AWARD NO.43
NMB CASE NO. 43
UNION CASE NO. 43
COMPANY CASE NO. 8-00232

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 (Riegel Construction Company) to perform Maintenance of Way work (build a switch turnout for installation as part of the west side lead at Saratoga yard) beginning on January 2 1, 2002 and continuing, instead of Messrs. N. Smith, T. Aurilio, J. Rich and P. Smith (Carrier's File 8-00232 DHR).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention 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 I and Appendix H.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above. Claimants N. Smith, T. Aurilio, J. Rich and P. Smith shall now be compensated at their respective rates of pay for all time worked by the outside forces in the performance of the aforesaid work beginning January 21, 2002.

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 ("Agreement") between Carrier and the Brotherhood of Maintenance of Way Employees ("Organization"). Portions of the 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")

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

The material facts giving rise to this case are established largely by joint stipulation. The record shows that on or about October 1, 2001 the Carrier leased to Slack Chemical Company (hereinafter "Slack")] a certain tract of land adjacent to the D&H Yard at Saratoga Springs, New York. Under the terms of that lease, Slack installed a private sidetrack leading to its warehouse and shipping terminal on the leased property, including a private grade crossing over its sidetrack for an existing private roadway running along the westerly portion of Carrier's Saratoga Yard. None of that work, all of which Slack apparently contracted out, appears to be involved in this case. Rather, the subject of the claim in this case is the construction of a rail turnout which was subsequently installed

by Carrier's BMWE-represented employees to connect the D&H Saratoga Yard tracks to the newly-constructed Slack Chemical private track.

By letter dated January 28, 2002, the Organization's Vice General Chairman submitted a claim on behalf of the above-named Claimants, which reads in pertinent part as follows:

> Please consider this a formal time claim for the Employee listed regarding their loss of work opportunity which is a violation of their fights under Rule 1. Preamble, Appendix "H" and Rule 28 rates of Pay, of the current Agreement between the Brotherhood of Maintenance of Way Employees and the Delaware and Hudson Railway (CP Rail System).
>
> * * *
>
> It has come to the Organization attention that the Carrier has hired Riegel Construction Company to build a Switch Turnout at or near Mile Post 36. 1. It is my understanding that this Turnout is presently under construction within Twenty (20) feet off the West SideLead between the Track and the Pole Line on the access road. This work that is being
> contracted out is on the Delaware and Hudson (CP Railway) property. The Organization understands that this contractor started work on January 21, 2002.
>
> The Organization has not received any notice from the Carrier to contract this work out. I believe you are aware the Brotherhood of Maintenance of Way Employees (B.M.W.E.) is opposed to contracting any work that accrues to the M/W Department. The type of work that is being contracted out is governed by our Scope Rule. This work has historically been performed by the M/W Department.
>
> It is perplexing that the carrier would ponder contracting this work out considering the qualified M/W Employees who are presently available to the Delaware & Hudson Railway. The controlling rules here are Rule 1, Preamble, Appendix "H' and 28.
>
> Therefore, the Organization requests that the Carrier stop this Riegel Construction Company from performing work that has historically been performed by the M/W Department Employees on the Delaware & Hudson Railway. Also, that the Carrier replaces Riegel Construction Employees with the MofW Department Employees to build this Switch Turnout. The Organization also requests that the Carrier reimburse the Track Foreman, Trackmen and the System Equipment Operator for all time that these Riegel Construction employees have worked on building this Switch Turnout. This time claim will be a continuing time claim until this project is completed.
>
> * * *

By letter dated April 5, 2002 Manager Track Maintenance, Todd L. Dragland denied Mr. Borden's claim, stating in pertinent part as follows:

> The turnout being constructed at Saratoga near mileage 35.6 Canadian Mainline belongs to Slack Chemical and was purchased and will be assembled and built including the track connecting to a new facility, by rail contractor employed by Slack Chemical. It should be noted that the area is leased to Slack Chemical and the installation of the turnout on the D&H track shall be undertaken by D&H BMWE employees. For the above stated reasons, the Carrier's position is that the Collective Agreement was not violated and your claim is respectfully denied.

The positions set forth above were unchanged throughput appeals on the property until the dispute was finally submitted to this Board for determination in arbitration.

The Organization made out a *prima facie* showing of a Scope Rule violation to which Carrier responded by asserting the affirmative defense that it lacked dominion and control over the work of constructing the turnout switch which was later made a part of the D&H West Main Yard. The following generally accepted standards governing proper disposition of such dominion and control cases were laid down by the NRAB Third Division in a series of decisions founded on the principle that a Carrier cannot avoid compliance with the requirements of contract language such as Rule 1, *supra* by doing indirectly what it cannot do directly under the Scope Rule:

> Numerous Awards have held a carrier harmless in instances where contracting work is undertaken by another party and where such work is not under thecontrol of and/or for the benefit of the Carrier. . . . Nothing herein is intended to dilute the effect of such Awards. Other Awards, however, have examined situations where a carrier is fully aware of the work to be performed and where it is apparent that such work could have been performed by carrier forces. To this effect is recent Third Division Award 26212 in a situation closely parallel to that here under review. Award 26212 states in part as follows:
>
> > Thus it appears this Board has defined several categories of cases in which the Agreement will not be violated by use of outside forces. These, at a minimum include situations:
> >
> > (1) Where the work, while perhaps within control of Carrier, is totally unrelated to railroad operations.
> >
> > (2) Where the work is for the ultimate benefit of others, is made necessary by the impact of the operations of others on Carrier's property and is undertaken at the sole expense of that other party.
> >
> > (3) Where Carrier has no control over the work for reasons unrelated to having itself contracted out the work.

See NRAB Award 3-32941 (Newman, 1998). *See also* NRAB Awards 3-26212 (Cloney, 1987), 3-28312 (Marx, 1990).

Applying these criteria, and recognizing as did the Third Division, there may well be others which would apply in different circumstances, we conclude the work at issue in the present case was within the Scope Rule of the Agreement. There can be no question that the turnout inured to the benefit of the Carrier and it is undisputed that the turnout was made a permanent fixture of the D&H tracks to permit access to the private side track constructed by Slack. The fact that the construction of the turnout occurred on the property leased by Slack does not alone support Carrier's position in this case. It is significant that once constructed the turnout was placed on Carrier's property as a fixture of the Yard Track.

We conclude that the facts of the present matter are not materially distinguishable from the facts which resulted in the sustaining award by the NRAB in Award 3-28312 (Marx, 1990), which reads in pertinent part as follows:

> An essential part of the arrangement with [the Lessor] was preparation of the tracks for use by the Carrier to the loading facility to be operated by [the Lessor] . Whether the work was to be performed by [the Lessor] or by a contractor selected by Consolidated is not the central issue. That the work was of a type which could have been performed by Carrier forces is not disputed.
>
> At issue here is the requirement of advance notice under [the Scope Rule]. It is not known whether, after conference which may have been requested by the Organization, some alternate arrangement would have been devised. What is certain is that failure to provide the required notice obviated any opportunity by the Organization to have the work done by Carrier forces. The Carrier knew that the [turnout construction] was to be performed as an essential preliminary to establishment of the loading facility.
>
> Under these circumstances, the Board finds the reasoning in Third Division Award 26212 persuasive. The Carrier proceeded without sufficient advance notice at its own peril.

The claims of these Claimants, all of whom were in furlough status when their Agreement-covered work was performed by the outside contractor, are sustained.

PLB No. 6493

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AWARD

1) Claims sustained.

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

Stewart A. Hurlbutt Jr.
Union Member 9/9/2005

Howard W. Buchanan
Company Member