

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42534
Docket No. MW-42549
17-3-NRAB-00003-140221**

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:

- (1) The Agreement was violated when the Carrier assigned outside forces (Pacific Company) to perform Maintenance of Way work (rock scaling and stabilization and related work) at the north portal of the Willsboro Tunnel at approximately Mile Post 145 on the Canadian Main Line beginning on approximately June 22, 2011 and continuing (Carrier’s File 8-00866).**
- (2) The Agreement was further violated when the Carrier failed to comply with the advance notice and conference provisions and failed to make a good-faith effort to reduce the incidence of contracting out and increase the use of Maintenance of Way forces.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants W. Barcomb, Sr., P. Jerdo and K. Bigelow shall now each be compensated at their respective straight time and overtime rates for an equal and proportionate share of all time worked by the outside forces beginning on approximately June 22, 2011 and continuing.”**

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.

The claim involves the Carrier's decision to outsource rock scaling and stabilization work at the north portal of Willsboro Tunnel.

On August 22, 2011, the Organization filed its claim alleging the work commenced on June 22, 2011 and continued without notice and opportunity for conference. The work is scope-covered, e.g., cutting brush and chipping away stone and rock along the roadway and at the north portal including construction of a new fence to catch loose rock. The force historically performs fence repair and construction, brush cutting and minor rock scaling when assigned and provided equipment. The Claimants were qualified, available and willing to do the claimed work.

On October 21, 2011, the Carrier denied the claim stating that rock scaling and stabilization involves use of a rock catchment system which is specialty work requiring trained personnel and such work has been contracted out for 15 years with no claims. Any brush removal was incidental to the contracted work; the Carrier has no record of brush removal. Rock slope stabilization is not work within the general scope rule; it is not recognized as maintenance of way work under Rule 1 because of its specialty expertise and trained personnel. Although there is no requirement to issue notice for non-scope work, in a good-faith effort to inform the General Chairman of this complex work the Carrier shared pictures on July 28, 2011. The Organization's description of the work as brush cutting, chipping away at stone, work historically performed by the force and minor rock scaling is misleading.

On December 21, 2011, the Organization filed an appeal to the claim denial. The Organization reiterates arguments in its claim filing and notes that brush removal work could have been fragmented from the contracted work and assigned to the force. Although the Organization has not filed claims on specialized work in the past, that occurred because the Carrier engaged the Organization with plans and discussions. In this situation, the Carrier did not provide notice that it was contracting out scope covered work including brush cutting and removal.

On August 8, 2011, the Carrier denied the appeal by reiterating statements in its claim denial. The fence installed is not the usual, customary fence as the installation is on the side of the rock slope requiring the installer to hang off the side of the rock cliff and perform the installation. The Organization provides no examples under the general scope rule of having performed this work. The Carrier is not required to issue notice when a contractor is on property performing non-scope work. The Organization acknowledged it has not contested this work in past years. Finally, the Carrier is not required to fragment work. In this regard, the Organization never disclosed the area where the brush removal occurred.

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

According to the Organization this is scope covered work under Rule 1.1 as it involves “inspection, construction, repair and maintenance of . . . buildings and other structures, tracks, fences and roadbed.” Rule 1.3 requires notice prior to contracting out work “within the scope of the Agreement.” On-property Third Division Awards 38147, 39490 and 41478 submitted by the Organization confirm notice is required for scope covered work. In the cases relied upon by the Organization there was no dispute that the work is scope covered; however, the Carrier asserts in this claim that the work is outside the scope.

Having reviewed the record, the Board finds that claimed work is not within the general scope rule. The force has not performed rock scaling and stabilization using the rock catchment system. There are no situations or examples provided by the Organization where it has performed rock scaling and stabilization using the rock catchment system. The force has not customarily and historically performed this work as it states in the appeal to the claim denial. Rock scaling and stabilization work of the kind presented in the circumstances of this claim is not “within the scope of the Agreement.”

As for the brush removal, that is scope covered work but the extent of that work is not established by the Organization. The Carrier has no record of it, brush removal was not part of the contract and the Organization did not provide any particulars other than alleging it was performed by the contractor. Based on the record, the Board finds any brush removal was incidental to the rock scaling and stabilization.

Third Division Award 29558 supports the Carrier's position that Rule 1 is not violated when there is a long-standing practice (15 years) for outsourcing without formal notice due to the specialized, complex work and equipment. ("There is no clear prohibition to the Carrier's use of special equipment, particularly in view of past practice in doing so.") Further support is on-property Third Division Award 35083 ("Carrier's employees did not have the tools or expertise to perform the work . . . Carrier not obligated to have provided training that would have permitted its own employees to do the work.")

Based on the record established by the parties in this proceeding, the claimed work is not "within the scope of the Agreement." Thus, notice was not required. 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 6th day of March 2017.