

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42414
Docket No. MW-41899
16-3-NRAB-00003-120217**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employees Division -**
(**IBT Rail Conference**
(**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 & Son) to perform Maintenance of Way work (remove ice from tunnel walls) in the Ticonderoga Tunnel at Mile Post 101 on the Canadian Main Line on February 11, 2010 (Carrier’s File 8-00802 DHR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with 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 eight (8) 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 March 17, 2010, the Organization filed a claim alleging the Carrier violated Rule 1 and Appendix H, among others, when it used a contractor with an excavator on February 11, 2010 to remove ice from the walls on the south portal of the Ticonderoga Tunnel.

On July 26, 2010, the Carrier denied the claim: "ice clearing . . . was performed under emergency conditions" and Claimant "was working elsewhere and not available to perform the work in the required time and Garrow was close by and readily available."

On August 13, 2010, the Organization filed an appeal stating "ice accumulation in tunnels and rock cuts" occurs regularly and have been removed by the force as "supported by the fact that the Carrier annually parks the CAT 318 in Tunnel, NY to handle the ice in the Belden Tunnel (approximately MP 599 - Freight Sub)" for the force to operate. There was no emergency as the Carrier "fails to show where the track was out of service or that the safety of the Railway . . . or the public was at risk." The Carrier's failure to prepare for winter weather does not justify declaring an emergency.

On June 6, 2011, the Carrier denied the appeal. Ice buildup on the south portal required immediate action because freight and Amtrak trains were stopped on the tracks until the ice could be removed as confirmed by Manager Lane's statement. The Carrier's excavator was one hundred (100) miles from MP 101, moreover, the Carrier needed an excavator with an extended boom (which is not owned by the Carrier) to assist the force with the ice removal. By practice the Carrier has rented such equipment operated by the agent.

On June 14 and 15, 2011, conference convened but a resolution of this claim was not attained. This matter is now before the Board for a final decision.

Having reviewed the record established by the parties in on-property exchanges as well as their submissions in support of their positions, the Board finds that the claimed work is within Rule 1. The Carrier acknowledges that the force has performed ice removal work in the past; however, it asserts an emergency existed on February 11, 2010. In this situation, the Carrier states that notice to contract out and conference is not required under Rule 1.

Third Division Award 24440 states that an “emergency is the sudden, unforeseeable, and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt.” The responsibility to establish the emergency - an affirmative defense - resides with the Carrier. Based on Manager Lane’s statement dated September 1, 2010, the Board finds an emergency existed.

Specifically -

“I received a call on Feb 11th regarding a significant amount of ice build up on the south tunnel portal at MP 101 Ticonderoga, NY. This section of track was removed from service and [an] excavator with a long reach boom and operator was called in to assist the B&B/Track department in the removal of this ice buildup.

Historically the Carrier has used a contractor in this area to assist our work force in the removal of ice buildup during the winter months. [Claimant] was not available and the CAT 318 was assigned to Tunnel, NY, which is well over 100 miles away from Ticonderoga, NY. In addition, the CAT 318 is not equipped with a long boom that was required to safely remove this ice buildup.”

Notwithstanding the Board’s finding that an emergency existed, the Organization notes that on-property Third Division Awards 36089 and 37287 show the Carrier “is still required to attempt to follow the Agreement” and “justify its reasons for not assigning a Maintenance of Way employee to the subject work.”

In assessing the Organization’s argument, the Board relies on the unrebutted assertion by the Carrier that the emergency work required special equipment - an excavator with an extended boom operated by the rental agent. The Carrier does not own this equipment and its practice, in an emergency situation, is to rent the equipment with operator.

Given the circumstances established in the record of this proceeding, the Board concludes that an emergency existed and, in responding to the emergency, the Carrier did not violate Rule 1 and Appendix H. Therefore, the claim will 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 31st day of October 2016.