

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43009
Docket No. MW-43838
18-3-NRAB-00003-160407**

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 to perform Maintenance of Way work (excavation, grading, drainage, pipe installation, brush cutting and all associated site work) at Mile Post 171.5 in Beekmantown, New York beginning on October 28, 2013 and continuing through November 18, 2013 (Carrier’s File 8-00978 DHR).**
- (2) The Agreement was further violated when the Carrier failed to comply with the advance notification and conference provisions in connection with the Carrier’s intent to contract out the aforesaid work or to 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 K. Sweatt, R. Lindsay and E. Sawyer shall now each be compensated for a total of one hundred four (104) hours at their respective straight time rates of pay and for twenty-nine and one-half (29.5) 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.

Beginning on October 28, 2013 and continuing through November 18, 2013, the Carrier assigned outside forces to perform culvert installation and related work at Mile Post 171.5 in Beekmantown, New York. The Organization protested that this outsourcing was in violation of the parties' collective bargaining Agreement.

The Carrier asserts it provided the Organization with notice of its intent to contract out the culvert work in Beekmantown, New York. It concludes a good faith attempt to reach an understanding was attempted.

It explained that the culvert work involved was atypical in that it involved use of new technology: the jack and bore method. The Carrier explained that the jack and bore method requires not only an understanding of environmental concerns such soil conditions and water patterns, but also mandates expertise regarding potential problems which may occur in the process. It notes that its forces lack experience in the methodology, and therefore do not possess the expertise to address the type of problems which may occur.

In the Carrier's view, the jack and bore method also requires a level of experience and expertise in the operation of required machinery that can only be gained through frequent repetition. The Carrier contends it does not expect to install a sufficient number of culverts to enable its forces to develop enough expertise to complete the installations safely and effectively. It notes it is not

required to hire additional forces or purchase additional equipment for peaks and/or short-term projects, such as that involved in the instant matter.

The Carrier maintains it is not required to hire additional employees for a short-term project of this nature because it does not constitute an efficient or cost effective alternative that meets the needs of the business. It concludes its actions have been proper under the parties' Agreement.

In the Organization's view, the issue of scope covered work is the work itself, not the equipment and/or the method utilized to perform that work. It argues culvert work is reserved to the BMWED regardless of the method of repair and/or installation. If the Carrier is looking to change its preferred method of installation to a 'jack and bore' method, then the Organization insists the Carrier is subject to two separate training agreements which require employee training for BMWED work. It contends there is no dispute that Maintenance of Way employees on this property have historically performed culvert installation.

The Organization alleges the Carrier must show that it attempted to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces prior to engaging in a contracting out process. It argues there is no reason to insist on the jack and bore method. It concludes the Agreement has been violated.

By letter dated September 19, 2013 the Carrier provided the Organization with advance notice of its intent to contract out the work in contention. The record further shows that the parties completed the conference to review the notice on September 23, 2013. Accordingly, the Board finds no violation of the requirement for notice and conference.

There is no question but that culvert installation and repair have historically been considered scope work performed by BMWED employees. However, in the opinion of the Board, the jack and bore method is distinguishable in that different skills, duties and equipment are necessary. It is new technology for the Carrier, and as such, unit employees are not experienced or skilled in performance of the duties involved.

The nature of the jack and bore approach to culvert installation and repair involves risks that do not exist under other circumstances. In the Board's

assessment, knowledge and comparable competence regarding line and grade, soil conditions, attributes of water flow and related matters is not necessary in tradition culvert installation and repair, whereas with jack and bore, it is essential to avoid failure of the project. In addition, the method requires competence in the operation of the machinery that can only be gained through substantial experience.

This decision is rooted in the context of the Carrier's assertion that it anticipates few culverts will require the jack and bore method; it does not address the circumstance where the jack and bore method becomes more prevalent than an occasional, short term project.

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 29th day of March 2018.