Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42469
Docket No. MW-41897
16-3-NRAB-00003-120213

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 Employes 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 & Sons, Inc.) to perform Maintenance of Way work (install culvert and related work) at Mile Post 503.2 in Esperance, New York on July 19, 20, 21, 22, 23, 26 and 27, 2010 (Carrier's File 8-00797 DHR).

(2) The Agreement was further violated when the Carrier failed to provide a proper advance notice of its intent to contract out the aforesaid work or make any good-faith efforts 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 D. Welch, T. Delamater and G. Lawyer shall now each be compensated for a total of fifty-six (56) hours at their respective straight time rates of pay and for fourteen (14) hours at their respective overtime 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.

On June 22, 2010, the Carrier issued the following notice to the Organization:

> **"RE: Contracting Out - Culvert Replacement - FML 503.20**
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> **Please be advised that under the provisions of the Collective Agreement the Carrier intends to contract out the replacement of the Culverts at FML 503.20.**
>
> **This culvert work is being contracted to a third party due to the lack of available qualified forces and specialized equipment requirements. The work is scheduled to begin on or about July 12, 2010.**
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> **The scope of the work will be as follows:**
>
> - **Replace deteriorated 24" corrugated pipe with 36" pipe using the pipe ram method."**

On July 7, 2010, the Organization responded to the notice with its opposition to any outsourcing. With the notice dated June 22, 2010 and the work scheduled to commence on July 12, 2010 the Organization asserts the Carrier failed to make any good-faith effort to plan and use the force. The Carrier's assertion that the force is unavailable shows the Carrier's failure to maintain adequate staffing. According to the Organization, the Carrier is required to train the force to ensure it is qualified for performing scope-covered work. The Organization requested information and documents.

On July 14, 2010, a conference convened by telephone. The next day the Carrier issued an e-mail to the Organization stating "pipe ramming/jacking is specialty work requiring specialized equipment and qualified technicians." This

type of work occurs twice or thrice annually; "we cannot make a business case for the purchase or rental and training that this type of work requires."

On August 30, 2010, the Organization responded stating that contracting out culvert replacements shows the Carrier's attempt to remove this work from the scope of Rule 1. The force historically and customarily performs culvert installation and replacement more than a few times a year; employees use Carrier owned or rented equipment. Using a different method for performing culvert work does not remove it from the scope of Rule 1 nor has the Carrier shown the force unqualified to use this specialty method as the Carrier is required to train employees. The Organization requested a copy of the contract, number of hours worked by the outside force, equipment used and terms of equipment agreement.

On September 9, 2010, the Organization filed a claim alleging the Carrier violated Rule 1 and Appendix H, among others, when it used a contractor for installing a new culvert at MP 503.2 in Esperance, NY. The Organization states that the outside force performed the work using the jack and bore process which, pursuant to the Agreement's Article XII, Training Commitment, the Carrier is required to train employees on "5. Specialized Equipment." The Carrier fails to rent the specialized equipment and train employees in the jack and bore method. Training would reduce the incidence of contracting.

On October 6, 2010, the Carrier denied the claim stating the notice contained the reason for contracting and when it would occur. "In this case - both a lack of qualified employees and specialized work were cited." The Organization misstates the complexity of the process for the jack and bore method; the level of expertise "is greater than the sum of its steps." Other entities that perform culvert work, such as municipalities, contract out for jack and bore.

> **"Installing a culvert using the jack and bore technique safely and effectively requires, inter alia, a practical experience in Geotechnical Engineering in order to understand line and grade, soil conditions, etc., and a level of experience and expertise in the operation of the required machine that can only be gained through frequent repetition."**

Some of the equipment is available to rent without an operator but renting the pipe ramming equipment requires use of the rental agent's operator. This work cannot be parceled; once a contractor is hired, it controls all steps for installation to

ensure safety and consistency. "Providing training to the force without the possibility of the force gaining the necessary expertise would be irresponsible."

On November 15, 2010, the Organization filed an appeal stating that the reasons for contracting out - unqualified force and specialized work - are controlled by the Carrier and shows lack of good faith to increase the use of the force as it exerted no effort to rent the equipment. The Organization identifies two companies that rent jack and bore equipment and provide onsite training. The notice does not state that this new culvert installation can be accomplished only with jack and bore; other methods are not explained away. Since 2000 the Carrier has installed 41 culverts with jack and bore thus removing work from Rule 1; it continues to refuse to provide training in this method. Any culvert work involves considering soil and water and other conditions.

On February 21, 2011, the Carrier denied the appeal by reiterating arguments in the claim denial. Specifically, this location for new culvert installation required use of jack and bore, specialized equipment. The force is not qualified to use this method. The Carrier complied with Rule 1 which does not prohibit outsourcing. Since 2000 the Carrier has installed 21 culverts using jack and bore which is an average of two each year. During conference in July 2010 the Organization did not provide alternatives to outsourcing or explain how the force could perform this work within the timeframe planned. The Organization did not identify sources for renting this equipment until November 2010, four months after the work.

On June 14 and 15, 2011, conference convened but an understanding 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 as the force historically and customarily installs and maintains culverts. The Carrier issued a written notice of its intent to contract this specialty work and, upon request, promptly met in conference with the Organization. During conference, there was a good-faith attempt to reach an understanding. In this regard, the Board considers that good-faith attempt in the context of the Organization's position that it opposes any outsourcing of scope-covered work and the Carrier's position that it complied with Rule 1. The discussions occurred within the framework of Appendix H where each party is

committed to reducing the incidence of contracting and increasing the use of the force "to the extent practicable."

As noted in on-property Third Division Award 38149, "[w]hile it is clear that the Organization did not agree with the Carrier's position and continued to disagree even after discussions between the Parties, there is no showing that the Carrier acted in other than good faith." Applying this on-property award to the findings in this claim, the Board notes that Rule 1 and Appendix H do not compel the parties to resolve their differences during conference and when that occurs, as here, the dispute has been placed before the Board by the Organization for a final resolution. The Carrier determined that pipe ramming equipment was necessary to install the culvert and renting this specialty equipment included the rental agent's operator for the equipment. In the circumstances of this claim, the Carrier's use of an outside force did not violate Rule 1 or Appendix H. Therefore, the claim is 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 November 2016.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 42469, DOCKET MW-41897
(Referee Patrick Halter)

In this instance, I must first concur because the Majority correctly determined that culvert installation is within Rule 1 and has historically and customarily been performed by the Carrier's Maintenance of Way forces. However, the Majority erred when it determined that the Carrier was permitted to contract out the claimed work. The Carrier's main assertion was that the work was performed using the "jack and bore" method for installing culverts. The Carrier also argued that the method was preferred as it was more efficient. The Majority's decision to deny the Organization's claim ignored the established precedent on this property. Specifically, Third Division Award 6305, which was rendered on August 6, 1953 and demonstrates that this Board has long recognized that culvert repair and installation of the nature involved herein is Maintenance of Way work and reserved to Maintenance of Way employes under the Agreement. The pertinent part of that award states:

> "OPINION OF BOARD: **At issue is the propriety of the Carrier's action in engaging a contractor to lay a culvert under its tracks** near Valcour, New York, in alleged violation of rules contained in the effective Agreement.
>
> **The respondent contends that the work in question was of a special kind requiring skills and experience which claimants did not posses and the use of equipment which was not owned by them**; and further that this construction work was of a type that the employes had never performed but had in truth and in fact been done by outside contractors over a period of years.
>
> Except in two particulars there exists no conflicts in the record (1) as to whether a 'jacking' or 'tunneling' process was used in installing the culvert, and (2) whether three or four men were used to complete the project in 12 working days. We conclude a 'tunneling' method, using tunnel liners, was the process adopted and that a superintendent and three other employes performed the work in question.
>
> **This Division has in numerous prior awards laid down the principle that a carrier cannot contract with outsiders for the performance of work which is of a kind and character covered by the effective collective bargaining agreement.** Award 757. Likewise it is fundamental that the employes coming under the Agreement are entitled to all of the work covered thereby, save and except that which is specially excepted from coverage of the Scope Rule. In Award 4701, this Board held:

> "'The burden of establishing an exception to the rule is on the Carrier and we do not believe it has met that burden.... In Award 757 this Board held that mere practice alone is not enough to establish exceptions to work clearly embraced in Scope Rule.'

Or as even more aptly put in Award 757:

> 'Mere practice alone is not sufficient, for as often held, repeated violations of a contract do not modify it.'

The Scope Rule here does not enumerate the various types or kinds of work which fall within the Agreement. Needless to say, some work was reserved to the Maintenance of Way employes, otherwise the need or necessity for a contract would not exist. We are of the opinion and so find and hold that there being no specified exception to the work covered by the rule, **the work which was here contracted out was of the kind and character of work properly classified as Maintenance of Way work, belonging to Maintenance of Way employes**.

This Board has so previously determined in Awards 5136 and 5090 as well as others cited therein. The claim here is valid.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained."

As referenced in the above-quoted section, the Carrier's argument that this type of culvert installation required special equipment has previously been rejected by this Board. The Majority simply chose to ignore the on-property precedent in issuing its decision. For the above reasons and in connection with the above-cited precedent, it is clear that the Majority in this instance erred when it determined that the Carrier was justified in its decision to contract out the claimed work. The Majority's decision that the Carrier was justified in contracting out this basic Maintenance of Way work is therefore palpably erroneous and must be considered to be without precedential value. Therefore, I respectfully dissent.

Respectfully submitted,

Zachary C. Voegel
Labor Member