Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41418
Docket No. MW-40877
12-3-NRAB-00003-090159

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(CP Rail System/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 (Tioga Contracting Company) to perform Maintenance of Way work (grading and installing sub-base for new track construction) at the Robinson Street Project in Binghamton, New York on September 11, 12, 13, 14, 15, 18, 19, 20, 21 and 22, 2006 (Carrier's File 8-00518 DHR).

(2) The Agreement was violated when the Carrier assigned outside forces (Innovative Rail Services and G. W. Peoples Contracting) to perform Maintenance of Way work (track construction and related work) at the Robinson Street Project in Binghamton, New York on October 9, 10, 11, 12, 13, 16, 17, 18 and 19, 2006 (Carrier's File 8-00520).

(3) 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.

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants R. Kane, E. Conrow, A. Kovaleski and J. Hurlburt shall now each be compensated for eighty (80) hours at

their respective straight time rates of pay and for thirty-five and one-half (35.5) hours at their respective time and one-half rates of pay.

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants G. Hutchings, R. Penzone, K. Chilson, B. Beamer, R. Albert, K. Quinlivan, H. Mason, D. Underwood, R. Vanderpool, F. Vanderpool, T. Tarchak and B. Cooper shall now each be compensated for seventy-two (72) hours at their respective straight time rates of pay and for thirty-six (36) 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 proceeding addresses two claims (dated November 4 and November 7, 2006). Each claim was handled in the usual manner on property including up to the highest designated officer of the Carrier. The parties consolidated the claims for the purpose of Board adjudication.

The consolidated claim, hereinafter referred to as the claim, involves the Carrier having contracted with outside forces to grade, build and lay sub-grade for new track construction and related work beginning on September 11, and continuing on certain dates through October 19, 2006 at the Robinson Street Project in Binghamton, New York. The Organization asserts violations of Rule 1 (Preamble) Rule 3 (Vacancies and New Positions) Rule 4 (Seniority) Rule 11 (Overtime) and Appendix H.

The Organization asserts that the claimed work of new track construction is within the scope and coverage of Rule 1.1 because it is "work generally recognized as Maintenance of Way work, such as . . . construction . . . other structures, tracks[.]" BMWE-represented employees customarily, historically and traditionally perform the claimed work. The Board finds that the Organization's unrebutted assertion is a fact of record. Crediting this unrebutted assertion is consistent with decisional authority in Third Division Award 36852: "It is well settled that unrefuted assertions of material fact become established as fact for purposes of evidentiary analysis."

Because the claimed work is scope covered, compliance with notice and conference requirements in Rule 1 is mandatory for the contracting transaction. Specifically, whether the notice was timely and whether good-faith discussions occurred prior to the commencement of the claimed work.

Rule 1.1 is silent on contracting out scope-covered work, but Rule 1.3 states that should the Carrier plan "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 practicable and in any event not less than fifteen (15) days prior thereto[.]" Rule 1.3 is self-evident as to the Carrier's obligation to issue advance written notice "prior thereto" - before the "contracting transaction."

When the General Chairman requests a conference "to discuss matters relating to the . . . contracting transaction," Rule 1.4 states that "the Carrier shall promptly meet . . . for that purpose." In that context the Carrier and Organization "shall make a good faith attempt to reach an understanding concerning . . . contracting, but, if no understanding is reached, the Carrier may nevertheless proceed" to contract out.

Readily apparent from this wording is that where the parties do not reach a "meeting of the minds" understanding, the Carrier can move forward with the contracting transaction.

The "good faith attempt" in Rule 1.4 is an equal and complementary effort that is assessed within the totality of circumstances. Although Rule 1 does not "effect the [parties] existing rights" with respect to contracting, Rule 1.5 states that the purpose of Rule 1 "is to require the [Carrier] to give an advance notice and, if requested, to meet with the General Chairman . . . to discuss and, if possible, reach an understanding in connection therewith."

Equally significant and applicable in the adjudication of a contracting-out claim is Appendix H where there is an assurance of "good-faith efforts to reduce the incidence of subcontracting" - "to the extent practicable" - as a means to increase the use of BMWE-represented employees. One measure of "good-faith efforts" would be procurement of rental equipment for Carrier forces to operate.

Finally, Appendix H states that advance notice requirements are to "be strictly adhered to" with the parties "encourage[d] . . . locally to take advantage of the good faith discussions . . . to reconcile differences." To enhance communications in support of good-faith discussions the "advance notice shall identify the work to be contracted and the reasons" for doing so.

Rule 1 embodies the elements in Appendix H, that is, advance written notice and a contractual commitment to good-faith discussions supplemented by identifying work subject to contracting and the reasons therefor. Any understandings attained through these discussions may reduce - "to the extent practicable" - the incidence of contracting and increase the use of Carrier forces performing general scope work.

As reflected in on-property Third Division Award 40858, contracting for outside forces is not subject to remedial relief through claim adjudication when the prerequisites in Rule 1 and Appendix H are satisfied. The opposite conclusion is apparent and, that is, when the prerequisites are not satisfied, contracting for outside forces subjects the Carrier to monetary claims as occurred in on-property Third Division Award 40456: "the conference did not satisfy the Carrier's obligation to discuss . . . in good faith prior to the contract being signed and work commencing."

Within this framework of Rule 1 and Appendix H, as well as on-property Awards, this claim is adjudicated.

The Carrier's initial notice (January 24, 2005) stated "we will be contracting out the installation of two bridges at MP613.84 on the Freight Main Line over Robinson Street" and it "will include all work associated with the installation of these structures and the removal of all existing bridges at this location."

A telephone conference convened on February 1, 2005. The Carrier indicated plans remained incomplete, but 20 to 40 employees were needed to complete the project by the end of 2005 and all work, including new track construction, would be contracted out. The partial list of work addressed the installation of bridges - new

abutments, pile driving, cement and steel work and excavation in the area. New track construction was not discussed - the official present during the telephone conference was not familiar with that item. Consequently, the Organization requested another conference on that topic.

A face-to-face conference occurred on March 7, 2005. The Organization requested another conference "once you have all the information concerning this project." Officials involved with new track construction were not present. Manpower was reasserted as the reason for contracting. The Organization informed the Carrier that it was not engaged in good-faith discussions.

Final notice issued on August 26, 2006 whereby "under the provisions of the collective agreement the carrier intends to hire contractors to work on . . . three projects." As pertinent to this claim, the Carrier identified the work as 1800 feet of new track construction, realigning the track approaching the new bridges and assembling three panelized turnouts. BMWE-represented forces were fully employed; manpower and equipment were the reasons for contracting.

On August 29, 2006 the Organization responded to the notice by addressing manpower and equipment and requesting copies of contracts with outside forces, as well as a conference. The parties met in conference on October 3, 2006.

During the conference the Carrier acknowledged that BMWE-represented employees construct track but, despite the Carrier having hired employees, there remained insufficient manpower to complete this project (slated to begin October 9, 2006) by the end of 2006. Carrier forces were to work on the Main Line and "throw the track into the Main Line." The Organization stated that it had not received proper and timely notice for contracting out and renewed its request for copies of contracts with outside forces.

On November 4 and November 7, 2006 the Organization filed its claims noting that the Carrier hired the contractor to perform new track construction prior to providing BMWE with 15-day advance written notice. This shows lack of good-faith discussions. The Carrier denied the claim, but acknowledged that it did not provide the 15-day notice prior to the contractor performing the work; however, the Claimants were fully employed and not available to perform the work within the Carrier's time constraints for the project.

On January 28, 2007 the Organization filed its appeal to the claim declination. It reiterated arguments about manpower and equipment, noted depletion of forces and asserted that the Carrier disrespects BMWE-represented employees when outside forces are on-property performing scope-covered work and, while performing that work, the Carrier assigns other scope-covered work to them without notice to or good faith discussions with the Organization. Employees should not be punished for the Carrier's failure to plan its work.

On March 12, 2007 the Carrier denied the appeal based on the contention the Organization received timely and proper notice for the Robinson Street Project on January 24, 2005. It further asserted that, the final notice (August 24, 2006) was also timely because the first claim date of September 11, 2006 was 18 days after the issuance date of the final notice. Floods in June and July 2006 required the Carrier to dedicate its forces to restoration of the mainline thereby rendering them unavailable to complete the project by the end of 2006.

The record shows that the Carrier's initial notice (January 24, 2005) identifies new bridge installation; the Carrier informed the Organization during conference that new track construction was to be contracted out. The Organization was on notice of that topic, but there were no discussions because officials involved with new track construction were not present. The official present for the conference discussed the installation of new bridges and identified related work.

Merely mentioning the topic of new track construction without disclosing any of the work involved, standing alone, does not conform to Rule 1 and Appendix H. The non-presence and non-participation of any official familiar with the plan for contracting out new track construction and its related work thwarted discussions and precluded the opportunity to reach any understandings. This negates the express purpose for Rule 1.

Nevertheless, the final notice (August 24, 2006) identifies new track construction and related work as 1800 feet of track installation, realignment of tracks approaching the bridges over Robinson Street and assembly of three panel turnouts. The final notice is also considered in the context of Rule 1 and Appendix H.

The Organization requested a conference on August 29, 2006. Tioga Contracting Company began performing scope-covered work on September 11, 2006. On September 21, 2006 the Carrier executed a contract with Innovative Rail Services

for its forces to perform scope-covered work. A conference convened on October 3, 2006 and Innovative Rail Services began performing scope-covered work on October 9, 2006.

Apparent from this chronology is the Carrier's contractual commitment to Tioga Contracting Company performing claimed work on September 11, 2006.Its further commitment to Innovative Rail Services is confirmed by the Carrier's execution of a contract on September 21, 2006. These commitments occurred well-before the parties' conference on October 3, 2006.

There is no explanation in the record for the delay in conferencing the matter until after the contracting transaction was completed and the performance of scope-covered work by outside forces commenced. In on-property Third Division Award 39340 the Board concluded that the Carrier "delayed the conference until after the work commenced, for this particular contracting transaction, the Carrier rendered the notice and conference provisions in Rules 1.3 – 1.5 meaningless."

In applying this on-property precedent from Award 39340 to the record established by the parties in the instant claim, the Board concludes that the conference held on October 3, 2006 did not satisfy the Carrier's contractual obligation of good-faith discussions for new track construction and related work "prior thereto" - that is, before completing the contracting transaction.

The Carrier's execution of these contractual commitments with outside forces prior to the parties' conference violated Rule 1 and Appendix H. The Carrier's defenses, some of which were not raised on the property, do not insulate it from the consequences for non-compliance with contractual commitments in the parties' Agreement. Because Rule 1 is dispositive of the claim, the Board will not address Rules 3, 4 and 11.

The Claimants may have been fully employed on the claimed dates but, as noted in Public Law Board No. 6493, Award 24, full employment does not preclude monetary relief because it serves to reinforce contractual obligations for notice, conference and good-faith discussion requirements in Rule 1 and Appendix H. Without a challenge by the Carrier, the hours claimed on each claim date are presumed accurate and will be granted as remedial relief.

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 5th day of September 2012.