

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40457
Docket No. MW-40857
10-3-NRAB-00003-090146**

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

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Corporation
(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 (surface track) between Mile Posts 683 and 684 at Laflin, Pennsylvania on November 18, 19, 20 and 30, 2006 (Carrier's File 8-00532 DHR).
- (2) 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.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants K. Harrington, V. Miner, III and G. Lawyer shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and for twenty-four (24) 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.

This is a subcontracting claim filed under Rule 1 and Appendix H, protesting the Carrier's contracting of track surfacing work on new track construction taking place between Mile Posts 683 and 684 at Laflin, Pennsylvania, on the four claim dates in November 2006. As was the situation in Third Division Award 40454, this case raises the issue of whether timely notice was served and good faith discussions occurred prior to the commencement of the work in issue. Because it involves the same notice and conference as that discussed in Third Division Award 40453, 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 by reference.

The instant claim was filed on December 7, 2006 for all track surfacing work performed by Railworks on November 18 (Saturday) 19 (Sunday) 20 and 30, 2006 on new track construction at Laflin, Pennsylvania, protested in Third Division Award 40455. It sets out the number of hours of straight time and overtime work performed on each of the four claim dates. Many of the assertions and arguments set forth in the correspondence on the property in Awards 40453 and 40455 are similarly contained in the instant case record, and the Board's discussion of their contents are also incorporated herein by reference. Additionally, in this claim, the Organization references an Annual Roster Protest Meeting held with Carrier representatives on October 17, 2006 at which time Track Maintenance Manager Pattyn informed it that the surfacing work on this project was going to be performed by the Carrier's own forces. The Organization asserted that the Carrier misled it by using the contractor and the contractor's 6700 Tamper on the claim

dates without any additional notice being served after it was promised the work. In its December 21, 2006 declination the Carrier states that it intended to use its own forces if possible, but was short of men due to mainline issues. In its appeal the Organization noted that at the two mile siding construction projects in 2001 and 2002, the Carrier used its own forces for both the construction and surfacing work, after its employees dumped the ballast at those locations, and stated that BMW-represented employees were used to dump the ballast at the Laflin project during the week of Thanksgiving when the contractor's employees were gone, but were not utilized to do the surfacing work they were promised. In its final declination the Carrier raised its efforts to hire additional employees over the past few years, the 2006 summer flood, and the fact that the Claimants were fully employed as an explanation for why this major work project was contracted. The record also contains correspondence on the complement of the seniority rosters.

A careful review of the record convinces the Board that the Organization presented a prima facie violation of Rules 1.3, 1.4 and Appendix H. The Carrier admitted that its own employees have performed surfacing work of this type in the past. Thus, the scope coverage of this work was undisputed on the record. The Carrier asserted that the surfacing work was a vital part of the overall completion of the Laflin construction project, and was encompassed within the August 24, 2006 notice. While the contracting notice specifically referred to the Laflin project and the construction of an industrial lead track, we are unable to agree with the Carrier that the August 24 notice implicitly encompassed the disputed surfacing work. In fact, the first of the three projects listed in the notice involved the rental of a tamper with operator starting on August 29 for four weeks at the Binghamton Yard. The specific mention of the rental of this equipment used for surfacing at one location and its exclusion from the description of the work at the Laflin project, could be interpreted as not intending to cover surfacing work at the Laflin project. However, even if we were to find that the original notice encompassed this work, for the reasons stated in Third Division Award 40453, the Board concludes that the October 3 conference did not satisfy the Carrier's obligation to discuss the Laflin project in good faith prior to the contract being signed and the work commencing.

In this case it appears that discussion of the surfacing work at the Laflin project took place subsequent to the October 3 meeting. At the October 17, 2006 meeting, the Carrier informed the Organization that this surfacing work would be performed by its own forces. Once this was communicated, there was no reason for the Organization to continue to protest, or to offer alternatives to contracting. The

record makes clear that no additional notice was served concerning the Carrier's intention to contract out the surfacing work prior to doing so on November 18, 2006, and no further discussion was held or explanation offered concerning why the Carrier decided to contract the work until its December 21, 2006 denial of the instant claim. Under such circumstances, the Carrier failed to satisfy its advance notice obligations contained in Rule 1.3, as well as its good faith responsibilities contained in both Rule 1.4 and Appendix H. See Public Law Board No. 6493, Award 44 and Third Division Award 36851.

Despite the fact that the Claimants were fully employed, in the absence of a specific challenge by the Carrier, there is no basis in the record to conclude that the amount of work involved did not encompass the hours listed on each claim date, or that the monetary remedy requested was excessive. (Third Division Awards 36851 and 37287.) In fact, the Organization noted that two of the claim dates occurred on a weekend, when the Claimants were not regularly scheduled to work and were available to perform the disputed surfacing. Accordingly, the claim will be sustained.

AWARD

Claim sustained.

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.