

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42324  
Docket No. MW-41298  
16-3-NRAB-00003-100169**

**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 (Ed Garrow and Sons) to perform Maintenance of Way work (culvert installation/repair and related work) in the vicinity of Mile Post 170.01 near Beekmantown in Clinton County, New York on October 16, 17, 18, 19, 22 and 23, 2007 (Carrier’s File 8-00595 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, Claimant J. Reightmyer shall now be compensated for forty-eight (48) hours 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.**

**On November 9, 2007, the Organization filed a claim “for work done [by an outside contractor] using an excavator to assist the B&B Department in a culvert repair” around Mile Post 170.01 near Beekmantown in Clinton County, New York, on October 16, 17, 18, 19, 22 and 23, 2007. The Organization alleged violations of Rule 1 and Appendix H, among others.**

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

**“The work that took place at the culvert identified in the claim required an experienced System Equipment Operator. None could be released from their current assignment during the time the work was required. That includes Mr. Reightmeyer who was on vacation during the time of this claim. There was insufficient time to post a vacant position given the short duration of the work and the time constraints.”**

**On February 22, 2008, the Organization filed an appeal to the claim denial; the Carrier denied the appeal on May 19, 2008. A conference was convened on August 22, 2008, during which each party reaffirmed its position. The Organization submitted a post-conference letter dated January 21, 2010, to which the Carrier responded by letter dated February 3, 2010.**

**A sampling of the precedent relied on by the Organization to support its position include on-property Third Division Awards 6305, 36851, 36937, 37287 and 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 include Second Division Award 6610, as well as Third Division Awards 20457, 26084, 29024, and 36827.**

**The Board finds that this claim was timely and properly presented and handled by the Organization at all stages of appeal up to and including the Carrier’s highest appellate officer.**

In its Submission to the Board, the Carrier raises a procedural issue and seeks dismissal of the claim. In this regard, that the Carrier asserts that the initial claim (November 9, 2007) involves the Carrier's use of a rented excavator with operator "to assist the B&B Department in a culvert repair." The Carrier states that its own forces performed all repair work at the culvert and the contractor's forces did not perform repair work.

The Carrier contrasts the initial claim (repair work) with the Statement of Claim wherein the Organization states that the Carrier "assigned outside forces . . . to perform Maintenance of Way work (culvert installation/repair and related work." According to the Carrier, the Statement of Claim expands the Organization's claim to include "installation/repair and related work," whereas the initial claim was limited to "repair work." When there is a material difference or variance between the on-property claim and the Statement of Claim presented to the Board, the claim must be dismissed and not addressed by the Board (Second Division Award 12062, Third Division Award 20457, and Fourth Division Award 4893).

The Board finds that the Organization "previously expressed positions that the installation and repair of culverts" in its on-property exchange letter dated January 21, 2010 and the Carrier responded to installation and repair of culverts in its on-property letter dated February 3, 2010. The Statement of Claim does not represent a difference or variance with on-property discussions. Therefore, the Carrier's request to dismiss this claim is rejected.

Having reviewed the on-property exchanges, as well as the Submissions of the Parties, 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. Numerous 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 Carrier forces.

Rule 1.3 requires the Carrier to issue a notice of intent to contract at least 15 days prior to the contracting transaction. The exception in the Agreement to issuing notice involves an emergency. The circumstances presented in this claim do not constitute an emergency, e.g., "fires, floods, heavy snow and like circumstances." In

this regard, “like circumstances” does not encompass a time constraint or deadline that is unilaterally determined by, and solely within the control of, the Carrier.

Additionally, the Carrier failed to prove that the time constraints could not accommodate the temporary assignment of an experienced System Equipment Operator. By failing to issue the notice of intent to contract, there was no opportunity for the Parties to discuss this option and how to assess it within the maintenance schedule. Furthermore, the Carrier failed to establish its affirmative defense that its practice is not to issue a notice when, in its view, time constraints dictate unilateral action. The Carrier’s defense relies on at least two situations that arose after the claim in this proceeding and other situations are identified in a Manager’s email; however, that email refers to the “jack and bore” method in culvert work, whereas this claim involves the use of an excavator. As the Organization noted, when it has been aware of situations where notice was not issued, it has filed a claim.

Given the Carrier’s violation of Rule 1 and Appendix H, this claim is sustained and the requested remedy is granted. Third Division Awards 18557, 30181 and 33161 establish monetary relief for an employee, such as the Claimant, that is fully employed and/or on personal leave during the period of time encompassed by the claim. In Award 18557 the Board held:

“The question of monetary payment to an unavailable Claimant has also been passed on by this Board in favor of the Organization. These Awards hold that one of a group entitled to perform the work may prosecute a claim even if there be others having a preference to it. The essence of the claim by the Organization is for Rule violation and the penalty Claim is merely incidental to it. The fact that another employee may have a better right to make the Claim is of no concern to Carrier and does not relieve Carrier of the violation and penalty arising therefrom.”

### **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 28th day of July 2016.**