

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 (Troy Top Soil) to perform Maintenance of Way work (operate equipment) in connection with moving material and equipment from the area at the Saratoga Amtrak station in the vicinity of Mile Post A35 to the area at the Saratoga Engine House in the vicinity of Mile Post A37 beginning on May 15, 2002 and continuing instead of System Equipment Operator D. Jordan (Carrier's File 8-00278 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 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 May 15, 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.

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AWARD NO. 44
NMB CASE NO. 44
UNION CASE NO. 44
COMPANY CASE NO. 8-00278

OPINION OF BOARD: This case had its genesis in a notification sent by Carrier management to the BMW General Chairman sometime in early February, advising that the Carrier anticipated a large number of subcontracting transactions 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 of April 22, 2002, Carrier served written notice of intent to contract out the work at issue in this case, as follows:

April 22, 2002
File: 013.293

Mr. Stuart A. Hurlburt, Jr.
General Chairman
Brotherhood of Maintenance of Way Employees
P.O. Box 138
Mansfield, MA 02048-0138

Dear Mr. Hurlburt:

We will be contracting the work required to revise the Saratoga Engine House and adjacent property in order to complete renovations for our forces to move from the Saratoga Station to the Saratoga Engine House. All B&B employees on the Saratoga Subdivision will be working during the time that the contractors are on the property.

Yours truly,

Robert P. Conroy
Field Manager, Structures

That same work was also included in a letter to the General Chairman dated April 29, 2002, which served notice of intent to subcontract certain specified 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. In part

most pertinent to the present case, that April 29, 2002 notification reads as follows (Emphasis added):

* * *

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 BMW 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:

* * *

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

* * *

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.

* * *

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:

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

The General Chairman did in fact respond to the April 22 and April 29, 2002 notifications, *supra*, with a request for a pre-contracting conference which was eventually held on May 22, 2002. In the meantime, on May 13, 2002, Carrier briefly posted for bid and then cancelled Advertisement Bulletin No. SWE 37.02, seeking bids on a System Equipment Operator position based at Saratoga Headquarters, to operate "Backhoe and other equipment as required". Carrier then went ahead and subcontracted the work at issue herein to Troy Top Soil, which began performance of the work on May 15, 2002, a week prior to the scheduled meeting required by Rule 1, §§ 1.3 and 1.4, *supra*.

Based on the foregoing undisputed facts, we find that the Organization made out a *prima facie* showing that Carrier subcontracted the disputed work one week prior to the contractually mandated pre-contracting meeting of May 22, 2002. On that basis, this Board will sustain Parts 1 and 2 of the claim but the remedial damages claimed in Part 3 must be adjusted to match the reality of the record in this case. Specifically, we conclude that the time period covered by the claim, *i.e.*, "starting on or about May 15, 2002 and continuing until resolved", was cut off by the following Letter Agreement entered into by the Carrier's Field Manager Structures and the BMW General Chairman at the meeting on May 22, 2002:

Letter of understanding that we will utilize BMW B&B employees when possible to operate small equipment for the work required to prepare the Saratoga Engine House and property for our forces to move from the Saratoga Station to the Saratoga Engine House. Some equipment will be a bobcat loader and roller tamper. All of our operators are currently working on other projects.

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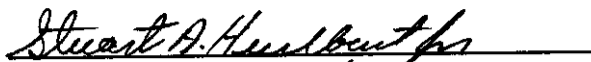
AWARD NO. 44
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AWARD

- 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.



Dana Edward Eischen, Chairman


Union Member 9/9/2005-


Company Member