

PUBLIC LAW BOARD NO. 6493

PARTIES TO THE DISPUTE:

CANADIEN PACIFIC RAILWAY CO., INC.
(Former DELAWARE & HUDSON)

-and-

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM:

Formal Time Claim of April 12, 2006 for Mr. Thomas Tarchak, regarding his loss of a work opportunity. The Carrier has violated the following Rules of the current Agreement between the parties. Rules violated are 1, 3, 4, 11, and 28. The days and hours claimed are as follows:

February 28, 2006	8 hours at ST rate/ 2 hours at the OT rate
March 1, 2006	8 hours at ST rate/3 hours at the OT rate
March 2, 2006	8 hours at ST rate/2 hours at the OT rate
March 3, 2006	8 hours at ST rate/2 hours at the OT rate
March 6, 2006	8 hours at ST rate/2 hours at the OT rate
March 7, 2006	8 hours at ST rate/1 hour at the OT rate
March 8, 2006	8 hours at ST rate/1 hours at the OT rate
March 9, 2006	8 hours at ST rate/2.5 hours at the OT rate
March 10, 2006	8 hours at ST rate
March 13, 2006	8 hours at ST rate/3 hours at the OT rate
March 14, 2006	8 hours at ST rate/3 hours at the OT rate
March 15, 2006	8 hours at ST rate/3 hours at the OT rate

The total Straight Time Hours claimed in the April 12, 2006 claim was 96 hours and the total Overtime Hours claimed was 22.5 hours "to date". Note: as stated in the claim "this will be an ongoing claim until resolved".

BACKGROUND

This claim had its inception in a contracting out notice sent to the Organization by the Carrier on January 24, 2005, advising of intent to contract out certain reconstruction work on two (2) Bridges at MP 613.84, on the Freight Line over Robinson Street, in Binghamton, NY. ("Robinson Bridge Subcontract"). The Organization responded to the Carrier on January 28, 2005 and on Tuesday, February 1, 2005, the project was discussed over the phone between Carrier Official, Mr. Robert Conroy and the Organization's General Chairman Hurlburt. Because the Carrier did not have all the information regarding the project at that time, it was agreed to conference this project again at the end of February or the first week of March, 2005.

On that basis, General Chairman Hurlburt memorialized the conference, by a February 1, 2005 letter to Field Manager, Structures Conroy, reading, in pertinent part as follows:

Regarding our phone conversation on Tuesday, February 1, 2005, concerning the above referenced project.

In our conversation you stated that the Carrier does not have all the final plans but will have the final plans for this project toward the end of February. The Organization requests another meeting toward the end of February or the first week in March to further discuss this project.

In our phone conversation you stated that all aspects of this project were going to be contracted out to a contractor, This project was scheduled to start around April 1, 2005, and to be completed around December 15, 2005.

The Organization asked why the Carrier was going to contract out this work?

The reason you stated why the Carrier was going to contract out this project was that the Delaware and Hudson Railway did not have the manpower to complete this project, This project was going to take from 20 to 40 employees working for the contractor at any given time.

The Organization asked how long this project was in the planning stage? It was also stated that this project has been discussed and planned for two (2) years or better.

The partial list of work that you described that this contractor was going to perform regarding the installation of the bridges was following; new abutments, pile driving, cement work, steel work and excavating around the area.

The Organization pointed out that the existing B&B Forces have constructed a new bridge before for the Carrier. In fact you even acknowledged that the B&B Department has constructed a new bridge before.

The Organization asked about the removal of the old bridges and you stated that tile old bridges would be removed by the contractor or given to the NYS&W Railroad that decision was not finalized yet.

It was also stated that this contractor was going to perform the complete new construction of the Track and the contractor was going to connect the new Track to the existing track. The Organization asked why the contractor was going to perform the construction of the new Track and connect the new track to the existing track, you stated that I would have to contact Mr, J, F, Boisvert or Mr, Dragland regarding that, for you did not have that information.

The Organization asked who was going to provide protection for this project. It was stated by you (Mr, Conroy) that the Carrier would provide a B&B Foreman to provide this protection on this project.

I believe that you are aware that the Brotherhood of Maintenance of Way Employes Division (BMWED), Of the International Brotherhood of Teamsters is opposed to contracting out any work that accrues to the Bridge and Building (B&B) and the Maintenance of Way Departments.

The type of work mentioned in the Contracting Out Notice has historically been performed by the employees of the B&B and M/W Departments.

It is perplexing that the Carrier would consider contracting this work out considering the highly qualified B&B and M/W employees who are presently available on the Delaware and Hudson Railway.(CP Rail System).

While the BMWED is vigorously opposed to assigning this work too outside forces and will use every legal recourse to protect our Agreement, The BMWED is more than willing to discuss this matter in good faith with you before you reach an agreement with an outside contractor.

Kindly contact the System Office at your earliest convenience to arrange a mutually agreeable date, time and place to conference this project once you have all the information and the proper Carrier Officials who can answer all questions for this project.

Should you have any questions regarding this matter, please do not hesitate to contact the System Office at (607) -988-7416.

On Monday, March 7, 2005, the Organization and the Carrier did conference this project, but the Organization was again advised that the Carrier did not yet have available all of the information for this project. Thereafter, the Carrier subcontracted the project and the Organization filed the instant time claim on April 12, 2006, which reads in pertinent part as follows:

On Monday, March 7, 2005, the Organization and the Carrier conference this project again. At this meeting the Organization was advised that the Carrier did not have all of the information for this project at this time.

* * *

The Organization would like to point out that on February 1, 2005, and March 7, 2005, Mr. Bob Conroy a Carrier Official stated that there would be an B-&B Foremen on this project providing track protection. As for information, the Carrier had already established a B&B Foreman to cover this project. There was a B&B Foreman position advertised and awarded for this project. This was agreed to between the parties.

The Carrier has now abolished that B&B Foreman position. and is sending a B&B Foreman from the basic headquarters in Binghamton, to cover this project. The Carrier has willfully violated what was agreed to between the parties concerning this project at Bridge over Robinson Street.

Therefore, this claim will be an on going claim until resolved and the B&B Foreman position is advertised and awarded for this project.

The foregoing claim was denied at the first level by Mgr. Engr. Maintenance Andre Lapalme in a letter dated June 7, 2006, reading in pertinent part as follows:

* * *

Re - Your claim dated April 12; 2006 addressed to Mr. Tim Nianmer, in which you claim 96 hours straight time and 24.5 hours over-time between Feb 28 to Mar 15, 2006 for Thomas Tarchak for loss of work opportunity at 2 bridges 613.84, Robinson Street, Binghamton, NY.

This claim is for B&B Foreman's work protecting the contractor at bridges 613.84, at Binghamton, NY. Your claim states that the carrier notified the organization of this contracting out on January 24, 2005. That is correct.

Your claim states that this project was conference on January 28, 2005 and again at the end of February and the first week of March. That is correct.

Your claim states that the Carrier stated that a B&B Foreman was going to provide track protection for this project. That is correct.

Your claim states that there was a B&B Foreman position advertised and awarded for this project. That is correct.

Your claim then states that the Carrier abolished the B&B Foreman's position and is sending a B&B Foreman from the basic headquarters at Binghamton to cover this project. This is not correct as the B&B Foreman position at the bridge was abolished in winter when the project shut down for the winter. When beams arrived in early spring to be unloaded, the carrier sent the B&B Foreman at Binghamton headquarters to the job to protect this work at all times that the contractor was on the property. At no time did the carrier indicate that an extra position would be established and be kept on through the winter at this project site.

It should be noted that since the summer projects have started and the workload has increased, the carrier has again established an extra B&B Foreman position headquartered at Binghamton to cover this project.

Since the carrier has provided a BMW B&B Foreman to provide protection at all times while a contractor is working on this project as per our contracting out notice and all subsequent meetings as per agreement, your claim is respectfully denied.

AGREEMENT PROVISIONS CITED IN THE CLAIM

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.

RULE 3 -VACANCIES AND NEW POSITIONS **ASSIGNMENT TO POSITION**

3.1 In the assignment of employees to positions under this Agreement, qualifications being sufficient, seniority shall govern.

3.2 The word "seniority" as used in this Rule means, first, seniority in the class in which the assignment is to be made, and thereafter, in the lower classed, respectively, in the same group in the order in which they appear on the seniority roster.

QUALIFICATION FOR POSITIONS

3.3 In making application for an advertised position or vacancy, or in the exercise of seniority, an employee will be permitted, on written request, or may be required, to give a reasonable, practical demonstration of his qualifications to perform the duties of the position,

3.4 In the event the employee requests, or is required to give a reasonable and practical demonstration of his qualifications for the position, the company must give a uniform job related test based upon reasonable job related criteria in order to ascertain initial qualifications for a position.

3.5 The above mentioned test and/or criteria may be reviewed by the designated union representative, upon reasonable notice to the designated Carrier officer.

ADVERTISEMENT AND AWARD

3.6 All positions and vacancies will be advertised within thirty (30) days previous to or within twenty (20) days following the dates they occur. The advertisement shall show position title, rate of pay, headquarters, tour of duty, rest days and designated meal period.

3.7 Advertisements will be posted on Mondays and shall close at 5:00 P.M. ten calendar days following. Advertisement will be posted at the headquarters of the gangs in the subdepartment of employees entitled to consideration in filling the positions, during which time an employee may file his application.

3.8 Bid for a new position or vacancy advertised under this Rule must be filed with the official whose name appears on the advertisement. Each furloughed employee shall be an automatic bidder for advertised positions for which he has seniority and is qualified, in his seniority territory.

3.9 Awards will be made and bulletin announcing the name of the successful applicant will be posted within seven (7) days after the close of the advertisement.

This Rule shall not be construed so as to require the placing of employees on their awarded positions when properly qualified employees are not available at the time to fill their places, but physical transfers must be made within ten (10) days, or such longer period as may be mutually agreed upon by the designated Carrier officer and the General Chairman or his authorized representative.

3.10 An advertisement may be cancelled within seven (7) days from the date advertisement is posted.

3.11 An employee who desires to withdraw his bid or application for an advertised position or vacancy must file his request, in writing, with the official whose name appears on the advertisement within seven (7) days from the date the advertisement is posted.

3.12 Copy of advertisements, awards and abolishments will be furnished the General Chairman and designated representatives.

FILLING TEMPORARY VACANCIES

3.13 A position or vacancy may be filled temporarily pending assignment. When new positions or vacancies occur the senior qualified available employees will be given preference, whether working in a lower rated position or in the same grade or class pending advertisement and award. When furloughed employees are to be used to fill positions under this rule, the senior qualified furloughed employees shall be offered the opportunity to return to service. Such employees who return and are not awarded a position or assigned to another vacancy shall return to furloughed status.

3.14 An employee so assigned may be displaced by a senior qualified employee working in a lower rated position or in the same grade or class, provided displacement is made prior to the starting time of the assigned tour of duty, by notice to the foreman, or other officer in charge. The latter employee will not be subject to displacement from such temporary assignment by a senior employee unless the senior employee is unable to exercise seniority to another position not requiring a change of residence.

3.15 Employees temporarily assigned in accordance with the foregoing will be governed by the starting time, headquarters, tour of duty and rate of pay of the position so filled.

The provisions of this Rule 3.15 apply only when positions are filled by the Company in accordance with Rule 3.13, or when an employee in the exercise of seniority displaces a junior employee in accordance with Rule 3.14.

The provisions of this Rule 3.15 do not apply to employees assigned by the Company to fill vacancies or new positions pending assignment after they have expressed a desire not to be so assigned.

3.16 An employee assigned to temporary service may, when released, return to the position from which taken, without loss of seniority; in the event the position from which he was taken has been permanently filled by a senior employee in the exercise of his seniority or abolished during his absence, he may exercise his seniority in accordance with the provisions of rules 4.4 through 4.7.

3.17 The word "senior" as used in Rule 3.13 means, first, senior in the class in which the assignment is to be made and, thereafter, in the lower classes, respectively, in the same group in the order in which the classes appear on the seniority roster. The word "senior" as used in Rule 3.14 means either senior in the class in which the assignment has been made or senior in the highest class in the same group in which the employee assigned hold seniority.

3.18 Vacancies which are not advertised may be filled in like manner.

RULE 4 - SENIORITY & SENIORITY DATE

4.1 Except as provided in Rule 3.19, seniority begins at the time the employee's pay starts. If two (2) or more employees start to work on the same calendar day, their seniority rank on the roster will be in alphabetical order. An employee assigned to a position of higher class than trackman will begin to earn seniority in such higher class and lower class on the same seniority roster in which he has not previously acquired seniority from the date first awarded an advertised position in such higher class. He will retain and accumulate seniority in the lower class from which assigned. An employee entering service in a class above that of trackman will acquire seniority in that class from the date assigned to an advertised position and will establish seniority as of the same date in all lower classes on the same seniority roster.

An employee displacing a junior employee who was promoted in his absence in accordance with Rule 5.1 shall acquire the same seniority date as the employee displaced and shall rank immediately above such employee.

4.2 If two (2) or more employees acquire seniority in a higher class on the same day, their relative rank in the higher class shall be the same as in the class from which promoted. If promoted from different classes, they will be ranked in accordance with their earliest seniority dates.

4.3 No new employee will obtain a roster standing until he has performed ninety (90) calendar days of service.

EXERCISE OF SENIORITY

4.4 Except as otherwise provided, an employee may exercise seniority to a position for which he is qualified:

- (a) when his position is abolished;
- (b) when the senior employee displacing his physically assumes the duties of the position;
- (c) when the starting time of his position is changed more than two (2) hours;
- (d) when the rest days of his position are changed;
- (e) when returning from a supervisory or official position;
- (f) when returning from leave of absence, sickness, jury duty, disability, special duty, vacation, or held out of service and his former position has been abolished or filled in the exercise of seniority;
- (g) when disqualified.

4.5 An employee entitled to exercise seniority must exercise his seniority within ten (10) days after the date affected. Except as provided in Rule 20, an employee who elects to exercise seniority may exercise seniority onto any position for which he is qualified by bid or displacement without loss of seniority. Failure to exercise seniority to any position not requiring a change in residence shall result in forfeiture of all seniority under this Agreement. If he presents evidence to his supervisor that extenuating circumstances prevented the exercise of seniority, the ten (10) days specified above shall be extended proportionately to the extent of his absence on account of such circumstances. An employee who is unable to so exercise seniority and who elects not to exercise other seniority, shall be furloughed.

Note: A "change of residence" as referred to herein shall only be considered "required" if the new reporting point of the employee would be more than fifty (50) normal highway miles via the most direct route from the employee's point of employment at the time affected, and the new reporting point is further from the employee's residence than his former point of employment.

4.6 Furloughed employees desiring to protect their seniority will keep their correct address on file with the Carrier and the General Chairman.

4.7 An employee whose seniority under this agreement is established after the effective date of this agreement and who is furloughed for 365 consecutive days will be terminated if such employee has less than three (3) years of seniority. The "365 consecutive days" shall exclude any period during which a furloughed employee receives compensation pursuant to an I.C.C. employee protection order or an employee protection agreement or arrangement.

SENIORITY TERRITORIES

4.13 The seniority territories are identified as follows:

Territory # 1.

Sunbury, Pennsylvania to Terrace Drive, East Binghamton, New York.

Territory #2.

Terrace Drive, East Binghamton to Schenectady interlocking, and South to Voorheesville, including yards at Binghamton, Oneonta and Schenectady.

Territory # 3.

Voorheesville to Albany, up to Mechanicville, West to Glenville, North to Whitehall, including yard at Whitehall. Also Saratoga Springs to North Creek, and Fort Edward to Glens Falls on Lake George Branch.

Territory # 4.

Whitehall to Rouses Point, including branch line from South Jet. to Fredenburg Falls.

Territory # 5.

S. K. yard only, at Buffalo.

Territory # 6 (System Equipment Operators)

System

The seniority territories may only be changed by agreement between the designated Carrier officer and the General Chairman.

RULE 11- OVERTIME

11.1 Time worked preceding or following and continuous with a regularly assigned work period shall be computed on the actual minute basis and paid for on time and one-half rates, with double time computed on the actual minute basis after sixteen (16) continuous hours and continue until the employee relieved from the emergency excluding employee regular assigned meal period.

11.2 The starting time of the work period of other than regularly assigned employees temporarily brought into service in emergencies, will be considered as of the time they commence work or are required to report

11.3 Time worked in excess of forty (40) straight time hours in any work week shall be paid at time and one-half rates except where such work is performed by an employee due to moving from one assignment to another or where days off are being accumulated in accordance with the provisions of Rule 11.

11.4 Employees worked more than five (5) days (four (4) days for four (4) day gangs) in a work week shall be paid at time and one half rates for work on the remaining days of their work weeks, except where such work is performed by an employee moving from one (1) assignment to another or where days off are being accumulated in accordance with Rule 10.

11.5 There shall be no overtime on overtime; neither shall overtime hours paid for, other than hours not in excess of eight (8) paid for at overtime rates on holidays or for changing shifts, be utilized in computing the forty (40) hours per week, nor shall time paid for in the nature of arbitrations or special allowances such as attending court, deadheading, travel time, etc., be utilized for this purpose, except when such payments apply during assigned working hours in lieu of pay for such hours.

11.6 If during the time on the road an employee is relieved from duty and is permitted to go to bed for five (5) or more hours, such relief time will not be paid for, provided that in no case shall he be paid for a total of less than eight (8) hours each assigned day, when such irregular service prevents the employee from making his regular daily hours on assigned territory.

11.7 An employee will not be required to suspend work for the purpose of absorbing overtime,

Preference of Overtime Work

11.8 Employees will, if qualified and available, be given preference for overtime work, including calls, on work ordinarily and customarily performed by them during the course of their work week or day in the order of their seniority.

POSITION OF THE PARTIES

BMW General Chairman Hurlburt's appeal letter and CP Vice President Frankenburg's final denial letter set forth the respective positions of the Parties as follows:

BMW Appeal Letter of August 1, 2006

* * *

In his denial dated June 7, 2006, Mr. Lapalme states that the Carrier had abolished the B&B Foreman's job because the job had shut down for the winter. He also states that at no time did the Carrier indicate that an extra position would be established and be kept through the winter at this project site.

The Organization does not contest the fact that the Carrier has the right to abolish a job or position when they deem necessary to do. The Organization fully understands that there is a need to abolish positions through the winter months until weather permits resuming such work. The Organization does not contest against the Carrier for abolishing this position for the winter, the Organization's contention is why this job was not re-advertised when conditions for such work improved in the early spring?

The Organization finds some fault or misinformation in Mr. Lapalme's statement regarding that the Carrier had never indicated that an extra position would be established and be kept through the winter at this project site because this position's history shows otherwise.

Enclosed is an Advertisement Bulletin from February 21, 2005 for this position. It is numbered Bulletin Number B & B 2.05. This advertisement outlines the position as a B &

B Foreman as a new position for Bridge 613.84. This job was subsequently awarded to Mr. Steve Hewitt on March 14, 2005. The Award Bulletin 2.05 dated March 14, 2005 is also enclosed. Also enclosed is an abolishment of this same position on Bulletin Number B & B 19.05 dated April 14, 2005 and an effective abolishment date of April 22, 2005. This hardly seems like a winter shutdown as April 22 is roughly early to middle spring. The Organization does not understand this abolishment but does acknowledge that the Carrier has the right to shut down any job for any reason at any time. For the Carrier to state that this is a winter shutdown is hardly a believable argument for the Organization to swallow.

Also enclosed is an Advertisement Bulletin from September 6, 2005 where this position is readvertised again as a B & B Mechanic/Foreman (note: There are no provisions in the current agreement between the parties for such a position, and there has been no agreement between the Carrier and the General Chairman for such position creation.) as Bulletin Number B & B 47.05. Again this is advertised as a new position for the Susquehanna Subdivision Startup, Bridge 613.84, Robinson Street.

A corrector (enclosed) for this position was posted the following day on September 7, 2005 changing its headquarters from Binghamton, NY to a various job. Which translated that the headquarter point could be anywhere on the Susquehanna Subdivision at any given time. There was no change in the Reason part of this Bulletin, it was still advertised as a new position. This position was later awarded to Mr. Arthur Melville on an Award Bulletin B & B 47.05 dated September 19, 2005.

At some point after Mr. Melville was awarded this job he was displaced by an senior B & B Foreman, Mr. Eric House. This is relevant because Mr. House had later vacated this same position in question here and the position was re-advertised again. This position was readvertised again on the enclosed January 9, 2006 Advertisement Bulletin Number B & B 1.06. This position was advertised as a B & B Foreman rather than the imaginary position of a B & B Mechanic/Foremen as noted earlier.

A corrector was out on the advertisement of this position dated January 10, 2006 (enclosed) where it was a simple error in the work center/headquarters line. This was still an extra/new position and was being advertised after the employee who held it vacated it for another position elsewhere on the property.

This position again was awarded on the enclosed Bulletin Number 1.06 dated January 25, 2006 to Mr. Steve Hewitt effective January 28, 2006. Again the Organization points out that this position is still an extra/new position and had been advertised as such for a period of almost one (1) year. It was not advertised as new when Mr. Hewitt was awarded this position because the job/position had previously existed while Mr. Melville and Mr. House held it, and since Mr. House vacated this position it had to be readvertised and per the agreement between the parties.

This position worked for roughly about three (3) weeks before it was abolished on the enclosed Bulletin Number 1.06 dated February 10, 2006. This position was abolished for what the Carrier states as it needed to shut the position down for the winter months. The Organization does not contest or challenge this reasoning on the Carrier, because the Organization is aware that during for this position the winter months that some work cannot be performed and that there is not a need for additional forces in the winter for certain kinds

of work. However, when work resumed on this project, that the position should have come back up for bid as a new position or that another additional B & B employee should have been able to cover the scope of such work until the position was readvertised and awarded to the highest qualified bidder. This never happened.

When work resumed on this project, the Carrier was using a headquarted B & B employee to conduct his normal work in the Conklin Facility and go over to Bridge 613.84 and protect contractors on the property working in this location. This is not what was agreed upon by the Organization and the Carrier. The Carrier had stated to General Chairman Hurlburt in a phone conversation/conference on Tuesday, February 1, 2005 (Letter regarding such conversation is enclosed.) that there would be a B & B Foreman provided by the Carrier to provide protection for the project.

For the year prior the Carrier had created a pattern of what was agreed upon by the Organization and the Carrier by advertising and awarding a new position for a foreman to provide protection for this project.

After the Carrier had abolished this position and eliminated a position which the Carrier and the Organization both agreed upon, they were sending Mr. Todd Delameter over to this project daily to protect the job site. This pulled Mr. Delameter away from his daily work in the Yard so the Carrier could more less eliminated a job. A job that the Carrier and the Organization had both agreed upon after the Contracting Out Notice had been served to the Organization.

This position was never re-advertised again until Mr. Hurlburt submitted a time claim on behalf of Mr. Tom Tarchak and the Organization for a loss of work opportunity. The Carrier in an effort to "nip a claim in the bud" re-advertised this position on the enclosed Bulletin Number B & B 17.06 dated May 15, 2006. This position was advertised as a B & B Mechanic/Foreman (note: There are no provisions in the current agreement between the parties for such a position, and there has been no agreement between the Carrier and the General Chairman for such position creation.)

This position was also advertised as a new position for Bridge 613.84, Robinson Street & Other B & B work as required. The Carrier advertised this position this way to arbitrarily eliminate the position that had been in place for over one (1) year out of spite on the time claim submitted by the Organization. Another reason this job is advertised as such is to justify the denial of the time claim submitted by the Organization. The Carrier in an "after the fact" effort to change the language of the job is trying to justify its denial of such claim and eliminate a position which was agreed upon by the Organization and the Carrier. This is nothing more than "back peddling" by the Carrier in attempt to justify it's own causes for such actions.

This position was awarded to Mr. Todd Delameter on the enclosed Bulletin Number B & B 17.06 dated May 26, 2006. Once this was done, the position had been filled and the Organization did not have anymore challenges. The Organization's Claim was ongoing until this job was awarded On May 26, 2006 because the Carrier had been stating their position that the position had been shut down for the winter and which was the reasoning for their denial, but was sending Mr. Delameter over there daily to work for twelve (12) days in March, 2006, nineteen (19) days in April, 2006, and for twenty (20) days in May, 2006

while he held a B & B Foreman's position in the Conklin Yard Facility until this position was awarded.

All of this time Mr. Delameter was covering this position and this work at some point this job should have been advertised and posted and was not. The Organization can only feel that this was done by the Carrier to eliminate a position and a work opportunity.

The Organization would also like to point out that currently on the property there are new positions being advertised and awarded on the property right now for providing protection for contractors on the property. This is usually the practice when such work is being done by contractors and most times these positions are created as such and agreed to by both parties.

Enclosed is a Contracting Out Notice dated July 26, 2006 addressed to the General Chairman regarding work to be done at Milepost 524.7 on the freight main regarding an eight foot (8'-0") stone arch failure at this location. Due to the roster being fully exhausted the Carrier intends to contract this work out. The Carrier however states that there will be a BMW foreman providing protection for these contractors while on the property.

Also enclosed is a Contracting Out Notice dated August 4, 2006 addressed to the General Chairman regarding other work to be done on the Susquehanna Subdivision for cleaning culverts, bridges, and bank restorations from the recent devastation caused by flooding in June of 2006. In the last sentence of this letter it is stated by the Carrier that there will be a B & B Foreman providing protection at all times when the contractor is on the property. This letter is from Mr. Andre Lapalme - Manager, Structures.

Mr. Lapalme seems to have forgotten here why he denied such claim that this letter is appealing. This work is roughly the same or similar to Robinson Street. He has stated that there will be a B & B Foreman providing protection at all times. The Carrier has even advertised a position for such work.

Enclosed is Advertisement Bulletin B & B 25.06 dated July 24, 2006 for one (1) B & B Foreman to provide protection for contractors while on the property for Emergency Culvert Repair. This position was awarded on the enclosed Bulletin B & B 25.06 dated August 4, 2006 to Mr. William Lyker. Mr. Lyker will be providing protection for contractors while they are on the property doing work. This position is not an existing position, it had to be advertised for this particular job, as has been the practice in the past regarding providing protection for contractors.

This is a new position and substantiates the Organization's claim that this is the practice that is used when contractors come on the property to conduct work. There is usually an additional or extra foreman's job advertised and awarded to do this work as it was at MP 613.84 for a period of one (1) year until the Carrier abolished the job and was using one (1) person to do two (2) jobs for a period of three months in spring (March, April, and May) of 2006.

History shows a pattern here as to what practice the Carrier uses while bring a contractor on the property. When the Carrier plans to contract out work and notifies the Organization

of such work it is always outlined that a BMW Foreman will be providing protection at all times whether it be Track or Structures. In most cases as shown in the enclosed documents and examples in this letter there is usually an additional/extra new position created for such work.

The Rules of the Agreement are clear and in place for a reason. The Carrier holds the Organization to the standard of being accountable for following the Agreement and when the Carrier fails to follow those rules or special agreements between the parties there always seems to be one reason or another why or where the Carrier was within the Agreement to deny the Organization's claims and grievances, when the Carrier fails the Organization and the individuals that we represent it hurts the safe operation of the Railroad as well as the morale of its employees.

Due to the reasons stated above, this claim will stand as originally presented. Kindly notify the System Office when payment will be made for this claim.

* * * * *

CP Denial Letter of September 18, 2006

Reference is made to your letter dated August 1, 2006 wherein you are formally appealing the June 7, 2006 decision by Robert P. Conroy, Manager Structures concerning a claim submitted on behalf of Tom Tarchak, dated April 12, 2006 - Robinson Street project NIP 613.84.

Please be advised that after a careful review of the facts in this dispute, the Carrier finds that it does not agree with the Organization's position.

The Carrier would first state that there is no dispute between the parties that on all dates of the alleged violation, there was in fact a B&B Foreman providing protection for the Contractor, out of the Binghamton terminal, which includes Robinson Street - NIP 613.84.

The Carrier would also state that the Binghamton terminal whereat the B&B Foreman was working that this claim is filed against, not only encompasses both locations in dispute, but, also that they are both in the same seniority territory.

The Carrier has reviewed the many rules cited by the Organization, that allegedly were violated in this dispute. A careful, and thorough review of each Rule (1, 3, 4, 11 and 28) cited by the Organization will clearly find that there is no Rule support for the Organization's position that an additional B&B Foreman was required to provide protection for the contractor.

Further, a careful and through review of all the rules in the D&H/BMWED Collective Agreement will provide that there is no rule support for the Organization's position that an additional B&B Foreman was required to protect the contractor.

Clearly, it is the Carrier's right to set the amount of super-visors required for any one (1) project, or, multiply projects. To require the Carrier to provide a B&B Foreman for each project, would not only add an additional financial burden on the Carrier, where none currently exists, but as well would provide a rule interpretation to benefit the Organization,

where none currently exists, without the benefit of negotiations.

Further, through-out the Organization's letter of appeal they state that the Carrier agreed to provide a B&B Foreman for protection of the contractor on this project. This, based on the Organization's own claim, was done. The Carrier did provide a B&B Foreman at all times for protecting the contractor.

The Organization's attachment to their claim, a letter dated January 24, 2005 from BMWED General Chairman, Stuart A. Hurlburt, Jr., states in pertinent part on page #2:

"The Organization asked who was going to provide protection for this project. It was stated by you (Mr. Conroy) that the Carrier would provide a B&B Foreman to provide this protection on this project."

This was done, where is the violation?

The fact that an additional B&B Foreman was not put on for the claimed period is of no significance. The Carrier deemed that the work required during the time period being claimed, only required one (1) B&B Foreman to cover. When an additional B&B Foreman was required, one was put on.

There simply was no violation of the D&W/BMWE Collective Agreement, including those rules cited by the Organization. Based on all the aforementioned facts, the Carrier must continue to deny your appeal of the instant dispute.

When the claim remained unresolved it was appealed to this Board for final and binding determination in arbitration.

DISCUSSION

There does not appear to be any dispute in this record that the Carrier's authorized agent Conroy made a commitment to the Organizations's General Chairman during the contracting-out meetings of February-March 2005 to bid and fill a "new/extra" B&B Foreman position to provide coverage for the outside contractor forces while they were working on the subcontracted Robinson Bridges Reconstruction Project at MP 613.84 near Binghampton, NY. On that basis, the Organization filed a formal objection for the record but did not file any grievance protesting or challenging the contractual propriety of that subcontract under the Scope Rule of the controlling Collective Bargaining Agreement. The record shows that the Carrier initially and for much of the

time of that project did comply with that *quid pro quo* commitment to post and fill such an additional B&B Foreman position to provide such protection. Nor are we persuaded that the routine seasonal abolishments of that particular position for the winter seasons, between the posting and re-posting of that new/extra B&B Foreman position, constituted a fundamental deviation from the mutual understanding of the Parties concerning this matter. However, the Organization has made out a *prima facie* showing, which the Carrier failed to effectively rebut, that Carrier violated the letter and spirit of that understanding when, prior to the May 26, 2006 re-posting, it diverted Mr. Delameter from his regular B&B Foreman's position in the Conklin Yard Facility. From the undisputed record it appears that Carrier so utilized Delameter to provide the protection for the subcontractor's forces at MP 613.84 on twelve (12) days in March, 2006, nineteen (19) days in April, 2006, and twenty (20) days in May, 2006.

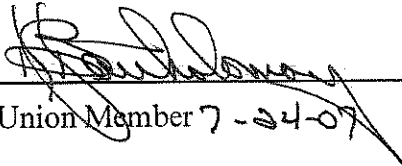
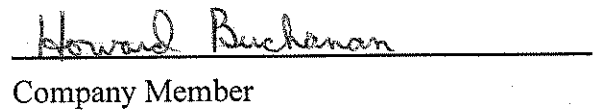
Based on all of the foregoing, the claim is sustained for the period February 1-May 25, 2006. The calculation of liquidated remedial monetary damages for the Claimant is remanded to the Parties; with a retention of jurisdiction by this Board should they be unable to arrive at a mutually agreeable remedy.

AWARD

- 1) Claim sustained to the extent indicated in the Opinion.
- 2) The Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.
- 3) The Board retains jurisdiction for the purpose of resolving any disputes which may arise over the interpretation or application of this Award.



Dana Edward Eischen, Chair


Union Member 7-24-07
Company Member

July 24, 2007