

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42997
Docket No. MW-43108
18-3-NRAB-00003-150301**

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 ARASA employes to perform Maintenance of Way duties (track protection) in connection with the Ballston Spa 2nd Main Track Expansion Project between Mile Posts 33 and 35 on the Canadian Subdivision beginning on January 3, 2013 through January 31, 2013 and continuing (Carrier’s File 8-00902 DHR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant G. Foster shall now be compensated for one hundred eighty (180) hours at his respective straight time rate of pay and thirty-six (36) hours at his time and one-half rate of pay and any additional dates the above-cited work was performed at this location by ARASA employes.”

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 Organization protests that track foreman duties have been assigned to an outside contractor in violation of the parties' agreement. It asserts the Carrier violated the bargaining agreement by assigning the duties of the Claimant first to another employee then to outside contractors.

The Carrier contends no damages are warranted because the Claimant remained employed during the period of concern. It notes that historically, the Company has utilized ARASA construction inspectors for projects relating to site work, grading and construction. According to the Carrier, track protection on this property is not exclusive to the BMWED Craft – employees qualified in GCOR can provide work site protection. It notes all track construction was suspended for the winter; there was no requirement for a BMWED represented Track Foreman. This project was scheduled to be completed by December 31, 2012, it asserts, noting that unfortunately a series of unanticipated extraordinary site work circumstances caused the project to become critically delayed.

The Carrier explained that it abolished the D&H/BMWED protection positions due to the fact that the track construction was suspended for the winter months and D&H/BMWED Foreman was not required. Once track construction resumed D&H/BMWED Track Foreman's positions were advertised. According to the Carrier, there is a well-established customary, historical, and traditional pattern on this property of utilizing ARASA construction inspectors to provide track protection. It concludes the claim must be denied.

The Organization argues that the Carrier failed to assign Claimant G. Foster to fill and perform protection duties in connection with track construction work in violation of the parties' Agreement. It maintains these protection duties have customarily and historically been performed by a Maintenance of Way foreman. In this regard, an assigned Maintenance of Way Track Foreman was performing the subject foreman protection duties until the Carrier abolished that position on December 21, 2012. According to the Organization, after the Carrier abolished the position, it reassigned the protection duties to several ARASA supervisors who have no work rights under the BMWED Agreement.

In the Organization's view, there can be no dispute that the protection duties of the ARASA employees included scope-covered Maintenance of Way track foreman duties. Indeed, prior to its December 21, 2012 abolishment, a track foreman position was performing these duties.

The Organization notes the Carrier has provided no substantiation for its assertion that the work has previously been performed by ARASA represented employees. The Organization contends it is undisputed that the Carrier bulletined and assigned a Maintenance of Way foreman to perform the same track protection duties up until December 21, 2012 and, it is undisputed that the Carrier committed to the Organization that it would have a track foreman at this location performing protection duties. It reasons that whether ARASA employees have provided on-track protection or not in the past is inconsequential because this was clearly a Maintenance of Way position which was bulletined, awarded and assigned to a Maintenance of Way track foreman and the Carrier committed to the Organization that it would assign a Maintenance of Way foreman to this work."

The Organization's point is well taken that a track foreman was performing the duties in question until December 21, 2012, thereby establishing that the work was indeed scope covered. As noted in Third Division Award 28185:

"It is the Board's view, contrary to Carrier's position, that the work in dispute has customarily (though not exclusively) been performed by members of the B&B Department. It would be wholly improper to assign such work to supervisory employees who are not covered by any Agreement (See Third Division Awards 25991 and 15461)."

The fact that track protection has been similarly handled in the past does not absolve the Carrier from contract violation. There is no showing that this practice was mutually agreeable or accepted as a proper interpretation of the parties' Agreement. The parties are bound by their Agreement.

With regard to compensation, numerous prior authorities have held that an award of compensation is appropriate for lost work opportunities notwithstanding that the particular Claimants may have been under pay at the time of the violation. For example, Third Division Award 21340 supports this conclusion, citing Third Division Award 19924. The fact that the position was previously bulletined to a

Maintenance of Way foreman is telling. The Board is persuaded that the Carrier violated the Agreement in this case.

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 29th day of March 2018.