

**SPECIAL BOARD OF ADJUSTMENT NO. 1048**

**AWARD NO. 110**

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**AND**

**NORFOLK SOUTHERN RAILWAY COMPANY**

(Carrier File MW-ROAN-00-35-LM-243)

(Carrier File MW-ROAN-00-41-LM-270)

(Carrier File MW-ROAN-00-43-LM-282)

(Carrier File MW-ROAN-00-51-LM-380)

Statement of Claim:

Claim on behalf of R. R. Hodge, H. G. Stump, C. B. Rickman, J. L. Gearhart, B. W. Songer, L. D. Lee, R. G. Davis, D. J. Mathews, B. A. Meadows, J. E. Brinkley, J. D. Mattox and F. M. Call for equal proportionate amount of the hours consumed by a contractor "to clean up track, grade and gravel parking space, and build a fence around a parking lot at the clean-out track ('dirty hole'), in Roanoke Yard" in Roanoke, Virginia. (MW-ROAN-00-35-LM-243)

Claim on behalf of F. M. Davenport for equal proportionate amount of the hours consumed by a contractor "to clean up track, grade and gravel parking space, and build a fence around a parking lot at the clean-out track ('dirty hole'), in Roanoke Yard" in Roanoke, Virginia. (MW-ROAN-00-41-LM-270)

Claim on behalf of C. L. Walker, C. C. Morrison, L. R. Wilkerson, H. C. Lambert, R. E. Altice and H. R. Logans for equal proportionate amount of the hours consumed by a contractor "to clean up track, grade and gravel parking space, and build a fence around a parking lot at the clean-out track ('dirty hole'), in Roanoke Yard" in Roanoke, Virginia. (MW-ROAN-00-43-LM-282)

Claim on behalf of H. L. Cash for equal proportionate amount of the hours consumed by a contractor "to clean up track, grade and gravel parking space, and build a fence around a parking lot at the clean-out track ('dirty hole'), in Roanoke Yard" in Roanoke, Virginia. (MW-ROAN-00-51-LM-380)

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

### AWARD

After thoroughly reviewing and considering the transcript and the parties' presentation, the Board finds that the claim should be disposed of as follows:

### BACKGROUND

The instant case arose on or about July 25, 2000 when General Chairman T. R. McCoy, Jr. provided notice to the Carrier as follows:

On May 26, 2000 and continuing, Thomas Brothers, a contractor from Roanoke, Virginia, was contracted by the carrier for the use of various equipment and personnel to clean up track, grade and gravel parking space, and build a fence around parking lot at the clean-out track ("dirty hole"), in Roanoke Yard. This contractor is working ten (10) hours each date, seven (07) days each week on this project, and are still working. Please consider this as a running claim, beginning on May 26, 2000, and continuing, so long as this violation exists, that the above employee be paid and equal, proportionate amount of the man hours worked by this outside contractor.

The General Chairman submitted three additional claims substantially identical to the foregoing July 25, 2000 letter. The General Chairman cited an alleged violation of Rules 1, 2, 3, 4, 5, 8 and Appendix "F" of the BMW Agreement in support of his claim.

The Carrier acknowledged that the General Chairman was not afforded written advance notice that outside contractors would be performing the work of installing a landfill cap as well as other incidental work associated with this project as set forth in Chairman McCoy's letter of July 25<sup>th</sup>. However, the Carrier defends its actions in its use of an outside contractor, and maintains that its actions did not rise to the level of a Rule violation as follows:

First, the Carrier acknowledges that it did, in fact, use the services of an outside contractor, without notice to the Organization, for the purpose of installing a cap on a Construction and Demolition Dump in Roanoke, Virginia as required by a Consent Order issued by the Virginia Department of Environmental Quality. The Carrier asserts that compliance with this Order required the use of licensed contractors to perform the necessary work. Accordingly, notice pursuant to Appendix F was not required since this work was not within the scope of work done by the Organization.

Second, the Carrier maintains that in any event, the Claimants were otherwise unavailable due to the fact that they were fully employed during the relevant time period associated with this project.

Finally, the Carrier asserts that it has "historically" used outside contractors to perform work of this type.

In response, the Organization maintains that it is irrelevant whether or not the Claimants were fully employed. The issue is one of a loss of work opportunity. Moreover, the Organization asserts, contrary to the Carrier's claim, that it has in fact done work of this type in the past involving "projects much larger than the one in question." Accordingly, the Organization maintains that the work at issue is clearly covered by the Scope of Agreement provision since it has "customarily and historically been performed by Maintenance of Way employees." The "bottom line" the Organization asserts, is the failure by the Carrier to provide proper notice to the Organization prior to the work being done by outside contractors.

## DISCUSSION

Article IV, "Contracting Out", at Appendix F provides:

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

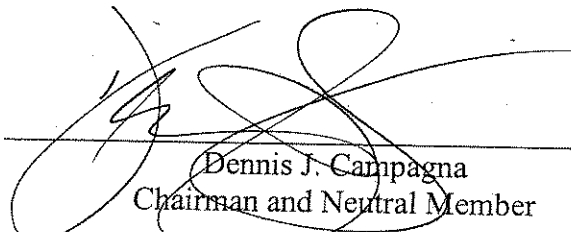
If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt 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.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give 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.

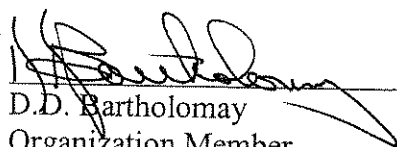
Following a careful review of the record in this case, the Board can find no viable reason to defend the Carrier's failure to provide the General Chairman with notice as set forth in Appendix F. Moreover, assuming, *arguendo*, the Carrier's position that the environmental cap was work required to be performed by a "licensed contractor", the fact remains that the additional work, including the grading and placemen of gravel for a parking space near the landfill, and the erection of a chain link security fence around the parking space is work of the type and nature performed by the Organization in the past. Accordingly, by its very terms, Appendix F required prior notice to the General Chairman.

### CONCLUSION

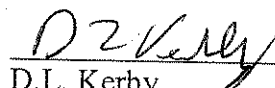
The Board finds and concludes that the Carrier's action in this case violated Appendix F. As a remedy, the Carrier is directed to make a timely payment to each of the Claimants herein for four (4) hours at their straight time rate.



Dennis J. Campagna  
Chairman and Neutral Member



D.D. Bartholomay  
Organization Member



D.L. Kerby  
Carrier Member

July 24, 2006  
Dated