AWARD NO. 45
NMB CASE NO. 45
UNION CASE NO. 45
COMPANY CASE NO. 8-00306

PUBLIC LAW BOARD NO. 6493

PARTIES TO THE DISPUTE:

DELAWARE & HUDSON RAILWAY COMPANY, INC.

- and -

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES

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 (cleaning ditches and culvert) between CPC 24 and Mile Posts 480 and 418 on the Saratoga Subdivision beginning June 6, 2002 and continuing, instead of System Equipment Operator D. Jordan (Carrier's File 8-00306 DHR).

(2) The Agreement was further violated when the Carrier failed to comply with the notice requirements regarding 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, Claimant D. Jordan shall now be compensated for eight (8) hours' pay at his respective straight time rate of pay for each date beginning June 6, 2002 and continuing and compensated for all additional hours on each date that the outside forces expended in the performance of the aforesaid work at his respective time and one-half rate of pay.

Public Law Board 6493 upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Board has jurisdiction over the dispute involved herein.

Parties to said dispute exercised the right to appearance at hearing thereon.

OPINION OF BOARD:

Machine Operators, as well as Trackmen and Track Foremen employed by the Delaware & Hudson Railway Company, Inc. ("Carrier"), are covered by the terms of the Collective Bargaining Agreement ("Agreement") between Carrier and the Brotherhood of Maintenance of Way Employees ("Organization"). Portions of the Agreement most pertinent to these cases read as follows (Emphasis added):

> Rule 1 PREAMBLE
>
> 1.1 **These rules shall be the agreement between D&H Corporation and its employees on the Delaware and Hudson Railway in the classifications set forth in Rule 28 represented by the Brotherhood of Maintenance of Way Employees, engaged in work generally recognized as Maintenance of Way work, such as, inspection, construction, repair and maintenance of** water facilities, bridges, **culverts,** buildings and other structures, tracks, fences and roadbed, and work which, as of the effective date of this Agreement, was being performed by these employees, and shall govern the rates of pay, rules and working conditions of such employees.
>
> 1.2 It is understood and agreed in the application of this provision that any work which was being performed prior to the date of acquisition on the property of the D&H Railroad, by other than employees covered by this Agreement, may continue to be performed by such other employees at the locations at which such work was performed by past practice or agreement on the effective date of this Agreement. It is also understood that work not covered by this Agreement which was being performed on the D&H Railroad, prior to the date of acquisition by employees covered by this Agreement will not be removed from the regular work assignments of the employees at the locations at which such work was performed by past practice or agreement on the effective date of this Agreement.
>
> 1.3 **In the event the Carrier plans to contract out work within the scope of this Agreement, except in emergencies, the Carrier shall notify the General Chairman involved**, in writing, as far in advance of the date of the contracting transaction as is practical and in any event not less than fifteen (15) days prior thereto. **"Emergencies" applies to fires, floods, heavy snow and like circumstances.**
>
> 1.4 If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier shall promptly meet with him for that purpose. Said Carrier and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the Carrier may nevertheless proceed with said contracting and the organization may file and progress claims in connection therewith.
>
> 1.5 Nothing in this Rule shall effect the existing rights of either party in connection with contracting out. Its purpose is to require the Company to give an advance notice and, if requested, to meet with the General Chairman or his representative to discuss and, if possible, reach an understanding in connection therewith.

APPENDIX H
December 11, 1981
* * *

During negotiations leading to the December 11, 1981 National Agreement, the parties reviewed in detail existing practices with respect to contracting out of work and the prospects for further enhancing the productivity of the carriers' forces.

The carriers expressed the position in these discussions that the existing rule in the May 17, 1968 National Agreement, properly applied, adequately safeguarded work opportunities for their employees while preserving the carriers' right to contract out work in situations where warranted. The organization, however, believed it necessary to restrict such carriers' rights because of its concerns that work within the scope of the applicable schedule agreement is contracted out unnecessarily.

Conversely, during our discussions of the carriers' proposals, you indicated a willingness to continue to explore ways and means of achieving a more efficient and economical utilization of the work force.

* * *

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contacted and the reasons therefor.

* * *

(Signed) Charles Hopkins, Jr.
I concur: (Signed) 0. M. Berge

The present claim involves Carrier's subcontracting, without notice or opportunity for conference, work expressly reserved to Agreement-covered employees by above-emphasized language in Rule 1, §1.1, *viz*, "inspection, construction, repair and maintenance of. . .culverts". On June 6, 2002, an outside contractor retained by Carrier removed debris from a plugged culvert on the Saratoga Subdivision, near the main line, using equipment owned by the contractor and operated by an employee of the contractor. The Claimant in this case, who is regularly employed by Carrier as a System Equipment Operator, timely filed the instant claim alleging violations of Agreement Rule 1, §§ 1.1, 1.3, 1.4 and 1.5, *supra*.

The foregoing undisputed facts make out a *prima facie* violation of the cited Agreement provisions, but Carrier denied the claim by asserting the affirmative defense of "emergency", in a letter of October 7, 2002, reading in pertinent part as follows:

> ... This claim is for emergency work that was required to protect the railway from possible flooding. A plugged culvert was endangering the Canadian Connector and the Canadian Main Line. The contractor used a special "long stick" excavator with an 80 foot reach. It should be noted that Mr. Jordan was working throughout this time on his regular job on other railway work.
>
> As per the current agreement between the BMWE and the D&H Railway, this was emergency work that was required to protect the railway. Therefore, your claim is respectfully denied.

The matter deadlocked in handling on the property and eventually was referred to this Board for final and binding determination in arbitration.

It is well-recognized that a proven bona fide "emergency", within the meaning of that word as used in the Rule 1, §1.3 of the Agreement, excuses non-compliance with the notice and conference requirements of Rule 1, §§1.3.1.4 and the December 11, 1981 Berg-Hopkins Letter, *supra*. The burden of persuasion is on the Carrier, however, and mere invocation of the word "emergency", without persuasive evidence to back it up, will not do. In our considered judgement, the Carrier did not even come close to meeting the burden of proof of its asserted affirmative defense on the record of the present case.

Specifically, there is not an iota of evidence to show that the blockage of the culvert was a sudden or unpredictable occurrence and no showing of any urgency or immanence of the asserted potential flood "emergency". In short, there is no evidence of record sufficient to justify Carrier's failure to comply with the Agreement-required notice to and good faith discussion with the General Chairman about the necessity of subcontracting as opposed to the performance of the work by Scope Rule-covered employees like the Claimant. 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 kinds 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.

Based on all of the foregoing, Parts 1 and 2 of the claim are sustained. As for Part 3, there is no showing by the Organization that the culvert excavation work consumed more than one (1) day, June 6, 2002. Thus the remedial damages awarded are limited to eight (8) hours at the applicable straight time rate. In that regard, as this Board has held in prior cases, the fact that the Claimant may have been "fully employed" on claim date does not bar an award of monetary damages as a deterrent to blatant violations of the good faith notice/conference requirements

AWARD

1) Claims sustained to the extent indicated in the Opinion.

2) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.

Dana Edward Eischen, Chairman

Stewart A. Heilbut
Union Member 9/9/2005

Howard H. Buchanan
Company Member