

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 submitted on behalf of John Radzikowski, hereinafter referred to as the Claimant, for Trackman's work at Buffalo performed by other than Trackman for the dates December 8, 9, 10, 11, 12, 15, 16, 17, 19, 23, 24, 25, 2003.

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:

Trackmen and Track Foremen employed by the Delaware & Hudson Railway Company, Inc. ("Carrier") are subject to the terms of the Collective Bargaining Agreement between Carrier and the Brotherhood of Maintenance of Way Employees ("Organization"). Portions of that Agreement most pertinent to this case read as follows:

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.

(Letters of Understanding are attached as Appendix "H")

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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 date.

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

* * * * *

RULE 11 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.

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RULE 28

RATES OF PAY

POSITIONS, CLASSIFICATIONS, GROUPINGS, RATES

28.1 B&B

A. Foreman B. Plumber Foreman C. Plumber D. Asst. Foreman E. B&B Mechanic
(Carpenter/Painter/Bridgeman)

2 8.2 Track

A. (i) Production Gang Foreman (over 30 men) (ii) Production Gang Foreman
in charge of 30 men or less iii Production Gang Assistant Foreman

* Note: the above classifications are not used currently

B. (i) Foreman
ii Assistant Foreman
iii Trackman
iv) Trackman/Truck Driver
(v) Track Machine Operator

C. I) Welder Foreman ii Welder iii Welder Helper

D. (I) Work Equipment Repair Foreman (ii) Work Equipment Repairman

E. (I) System Equipment Operator (ii) Special SEO
Note: The rates as provided in the agreement are not included.

At the arbitration hearing in this matter, it was stipulated that the Carrier leases a relatively small portion of yard trackage at SK Yard, a Norfolk Southern ("NS") at Buffalo, New York. Carrier formerly had a three-person staff at SK Yard, a Track Foreman position previously occupied by Mr. Bill Smith, a Trackman position previously occupied by Claimant and a System Equipment Operator position occupied by Mr. Lipka. After Mr. Smith retired, Carrier reduced the manning at

SK Yard from three (3) to two (2) employees, by promoting Claimant to the Track Foreman position and blanking his former Trackman position.

As described with specificity in Award No. 12 of this Board, Carrier disqualified Claimant from all Foreman positions in January 2003. Because at that time there no longer was a Trackman position at SK Yard and Claimant had no seniority rights in the SEO position, he was furloughed. Subsequently, until it eventually filled the Track Foreman position from which Claimant had been disqualified, Carrier occasionally called Claimant in as needed. The *gravamen* of the instant claim(s) is that Carrier supplemented these calls with the use of outside contractor employees to also perform Agreement-covered work formerly performed by Claimant as Trackman or Track Foreman.

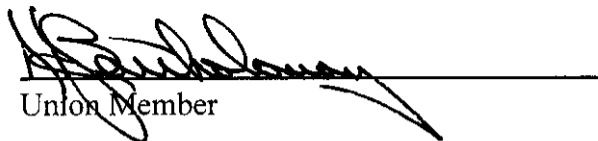
Based on a careful review of the record evidence and contract language, we are persuaded that the claims presented for Mr. Radzikowski by the Organization have merit. Due to the unique facts and circumstances and without precedent value or prejudice to the positions of either Party, these claims are sustained by directing Carrier to pay compensatory damages to Claimant, for each claim date, in an amount equal to the difference, if any, between the Trackman rate of pay (straight time or overtime as the case may be) and his other compensation for that claim date. [In that regard, it is also noted that, during the time period covered by the claim(s), Mr. Radzikowski was covered by Appendix S of the Collective Bargaining Agreement of December 21, 1999, *viz.*, Supplemental Unemployment Benefits ("SUB")].

AWARD

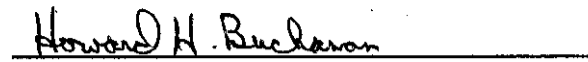
- 1) Claims sustained to the extent indicated in the Opinion.
- 2) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.
- 3) Jurisdiction is retained for the sole purpose of resolving any disputes which may arise between the Parties regarding the meaning, application or implementation of this Award.



Dana Edward Eischen, Chairman



Union Member



Howard H. Buchanan
Company Member