

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42326
Docket No. MW-41325
16-3-NRAB-00003-100186**

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 (Railworks) to perform Maintenance of Way work (yard track construction) between Mile Posts A56 and A58 at Fort Edward, New York on June 20, 2007 through July 28, 2007 (Carrier’s File 8-00581 DHR).**
- (2) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work (yard track construction) between Mile Posts A56 and A58 at Fort Edward, New York on August 6, 2007 through August 31, 2007 (Carrier’s File 8-00586).**
- (3) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work (yard track construction) between Mile Posts A56 and A58 at Fort Edward, New York on November 2, 2007 through December 14, 2007 (Carrier’s File 8-00600).**
- (4) 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’.**
- (5) As a consequence of the violations referred to in Parts (1) and/or (4) above, Claimants R. Gordon, D. Jordan, N. Smith, T. Aurilio, J. Lavin and F. Lipka shall now each be compensated for two**

hundred sixteen (216) hours at their respective straight time rates of pay and for one hundred fourteen (114) hours at their respective time and one-half rates of pay and Claimants K. Herrington, J. Rich and J. Jackson shall now each be compensated for forty (40) hours at their respective straight time rates of pay and for thirty (30) hours at their respective time and one-half rates of pay.

- (6) As a consequence of the violations referred to in Parts (2) and/or (4) above, Claimant J. Christman shall now be compensated for one hundred twenty (120) hours at his respective straight time rate of pay and for sixty (60) hours at his respective time and one-half rate of pay, Claimants M. Berner, D. Therrien and E. Pratt shall now each be compensated for eighty (80) hours at their respective straight time rates of pay and forty (40) hours at their respective time and one-half rates of pay, Claimant F. Lipka shall now be compensated for seventy-two (72) hours at his respective straight time rate of pay and for thirty-six (36) hours at his respective time and one-half rate of pay, Claimant J. Jackson shall now be compensated for sixty-four (64) hours at this respective straight time rate of pay and for thirty-two (32) hours at his respective time and one-half rate of pay, Claimant R. Lindsay shall now be compensated for forty-eight (48) hours at his respective straight time rate of pay and for twenty-four (24) hours at his respective time and one-half rate of pay, Claimant V. Miner, III, shall now be compensated for forty (40) hours at his respective straight time rate of pay and for twenty (20) hours at his respective time and one-half rate of pay, Claimants K. Herrington and J. Rich shall now each be compensated for thirty-two (32) hours at their respective straight time rate of pay and for sixteen (16) hours at their respective time and one-half rates of pay, Claimant N. Smith shall now be compensated for twenty-four (24) hours at his respective straight time rate of pay and for twelve (12) hours at his respective time and one-half rate of pay, Claimants R. Gordon, D. Jordan, J. Lavin, T. Aurilio and R. Wright shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and for eight (8) hours at their respective time and one-half rates of pay and Claimant D. Gaston shall now be compensated for eight (8) hours at his respective straight time rate of pay and for four (4) hours at his respective time and one-half rate of pay.
- (7) As a consequence of the violations referred to in Parts (3) and/or (4) above, Claimants J. Christman, M. Berner, D. Jordan, F. Lipka, J. Lavin, T. Aurilio, R. Wright, K. Herrington and J. Rich shall now each be compensated for one hundred sixty-eight (168) hours at their respective straight time rates of pay and for forty-

two (42) hours at their respective time and one-half rates of pay, Claimant R. Lindsay shall now be compensated for one hundred sixty (160) hours at his respective straight time rate of pay and for forty (40) hours at his respective time and one-half rate of pay, Claimant V. Miner, III shall now be compensated for one hundred twenty (120) hours at his respective straight time rate of pay and for thirty (30) hours at his respective time and one-half rate of pay, Claimants D. Gaston and J. Jackson shall now each be compensated for eighty (80) hours at their respective straight time rates of pay and for twenty (20) hours at their respective time and one-half rates of pay, Claimant R. Gordon shall now be compensated for fifty-six (56) hours at his respective straight time rate of pay and for fourteen (14) hours at his respective time and one-half rate of pay, Claimant E. Pratt shall now be compensated for forty (40) hours at his respective straight time rate of pay and for ten (10) hours at his respective time and one-half rate of pay, Claimants J. Lavin, W. Hoerning and S. Brooks shall now each be compensated for thirty-two (32) hours at their respective straight time rates of pay and for eight (8) hours at their respective time and one-half rates of pay and Claimants J. Reightmyer and M. Jackson shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay and for six (6) 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.

In 2007 the Carrier entered into an agreement with the General Electric Company (GE) wherein the Carrier leased two acres of its land at Fort Edwards, New York, to GE. The leased land was adjacent to the Carrier’s mainline. Adjoining the Carrier’s property was a parcel of land – 110 acres – that GE

purchased from private owners. The GE-owned property was situated between the Carrier's property and the Champlain Canal.

By letter dated March 14, 2007 the Carrier notified the Organization of the following:

"RE: General Electric Track Contractors. Ft Edward NY:

As information, General Electric will have contractors grading and constructing 10,000 feet of GE-owned track on land leased from CPR at Fort Edwards NY. CPR forces will be installing the Mainline Turnouts. Work is scheduled to start on or about April 1, 2007. It should be noted that as part of the overall General Electric project, we are planning to have CPR forces construct a 1600-foot extension to a siding at Watervliet NY late 2007."

The Organization responded by stating the Carrier's letter – "contracting out notice" – did not contain reasons for outsourcing scope-covered work (track construction) in violation of Rule 1 and Appendix H. The Organization requested a conference, a copy of the lease and other contracts.

During the conference which convened on March 22, 2007, the Carrier responded that its letter dated March 14, 2007 was an informational notice - not a contracting out notice - and the work discussed during conference (10,000- foot siding) was not subject to Rule 1 because it falls outside the Agreement.

Following conference. the Organization filed three claims involving yard track construction beginning June 20, 2007 and continuing on various dates through December 14, 2007. Each claim was processed separately on the property, but have been mutually combined by the Parties for presentation to the Board and are collectively identified as the claim. In this regard, the claim in this proceeding (yard track construction) is separate and distinct from the claim for the 10,000-foot siding extension discussed in Third Division Award 42325.

The Board finds the claim was properly handled at all stages of processing on the property including up to the Carrier's highest designated officer.

The record shows that GE entered into a contract with Railworks for construction of a rail yard. The Hudson River Dredging Project summary of construction and The Hudson River Dredging Project news chronology confirm GE building a waste processing facility and constructing a rail yard with repair and inspection tracks on 110 acres of GE property. Unlike the claim discussed in Award 42325 where the 10,000-foot siding occupied Carrier property, the construction of the rail yard in this claim is on GE property. The lease noted in the Carrier's letter dated March 14, 2007 invokes access to and control of Carrier land; the lease is not dispositive or relevant in this proceeding because the construction of the GE rail yard does not invoke Carrier property.

In the circumstances of this claim there is no evidence that the Carrier had any role (principal or agent) in the GE-Railworks contract engagement. In other words, the Carrier had no control over the rail yard constructed by GE. Third Division Awards 20644, 23422, 23433 and 30824, to name a few, show that when the Carrier has no control over the work it has no obligation to notify and confer with the Organization. Any assertion by the Organization of benefit to the yard by the Carrier as the basis for Carrier dominion and control is speculation.

In short, the Board finds that the construction of the rail yard is work that does not fall within the scope of the Parties' Agreement. Thus, there is no violation of the Agreement and the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of July 2016.