

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40455
Docket No. MW-40855
10-3-NRAB-00003-090129**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(CP Rail System (former Delaware and Hudson
(Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work (track construction and related work) between Mile Posts 683 and 684 at Laflin, Pennsylvania on October 16 through November 5, 2006 (Carrier's File 8-00529 DHR).**
- (2) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work (track construction and related work) between Mile Posts 683 and 684 at Laflin, Pennsylvania on November 6 through November 10, 2006 (Carrier's File 8-00528 DHR).**
- (3) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work (track construction and related work) between Mile Posts 683 and 684 at Laflin, Pennsylvania on November 11 through November 16, 2006 (Carrier's File 8-00527 DHR).**
- (4) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work (track construction and related work) between Mile Posts 683 and 684 at**

**Laflin, Pennsylvania on November 17 through November 21, 2006
(Carrier's File 8-00530 DHR).**

- (5) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work (track construction and related work) between Mile Posts 683 and 684 at Laflin, Pennsylvania on November 27 through November 30, 2006 (Carrier's File 8-00531 DHR).**
- (6) The Agreement was further violated when the Carrier failed to comply with the notice requirements regarding its intent 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.**
- (7) As a consequence of the violations referred to in Parts (1) and/or (6) above, Claimants D. Kovaleski, R. Ossig, A. Kovaleski, P. DeFazio, A. Thomas, K. Doyle, E. Hermanofski, E. Nicholson and R. Vanderpool shall now each be compensated for one hundred twenty-four (124) hours at their respective straight time rates of pay and for ninety (90) hours at their respective time and one-half rates of pay.**
- (8) As a consequence of the violations referred to in Parts (2) and/or (6) above, Claimants D. Kovaleski, R. Ossig, A. Kovaleski, E. Nicholson, P. Smith, P. DeFazio, A. Thomas, K. Doyle, E. Hermanofski, and R. Vanderpool shall now each be compensated for forty (40) hours at their respective straight time rates of pay and for ten (10) hours at their respective time and one-half rates of pay.**
- (9) As a consequence of the violations referred to in Parts (3) and/or (6) above, Claimants D. Kovaleski, R. Ossig, A. Kovaleski, E. Nicholson, P. Smith, P. DeFazio, A. Thomas, and K. Doyle, shall now each be compensated for thirty-two (32) hours at their respective straight time rates of pay and for twenty-eight (28) hours at their respective time and one-half rates of pay.**

- (10) As a consequence of the violations referred to in Parts (4) and/or (6) above, Claimants D. Kovalski, R. Ossig, A. Kovalski, E. Nicholson, P. Smith, F. Howatch, P. DeFazio, A. Thomas and K. Doyle, shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay and for twenty-six (26) hours at their respective time and one-half rates of pay.
- (11) As a consequence of the violations referred to in Parts (5) and/or (6) above, Claimants D. Kovalski, R. Ossig, A. Kovalski, E. Nicholson, P. DeFazio, A. Thomas and K. Doyle, shall now each be compensated for thirty-two (32) hours at their respective straight time rates of pay and for eight (8) hours at their respective time and one-half rates of pay.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

As was the situation in Third Division Awards 40453 (track grading work) and 40454 (installation of ties) this subcontracting claim involves work performed between October 16 and November 30, 2006 at the Laflin, Pennsylvania, siding project. It is a combination of five different claims involving new track construction performed by Railworks between Mile Posts 683 and 684, with each covering a distinct week period of time, and which were handled separately on the property. A review of the extensive on-property record reveals that the content of the correspondence is almost identical with respect to each of the five claims, and is the same as that referenced in the prior two Awards dealing with the Laflin siding project. Because this consolidated claim involves the same notice and conference as

that discussed in the aforementioned Awards, the facts concerning the August 24 notice, the Organization's August 29 response and request for conference, the October 3 conference, and the Organization's October 11, 2006 correspondence are incorporated herein. Additionally, most of the assertions and arguments raised by the parties on the property in these cases are similar to those contained in the prior cases, and the Board's discussion of their contents in Award 40453 are also incorporated herein by reference. As was the situation in the prior cases, these claims also raise the issue of whether timely notice was served and good faith discussions occurred prior to the commencement of the work at issue.

The Organization argues that new track construction is specifically encompassed within Rule 1 of the Agreement and has customarily and historically been performed by BMW-represented employees, citing Public Law Board No. 6493, Award 45, as well as Third Division Awards 2701 and 6305, and notes that this fact was not disputed by the Carrier. It asserts that the Carrier (1) failed to comply with its good faith obligations set forth in Rule 1.4 and Appendix H, because no specifics were contained in the notice or discussed at the conference (2) was not forthright about the time parameters for completion of the project and (3) it failed to get back to the Organization with information as promised prior to the contract being entered into or the work commencing, relying on Public Law Board No. 6493, Award 44, as well as Third Division Awards 38010, 38012 and 39490. The Organization contends that the Carrier's affirmative defenses are without merit and are unsupported on the record, citing Public Law Board No. 6493, Award 45, as well as Third Division Awards 36937 and 37287 and that both the prior flood issue and the fact that the Claimants were fully employed are irrelevant and do not negate the appropriateness of a monetary remedy for its violations, relying on Public Law Board No. 6493, Award 45, as well as Third Division Awards 2701, 6305 and 39490.

The Carrier contends that it sent timely notice encompassing the work in issue and held a pre-contracting conference with the Organization, thereby meeting its contractual obligations with respect to the contracting of this work. It notes that no viable alternative to contracting was proposed by the Organization, especially in light of the fact that all Claimants were fully employed and had no loss of earnings. The Carrier asserts that the Organization ignores the fact that it was seriously affected by major flooding in the summer, which required full use of its manpower and equipment to get the main line back in working order, as well as its consistent efforts to hire new employees over the past few years in an effort to permit more work to be performed by its employees. The Carrier posits that its forces are

scheduled to perform all maintenance and repairs in the Engineering Department and cannot handle a project of this magnitude. Because it met its notice and conference obligations, the Carrier contends that there is no prohibition against its contracting this work, and because there was no loss of earnings established, it urges the Board to find no contractual violation and that a monetary remedy is inappropriate, citing Public Law Board No. 6493, Awards 23, 24 and Third Division Award 37287.

A careful review of the record convinces the Board that the Organization presented a prima facie violation of Rules 1.1, 1.4 and Appendix H. Rule 1.1 specifically reserves to BMWE-represented employees the work of track construction. Thus, there can be no dispute that the work involved herein was scope-covered. Public Law Board No. 6493, Award 45. The August 24, 2006 contracting notice specifically referred to the Laflin industrial lead track and included the construction of 6600 feet of track, the approximate starting time of the project, and the fact that there was a need to utilize additional manpower and equipment to complete the project in 2006 because all employees were working. The Board concurs with the Carrier that the notice encompassed the disputed track construction work and was timely served. However, as the Board noted in Third Division Award 40453, the record makes clear that the October 3 conference dealt primarily with the other two projects covered by the notice; the specifics of the Laflin project were not discussed. The Carrier's representative agreed to get back to the General Chairman to discuss the matter further once he obtained additional information about the project.

The Carrier's April 20, 2007 declination acknowledges that its representative was delayed in making his response, and quoted an email from Pattyn to General Chairman Hurlburt referencing their meeting the prior week and his uncertainty as to whether employees were going to do the work in issue, and stating that he was informed that because there were no men available, it had to contract out or lose the funding. No further discussion or meeting took place between Carrier representatives and the Organization prior to the commencement of the disputed track construction work by the contractor's employees on October 16, 2006. It appears from the record that after receipt of this email, Local Chairman Evanski made a written request on October 19, 2006 for all information concerning the grant allocations for the Laflin Siding project under Pennsylvania's Right To Know Law. As a result, he obtained a copy of the contract indicating that the funding for the project was valid until June 30, 2007, with the possibility of an extension. This

information, coupled with the fact that no subsequent conference or discussion took place concerning the Laflin project prior to the contract being signed and the work starting, is the basis for the Organization's contention that the Carrier failed to meet the good faith requirements contained in Rule 1.4 and Appendix H. We agree, as set forth more fully in Third Division Award 40453. See, Public Law Board No. 6493, Award 44, as well as Third Division Award 36851. This finding distinguishes this case from Third Division Awards 38148, 38149 and 38151 wherein the Board held that advance notice and good faith discussions occurred prior to the decision to contract out work.

The Carrier's defenses, including the effect of the summer flood on manpower availability in October and November 2006 and its efforts to hire additional employees, were all proper subjects of a contracting conference, where the parameters of the project, its funding deadline and possible work schedule could have been discussed. Public Law Board No. 6493, Award 45. Because we have held that this project was not properly conferenced, these factors cannot negate the Carrier's contractual commitment to make a good faith effort to reduce the incidents of subcontracting and to utilize employees to perform admittedly scope-covered work. Despite the fact that the Claimants were fully employed, and considering that there was a possibility that this project could have been delayed until such time as employees would have been available to perform the work, there is no basis to conclude that a monetary remedy would be inappropriate for the proven lost work opportunity. See Third Division Awards 36851 and 37287. Because the Carrier never contended that the remedy requested was excessive, the claim will be sustained with the exception of the dates encompassed within paragraphs (1) (2) and (3) for which Claimants D. Kovaleski, A. Kovaleski and P. DeFazio have already received compensation pursuant to Third Division Award 40453; any additional monetary award to them for October 30, 31, November 1, 6, 8, 10 and 13, 2006 would be duplicative.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 14th day of May 2010.