

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 Richard Lindsey (em. # 684768), Roger Wright (em. # 685157) SEO, Francis Baker (em. # 683156) Foreman Darryl Crossman (em. # 684495), Trackman Daniel Slattery (em. # 685051) Trackman Peter Jerdo (em. # 685823), Thomas Aurilio (em. # 683151), William Barcomb (em. # 683162) hereinafter referred to as the Claimants, at the appropriate rates that correspond to their titles that are listed next to their names. This claim is for the work done by the contractor, Railworks, at the various times and locations listed below:

This part of the claim is for eight (8) hours at straight time rates for work constructing a track panel to be put in at Ketchum's crossing which lies at M.P. A. 176.36 on the Canadian Main Line. This work happened on Thursday, August 15, 2002:

This part of the claim is for eight (8) hours at straight time rates for work installing the crossing at Ketchum's. This crossing lies at M.P. A. 176.36 on the Canadian Main Line. This work was done on Friday, August 16, 2002. The contractor employed seven (7) men for the above- mentioned work.

The next part of the claim is for eight (8) hours at overtime rates for constructing track for the crossing at Essex Crossing. Essex Crossing lies between M.P. A. 137 and M.P. A 138 on the Canadian Main Line. The contractor employed eight (8) men in this work. The extra man named for this part of the claim is William Barcomb (em. # 683162). Mr. Barcomb would receive Trackman's rate.

The work outlined has been the work of the BMWWE , historically, and is still work done by BMWWE employees. The Carrier violated Rule 1, Rule 4, Rule 11, Rule 15, Rule 20, Rule 28, and Appendix H " of the Agreement between the parties.

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: This case presents one of a large bloc of claims filed by the Organization, alleging violations of the Scope Rule in connection with the Carrier's contracting out in 2002 the work of renovating, maintaining and repairing track and related appurtenances, primarily crossing rehabilitation on the Canadien Mainline ("CML") and the Freight Mainline ("FML") in the states of New York and Pennsylvania. Trackmen and Track Foremen employed by the Delaware & Hudson Railway Company, Inc. ("Carrier") are subject to the terms of the Collective Bargaining Agreement ("Agreement") between Carrier and the Brotherhood of Maintenance of Way Employees ("Organization"). Nor is there any dispute that the type of work at issue was covered by the Scope Rule of that Agreement and had been performed in the past and currently by Agreement-covered employees.

Portions of the Agreement most pertinent to these cases 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")

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 contracted and the reasons therefor.

* * *

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

The facts surrounding the claims are not in material dispute. Sometime in early February the Carrier informed the General Chairman that a large number of subcontracting transactions should be anticipated during the 2002 work season. The General Chairman responded by letter of February 8, 2002, reading in pertinent part as follows:

I am in receipt of your letter dated February 4, 2002, received in the System Office on February 6, 2002, concerning the possible contracting out projects for 2002.

I understand that this is just a proposal of what may be contracted out in the production season of 21002. The Organization will need to have a separate contracting out notice for each project that you feel is necessary to hire a contractor to perform work that has Historically been performed by employees represented by the Brotherhood of Maintenance of way Employees.

* * *

Thereafter, by letter dated April 29, 2002, Jean-Francois Boisvert, Service Area Manager ES Montreal-NEUS Service Area, served the General Chairman with formal notice of Carrier's intent to contract out certain specified work, as follows:

* * *

Due to an increase in projects on the D&H portion of Canadian Pacific Railway, it is carrier's intention to implement the following actions. In order of priority: recall all furloughed BMW employees, recruit and hire new employees in the BMW and select isolated projects on the carrier's properties for contracting.

The carrier is perplexed with numerous projects that are sustained by either changing business situations or state funded-grant applications. Both categories compile a number of projects that are pending approval. The carrier is anticipating financial approvals for several of the projects will be passed soon giving short notice and minimal planning time.

Due to the traffic demands and time constraints it is conceivable that there will not be sufficient BMW staff to allow the carrier to complete all the anticipated projects. Additionally it is unlikely that available new hires will meet all of the need for qualified employees, although we will research the available employee listing with the Railroad Retirement Board for qualified railroad employees. The work in general will be of a seasonal/ temporary nature, making it somewhat difficult to attract new hires. Please accept this letter as official notification of the carrier's intention to contract out work, some of which has in past historically been performed by BMW employees. Work will be offered to furloughed

BMWE employees before new employees are hired, and before any contracting out agreements are entered into to by the carrier.

The following is a list of the work projects that the carrier intends to offer to contract to rail contractors to ensure completion in 2002:

Buffalo, NY: Install two (2) turnouts, construct 2,000' of track and install approximately 2,500 Ea. Crossties. Repair bridge and abutments over Bailey Ave. (SK Yard)

Canadian Mainline: Rehabilitate five (5) Road Crossings various locations, Install six (6) Turnouts between mileage 35.8 and 36.5 at Saratoga, NY, Construct 1,800' of track at No. 2 south end Saratoga Yard. Thermite Weld 200 Ea. rail locations between Saratoga, NY and Rouses Point, NY. Install rail anchors various locations.

Revisions to Saratoga Engine House and property to accommodate Engineering employee's move from Saratoga Amtrak Station.

Freight Mainline: Rehabilitate ten (10) Road Crossings various locations, Thermite Weld 200 Ea. rail locations between Schenectady, NY and Taylor, PA., Install rail anchors various locations. Construct new passing siding between mileage 659 and mileage 661.

Pennsylvania - Rail Freight Assistance Program, ballast undercutting and raise track, bridge rehabilitation and safety appliance installation (bridge walkways). Locations submitted in a grant application are MP 691 and MP 696 on the Freight Mainline.

A complete list of all projects planned in 2002 is attached for your information. Should you wish to meet and discuss for further clarification please contact me at your convenience.

* * *

The "complete list of all projects planned in 2002", described fifteen (15) specific 2002 road crossing rehabilitation projects, as follows:

<u>Road Name</u>	<u>MilePost Location</u>	<u>SubDivision Name</u>	<u>Block Date</u>
		CML	26 August
1 Blue Barns Rd.	23.99	CML	11 September
2 Fort Ann	66.92	CML	12 August
3 Vialls Rd.	129.26	CML	8 August
4 Essex Rt 22	137.26	CML	5 August
5 Chapman St.	190.8	FML	2 October
6 Ushers Rd.	470.41	FML	9 October
7 Cole Rd.	498.55	FML	16 October
8 Church St	508.31	FML	18 October
9 Barberville	514.27	FML	21 October
10 River St.	561.62	FML	23 October
11 Clifton Rd.	571.2	FML	28 October
12 Hurds Rd.	596.7	FML	30 October
13 Depot St	604.5	FML	4 November
14 Broad St.	681.5	FML	7 November
15 Coal Rd.	705.8	FML	8 November

At the Organization's request, the Parties discussed the foregoing notice in conference on May 22, 2002, following which the General Chairman sent Carrier a letter of same date which read, in parts pertinent to the instant case, as follows:

On Wednesday, May 22, 2002, the Organization and the Carrier conferenced the Contracting Out Notice dated April 29, 2002. In this meeting the Carrier maintained that the projects listed on the Contracting Out Notice dated April 29, 2002 are projects that the Carrier has deemed necessary to contract out. These projects are to be completed by end of the production year 2002. A few of these projects have been talked about for the last two (2) years. A couple of these projects are in the production schedule to be completed by the Delaware and Hudson existing employees working in the production gangs. At this time, the Carrier is placing a time frame on the production schedule for these projects if they are to be completed by D&H existing forces.

When the Organization brought up that the Carrier needs to hire more employees to complete these projects, the Carrier stated at this meeting that they have advertised in different newspapers that the Delaware and Hudson Railway (CP Rail Systems) were taking application for employment at this time. However the Carrier was only going to hire around twenty-four (24) new employees for these summer projects. The Organization does not understand why the Carrier has waited until May 22, 2002, to start the interview process for new hires, as well as only hiring only 24 new employees. As stated above, the Carrier has known for a couple of years that with some of these projects, there was a strong possibility that they were getting closer to be completed.

* * *

In review of the Canadian Mainline: The Organization does not understand the contracting out of the road crossing. The Carrier has stated that there is a four (4) year plan on road crossing. If this is true, then why hasn't the Carrier made plans to have this work performed by existing Delaware and Hudson employees in the production year?

* * *

The Contracting Out Notice dated February 4, 2002: Both Mr. Jean-Francois Boisvert and Mr. Dragland stated that if the Carrier plans to perform any work that is listed on that contracting out notice, the Carrier will send a letter to the Organization at that time so a timely conference can be held regarding the listed projects.

* * *

The Organization would like to point out Rule 1.1 of the Schedule Agreement clearly reserves the work recognized as Maintenance of Way Work, such as, inspecting, 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.

This work is part of the core work of the bargaining unit and D&H employees regularly perform such work using D&H tools and equipment or leased equipment. Consequently, assigning this work to outside contractors cannot be justified under Rule 1.

In addition to D&H's clear contractual obligations under Rule 1.1, which should be dispositive of this issue standing alone, I remind you that the Delaware and Hudson Railway has obligations under Appendix "H" to make good-faith efforts to reduce subcontracting. Contracting out this significant amount of work could hardly be considered in keeping with good-faith obligation to reduce contracting out.

I am particularly concerned about the contracting out of this work not only because it is the core of the bargaining unit, but because Delaware and Hudson employees are fully capable to perform the work. As you know, many of our employees are furloughed several months of each year. I am convinced that with proper and timely planning, we could increase their employment opportunities, protect our collective bargaining agreement and do a good job in getting the work done.

In summary, BMW E does not believe that assigning outside forces to perform the work in question can be arguably justified under the plain language of the Agreement. Therefore, Delaware and Hudson should simply abandon any plan to allow outside forces to perform this work.

While BMW E is vigorously opposed to assigning this work to outside forces and will use every legal recourse to protect our Agreement, the BMW E is more than willing to discuss this matter.

Carrier went ahead with bidding process and eventually entered into a contract with Railworks, Inc., dated July 19, 2002, for performance of all of the projects listed in the April 29, 2002 notice, *supra*. About one week later, by letter of July 26, 2002, Carrier informed the General Chairman that it had also contracted with Railworks to perform some additional projects, which were neither listed in the April 29, 2002 notice nor discussed in the May 22, 2002 conference. some more projects as follows:

Please be advised that in addition to the previously communicated I-13 road crossings rail contractor notice of intent. Please be advised that due to Amtrak performance improvement requirements, road crossings on the CML at MP 44.13, Edie Road and MP 176.3, Ketchum's Bridge Road are also dependant on rail contractor assisting CPR track forces, due to shortage of qualified people. The low bidder from our list of rail contractors was "Railworks" accordingly they have been awarded the work.

Railworks proceeded with all of the above-referenced work during the August-November 2002 time frame; as a result of which the Organization filed approximately eighteen (18) claims, including the present case. The claims allege failure or inadequacy relative to the Rule 1§1.3 notice/conference requirement as well as substantive violations of Rule 1 and Appendix H by contracting out Agreement-covered work. Regarding the Essex Rt. 22 claim, we find that there was adequate notice on April 29, 2002 and adequate opportunity for conference on May 22, 2002. Nor are we persuaded on this record that Carrier acted in bad faith in contracting with Railworks to assist Carrier forces on that project, since it appears that despite recalling all furloughed employees and

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hiring additional employees there was still a shortfall in available qualified manpower. Accordingly, the Essex Road claim is denied.

However, there really is no question that the claims concerning the crossing rehabilitation work at Ketchum's Bridge Road must be sustained due to Carrier's blatant violation of the notice requirement of Rule 1§1.3. The record plainly shows that there was no 15-day notice of intent/opportunity for conference at all relative to that particular project; but rather just notice of a *fait accompli* on July 26, 2002, that Railworks had already been contracted by Carrier to perform that additional project. It cannot be reasonably maintained that such casual disregard for the requirements of Rule 1§1.3 is good faith compliance with the commitments undertaken in the following provision of Appendix H, the Berg-Hopkins letter of December 11, 1981:

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.

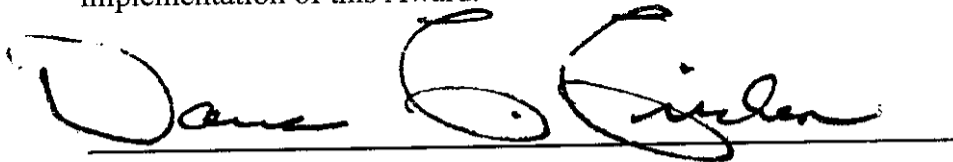
Finally, the fact that the Claimants may have been "fully employed" on claim dates does not bar an award of monetary damages as a deterrent to blatant violations of these good faith notice/conference requirements

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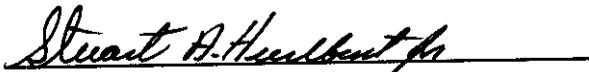
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AWARD

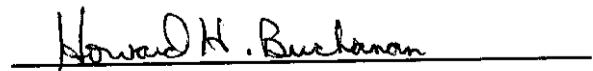
- 1) Claims sustained to the extent indicated in the Opinion.
- 2) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.
- 3) Jurisdiction is retained for the sole purpose of resolving any disputes which may arise between the Parties regarding the meaning,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

A handwritten signature in cursive script, appearing to read "Dana E. Eischen", written over a horizontal line.

Dana Edward Eischen, Chairman

A handwritten signature in cursive script, appearing to read "Stuart A. Hurlbut Jr.", written over a horizontal line.

Union Member 9/9/2005

A handwritten signature in cursive script, appearing to read "Howard H. Buchanan", written over a horizontal line.

Company Member