

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42510
Docket No. MW-41896
17-3-NRAB-00003-120202**

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 on behalf of the System Committee of the Brotherhood:

- (1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (transport Maintenance of Way work equipment-excavator) from Albany, New York to Plattsburgh, New York on June 18, 2010 and from Plattsburgh, New York to Chazy, New York on June 25, 2010 (Carrier’s File 8-00785 DHR).**
- (2) The Agreement was further violated when the Carrier failed to provide an advance notice of its intent to contract out the aforesaid work or make any good-faith effort to reduce the incidence of subcontracting and increase the use of its 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. Miller shall now be compensated for a total of eight (8) hours at his respective straight time rate of pay and for four (4) hours at his respective overtime 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.

This claim involves the Carrier's decision on June 18, 2010 to rent from Hertz an excavator and a truck for transporting the excavator.

On July 31, 2010, the Organization filed a claim for the time Hertz personnel consumed transporting the excavator from Albany, New York to Plattsburgh, New York and, thereafter, from Plattsburg, New York to Chazy, New York. This is scope covered work customarily performed by the Claimant, a Tractor Trailer Operator. The Carrier failed to provide notice and no emergency existed. There was no good-faith attempt to reduce the incidence of outsourcing.

On August 16, 2010, the Carrier denied the appeal. "The equipment transported is special equipment not owned by CP Rail there for requires a special transport to move this type of equipment due to weight restrictions." The Claimant informed the Carrier, in response to CP's inquiry, that this type of equipment could not be transported with the truck and trailer owned by CP due to weight restrictions, axle on the tractor and registration weights issued by the State of New York. "Tractor is 17000 lbs. trailer is 30,000 lbs. excavator is 77000 lbs. with a total of 124000 lbs. truck and trailer is Registered for 95000 lbs. there for the load would be over loaded by 29000 lbs. there for making these moves could not be permitted for the carrier's truck and trailer." In the past, the Carrier states the Claimant has been denied transporting equipment due to weight restrictions on Carrier equipment.

On October 15, 2010, the Organization filed an appeal. Weight restrictions on the truck and trailer "are not the fault of the claimant." This is scope-covered work; the Carrier does not dispute this point in its claim denial. "Historically, when the Carrier has required special transports of equipment due to transport restrictions, the Carrier has notified the Organization in writing of its intent to contract out the work; this fact alone supports that the transport of work equipment is scope covered." In a recent situation, (July 8, 2010) where the Carrier notified the Organization that it intended to contract with a transport carrier to haul CP equipment, the Organization agreed. The Organization was denied the notice and opportunity to discuss in this claim. This situation is within the Carrier's control and ability by upgrading its

equipment and, until then, the Claimant is “punished or denied” this work opportunity for reasons beyond his control.

On December 31, 2010, the Carrier denied the appeal by reiterating arguments in its claim denial. The Claimant confirmed the Carrier did not have the equipment to transport the excavator. The practice on property is to rent equipment with the vendor delivering and picking up. Transport of rented equipment by the vendor to and from the Carrier’s work site is not scope covered work. Vendors continuously perform this work and the Carrier does not issue notice. The situation of July 8, 2010 is not applicable because that involved transport of Carrier equipment by a vendor whereas this claim involves the Carrier renting an excavator and renting the trailer to transport that excavator.

Following conference on June 14 and 15, 2011, this matter remains deadlocked on property and is now before the Board for a final decision.

Having reviewed the record, the Board finds that the burden of proof resides with the Organization to establish that the work is scope covered. The Organization relies on Rule 1.1 noting the claimed work is the transport of equipment used for the construction, repair and maintenance of culverts, tracks and roadbed and refers to arbitral precedent in on-property Third Division Awards 40454 and 40455, among others. Transporting equipment is customarily and historically performed by the force.

The Claimant, a Tractor Trailer Operator, performs this scope covered work, e.g., transports equipment. The Carrier does not state that the Claimant is unqualified to transport the excavator. Rather, the Carrier’s position is that the equipment (excavator and trailer) are not Carrier owned, therefore, it is not required to issue notice. The Carrier also asserts that the on-property practice is for the vendor to deliver and pick up.

The Board finds that Claimant is a qualified Tractor Trailer Operator who transports equipment for the Carrier. The Carrier does not establish that the Claimant is unqualified to operate the rented tractor trailer transporting the excavator. There is no evidence in the record that rental of the tractor trailer required operation by Hertz personnel. The on-property practice of the vendor delivering and picking up is asserted but not proven.

The Carrier’s claim denial essentially affirms that the Claimant would have transported the equipment except that the equipment exceeded a certain weight. The Carrier did not deny the claim on the basis that it was leased equipment. The Board finds the claimed work is scope covered and notice to outsource was required. The

Carrier asserts, without demonstrable support, that it routinely outsources this kind of work without issuing notice. This affirmative defense cannot be sustained based on the record placed before the Board.

On-property Award 45 of Public Law Board No. 6493 provides guidance in this claim supportive of the Organization's position.

“By the same token, to simply declare that the outside contractor used a piece of specialized equipment, without also showing that the work could not have been performed by Carrier employees using Carrier-owned or leased equipment, is a meaningless non-sequitur. Indeed, these are precisely the kind of issues which are mutually intended by the Parties to be discussed prior to subcontracting in compliance with the good-faith requirements of Rule 1 and Appendix H.”

Applying precedent in Award 45, the Board sustains the claim. A monetary remedy is appropriate to enforce the terms of the Agreement. Support for the remedy is apparent in on-property Third Division Awards 36851, 40453, 40454, 40456 and 40457.

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 11th day of January 2017.