating:

“The work that took place at the culvert identified in the claim was not to install a new culvert, but [to] repair an existing culvert using the jack and bore technique which requires specialized equipment and, by past practice, has been contracted out. This was not anticipated at the planning of the repair and therefore there was insufficient time available to send a 15-day notice before work commenced.”

On February 24, 2008 the Organization filed an appeal, which the Carrier denied on May 15, 2008. A conference was convened on August 22, 2008 wherein each Party reaffirmed its position. The Organization submitted a post-conference letter dated October 26, to which the Carrier responded by letter dated November 30, 2009.

A sampling of precedent relied upon by the Organization to support its position in this claim are on-property Third Division Awards 6305, 36851, 36937, 37287, 39490, as well as off-property Third Division Awards 15444, 18447, 21678, 35773, and 35975.

Precedent relied on by the Carrier to support its position are on-property Third Division Award 38150 and off-property Third Division Awards 28574 and 39915.

Having reviewed the on-property correspondence, as well as the Parties' Submissions, the Board finds that construction, repair and maintenance of culverts is subject to Rule 1.1 and is work that has been historically and customarily performed by BMW-represented employees. Ten statements from employees attest to their experience and qualifications performing culvert installation, repair and related work. Moreover, on-property Third Division Award 6305 recognized that culvert repair and installation is work performed by BMW-represented employees.

According to the Carrier, the use of the "jack and bore" method for performing the culvert work in question was not anticipated. Rather, the Carrier intended to use the customary methods and equipment for this repair. Notwithstanding planning for customary culvert repairs and equipment, the Carrier failed to issue a 15-day notice to the Organization prior to engaging the contractor. This violates Rule 1 and Appendix H. The Carrier's assertion regarding the use of specialized equipment and the "jack and bore" method is an after-the-fact rationalization for its failure to issue notice and engage the Organization in conference. The Board further finds that the Carrier failed to establish its affirmative defense of not issuing notice in the past when it used the "jack and bore" method. Whether the Organization was informed about or aware of those prior occasions is not proven by the Carrier in this record.

Given the Carrier's violation of Rule 1 and Appendix H, the claim is sustained and the requested remedy is granted. The Board notes that in reaching this decision it did not consider the e-mail dated January 5, 2009, because the document was not disclosed or shared during handling on the property.

### **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 15th day of June 2016.**