

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42994
Docket No. MW-43067
18-3-NRAB-00003-150306**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
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(Delaware 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 (Track Builders Construction Corporation) to perform Maintenance of Way work (track construction) in connection with the Ballston 2nd Main Track Expansion Project between Mile Posts 33 and 35 on the Canadian Subdivision beginning on June 3, 2013 through July 25, 2013 and continuing (Carrier’s File 8-00936 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 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, Claimants D. Gaston, K. Wetsell, T. Aurilio, J. Hammond, C. Gordon, K. Oswald, J. Radzikowski, S. Bologansky, G. Foster and W. Wade, Jr. shall now each be compensated at their respective and applicable rates of pay for an equal and proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning on June 3, 2013 through July 25, 2013 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.

Beginning June 3, 2013 and continuing, the Carrier decided to assign outside forces (Track Builders Construction Corporation) to perform new track construction and related duties between Mile Posts 33 and 35 on the Canadian Subdivision, instead of using its own Maintenance of Way forces. The Organization protested this as a violation of the parties' collective bargaining agreement.

The Carrier alleges proper notice was given to the Organization and the parties held a good faith discussion on August 1, 2012. It argues there was no tradition, custom or practice of the BMWWE represented employees performing this type of work. It maintains the building of a new siding on the Delaware & Hudson is only performed sporadically or intermittently. The Carrier further asserts it could not have completed the project by the end of the year without contracting out. In view of these facts and circumstances, the Carrier concludes its actions were legitimate.

The construction in question was described as follows:

- "Construct new track - approximately 10,500 feet and realign approximately 13,500 feet of existing track between CPC-33 and CPC-33
- Remove one (1) turnout at CPC-33 and one (1) turnout at CPC-35
- Install two (2) #15 crossovers at CPC-33
- Install one (1) crossover at CPC-35
- Install approximately seven hundred and fifty (750) track feet at the new crossovers

- Perform grade crossing work including installing cross flange timbers at both crossing locations on the new proposed track and fill new crossing areas with dense aggregate”

The Organization points out that Third Division Awards 40455 and 41474 involved the same type of track construction work as that involved here. It argues these prior decisions firmly establish that track construction work is reserved to Maintenance of way forces: Award 40455 held: “Rule 1.1 specifically reserves to BMWE-represented employees the work of track construction. Thus, there can be no dispute that the work involved herein was scope-covered. Public Law Board No. 6493, Award 45.”

The Organization also provided statements and photographs of unit employees doing the same type of work. It notes the work ran over and was not completed by the end of 2012. In its view, this completely undermines any contention by the Carrier that it had to complete the work by the end of 2012. The Organization concludes that the facts and circumstances do not support the Carrier’s decision and the parties’ Agreement has been breached.

The Board finds the work at issue to have been track construction, which falls squarely within the Rule 1.1 delineation of scope covered work. In the view of this Board, Third Division Award 6305 controls:

“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 employees 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 view of the evidence offered by the Organization, the Carrier’s assertion that the work in question has not historically been performed by unit employees is not persuasive. This work appears to have indeed been previously performed by Maintenance of Way employees. The assertion that the work is only performed intermittently does not alter this conclusion.

The Carrier maintains it needed the work to be finished by the end of 2012, and could not have moved toward this goal without subcontracting. This argument is not persuasive to the Board, because the work apparently continued into 2013 and the perceived 2012 deadline was dropped. Under these circumstances, it cannot be said that the Carrier has met its burden of proof.

The claim is sustained in full. the Claimants D. Gaston, K. Wetsell, T. Aurillo, J. Hammond, C. Gordon, K. Oswald, J. Radzikowski, S. Bologansky, G. Foster and W. Wade, Jr. shall now each be compensated at their respective and applicable rates of pay for an equal and proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning on June 3, 2013 through July 25, 2013 and continuing thereafter.

AWARD

Claim sustained in accordance with the findings.

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 29th day of March 2018.