Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41420
Docket No. 40879
12-3-NRAB-00003-090173

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 (Railworks) to perform Maintenance of Way work (track construction) between Mile Posts 629 and 632 at New Milford, Pennsylvania on May 14, 2007 through June 2, 2007 (Carrier's File 8-00559 DHR).

(2) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work (track construction) between Mile Posts 629 and 632 at New Milford, Pennsylvania on June 3, 2007 through June 23, 2007 (Carrier's File 8-00575).

(3) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work (track construction) between Mile Posts 629 and 632 at New Milford, Pennsylvania on June 24, 2007 through July 28, 2007 (Carrier's File 8-00576).

(4) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work

(ditching) between Mile Posts 629 and 632 at New Milford, Pennsylvania on July 16, 2007 through July 31, 2007 (Carrier's File 8-00579).

(5) 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.

(6) As a consequence of the violations referred to in Parts (1) and/or (5) above, Claimants S. Bologansky, A. Gaspar, C. Gill and J. Hurlburt shall now each be compensated for one hundred twelve (112) hours at their respective straight time rates of pay and for one hundred (100) hours at their respective time and one-half rates of pay, Claimants P. Smith and A. Thomas shall each be compensated for seventy-two (72) hours at their respective straight time rates of pay and for eighty (80) hours at their respective time and one-half rates of pay, Claimants R. Ossig and A. Klemash shall now each be compensated for seventy-two (72) hours at their respective straight time rates of pay and for fifty-six (56) hours at their respective time and one-half rates of pay, Claimant T. Vanderpool shall now be compensated for sixty-four (64) hours at his respective straight time rate of pay and for sixty-four (64) hours at his respective time and one-half rate of pay, Claimant A. Kovaleski shall now be compensated for forty (40) hours at his respective straight time rate of pay and for thirty-two (32) hours at his respective time and one-half rate of pay, Claimant J. Vanderpool shall now be compensated for twenty-four (24) hours at his respective straight time rate of pay and for twelve (12) hours at his respective time and one-half rate of pay, Claimant P. Delamater shall be compensated for eight (8) hours at his respective straight time rate of pay and for sixteen (16) hours at his respective time and one-half rate of pay and Claimant D. Lattimer shall be compensated for twelve (12) hours at his respective time and one-half rate of pay.

(7) As a consequence of the violations referred to in Parts (2) and/or (5) above, Claimant T. Hurlburt shall now be compensated for one hundred twelve (112) hours at his respective straight time rate of pay and one hundred twenty-eight (128) hours at his respective time and one-half rate of pay, Claimants R. Ossig, S. Bologansky, C. Gill and A. Thomas shall each be compensated for ninety-six (96) hours at their respective straight time rates of pay and for one hundred twenty (120) hours at their respective time and one-half rates of pay, Claimant R. Vanderpool shall be compensated for sixty-four (64) hours at his respective straight time rate of pay and for ninety-two (92) hours at his respective time and one-half rate of pay, Claimant T. Vanderpool shall be compensated for forty-eight (48) hours at his respective straight time rate of pay and for sixty (60) hours at his respective time and one-half rate of pay, Claimant P. Smith shall be compensated for forty (40) hours at his respective straight time rate of pay and for fifty-six (56) hours at his respective time and one-half rate of pay, Claimant A. Klemash shall be compensated for forty (40) hours at his respective straight time rate of pay and forty-four (44) hours at his respective time and one-half rate of pay and J. Vanderpool shall now be compensated for ten (10) hours at his respective straight time rate of pay and for eight (8) hours at his respective time and one-half rate of pay.

(8) As a consequence of the violations referred to in Parts (3) and/or (5) above, Claimant P. Robinson shall now be compensated for one hundred fifty-two (152) hours at his respective straight time rate of pay and for one hundred seventy-two (172) hours at his respective time and one-half rate of pay, Claimant J. Hurlburt shall now be compensated for one hundred forty-four (144) hours at his respective straight time rate of pay and one hundred sixty-eight (168) hours at his respective time and one-half rate of pay, Claimant S. Bologansky shall now be compensated for one hundred thirty-six (136) hours at his respective straight time rate of pay and one hundred fifty-two (152) hours at his respective time and one-half rate of pay, Claimant B. Gardner shall now be

compensated for one hundred twelve (112) hours at his respective straight time rate of pay and one hundred forty (140) hours at his respective time and one-half rate of pay, Claimants P. Smith, P. Delamater and D. Lattimer shall each be compensated for one hundred twelve (112) hours at their respective straight time rates of pay and for one hundred twenty-eight (128) hours at their respective time and one-half rates of pay, Claimant C. Gill shall now be compensated for eighty-eight (88) hours at his respective straight time rate of pay and ninety-two (92) hours at his respective time and one-half rate of pay, Claimant K. Chilson shall be compensated for seventy-two (72) hours at his respective straight time rate of pay and for ninety-six (96) hours at his respective time and one-half rate of pay, Claimant C. Gill shall be compensated for seventy-two (72) hours at his respective straight time rate of pay and for sixty (60) hours at his respective time and one-half rate of pay, Claimant A. Gasper shall be compensated for forty (40) hours at his respective straight time rate of pay and for thirty-two (32) hours at his respective time and one-half rate of pay, Claimant J. Vanderpool shall be compensated for twenty-four (24) hours at his respective straight time rate of pay and for twenty-four (24) hours at his respective time and one-half rate of pay and Claimant F. Vanderpool shall be compensated for seventy-two (72) hours at his respective straight time rate of pay and sixty (60) hours at his respective time and one-half rate of pay.

(9) As a consequence of the violations referred to in Parts (4) and/or (5) above, Claimants F. Howatch, R. Penzone and G. Hobbs shall now each be compensated for eight-eight (88) hours at their respective straight time rates of pay and for ninety-two (92) 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 five claims filed between June 8 and August 2, 2007. The claims and appeals and responses thereto were timely processed, each separately, in the usual manner during on-property exchanges including up to the highest designated officer of the Carrier. The claims involve the same contractor working the same project at the same location and involve similar issues and arguments. The parties consolidated the claims for the purpose of Board adjudication.

The consolidated claims, hereinafter referred to as the claim, covers the period of May 14 through July 31, 2007. The Organization asserts that the Carrier's use of outside forces for track construction and ditching between Mile Posts 629 and 632 at New Milford, Pennsylvania, violates the controlling Rules for the claim - Rule 1 (Preamble) Rule 3 (Vacancies and New Positions) Rule 4 (Seniority) Rule 11 (Overtime) Rule 28 (Rates of Pay) and Appendix H.

On February 20, 2007 the Carrier issued the following notice to the Organization:

> "Please be advised that under the provisions of the collective agreement the carrier intends to hire contractors to perform grading and construct 10,000 feet of track at New Milford siding in Pennsylvania. CPR forces will be installing the mainline turnouts. The grading work is scheduled to begin as soon as weather permits. The track construction is scheduled to start mid-April."

By letter dated February 21, 2007 the Organization acknowledged that the notice was timely, but it protested the contracting out of scope-covered work and requested a conference. The Organization stated that Carrier forces were available

and qualified to perform the claimed work of new track construction. The Carrier did not plan to use its employees as evidenced by its having scheduled the work to commence in mid-April 2007 and by not showing any effort to rent or lease machines or equipment (not in the Carrier's inventory) without operators for its own forces to use. By scheduling the work to commence in mid-April the Carrier did not plan for the use of its own forces. The Organization requested the copies of the contracts with the outside contractors.

On March 22, 2007 the parties met in conference to discuss the claimed work. The Carrier acknowledged that grading and 10,000 feet of track construction is scope-covered work that its own employees have performed in the past, but it identified the reason for contracting as an insufficient number of qualified employees (manpower). The Organization disputed the reason and noted that the Carrier was not engaged in good faith discussion including not itemizing ditching in the notice. According to the Organization, the Carrier had a predetermined intent to contract out as evidenced by its refusal to consider BMWE's request to increase the use of BMWE-represented employees. No understandings were reached and the Organization subsequently filed its claim.

In its claim and appeal, the Organization contends that the notice is deficient because it does not identify reason(s) for contracting out the work in question. Without that information there can be no good-faith discussions at a conference and that precludes the Organization from providing alternatives to contracting out. The Carrier submitted its grant application to the Pennsylvania Department of Transportation in July 2006, but did not notify the Organization until February 2007. Between the date of the application (July 2006) and the work commencing (mid-April 2007) the Carrier could have hired more employees; the Carrier is required to maintain an adequate workforce. Rather than providing advance written notice "as far in advance of the date of the contracting transaction as is practicable" the Carrier delayed and provided the minimum 15-day advance notice, further evidencing its predetermined intent to contract out prior to conference. Although contracts with outside contractors were requested on numerous occasions, they were never disclosed.

In its denial of the claim and appeal, the Carrier asserts that it engaged in good-faith discussions and had not violated any controlling Rules. During conference, the Carrier informed the Organization that manpower was the reason for contracting,

that is, an insufficient number of BMWE-represented employees. Whenever outsourcing is under consideration the Carrier assesses each project in terms of time constraints, machine and equipment requirements and availability of Carrier forces. The Organization presented no means by which the planned and scheduled work for fully employed employees dedicated to maintenance or track programs could be deployed for this project and complete regular maintenance and track work. In its effort to reduce outsourcing "to the extent practicable" the Carrier hired 82 new employees in 2006 and 2007. The grant from the Pennsylvania Department of Transportation funded part of the project; it was not final until January 5, 2007. Under the terms of the grant, funds would revert if the project was not timely completed and, should that occur, the Carrier would be ineligible to receive funds for one year thereafter. Prudent planning required the Carrier to complete the project sooner rather than later as in delaying the project and risking exposure to the grant expiration date.

The Board's close review of the claim shows that ditching was a matter addressed during the on-property exchanges, with the Organization objecting that it was not mentioned in the notice, but the work was nevertheless performed by contractors, and the Carrier stating that ditching is, essentially, integrally related to and part of grading, so there was no Rules violation for not specifically mentioning "ditching" in the notice.

The Board recognizes that itemizing every detail of work that is subject to contracting may not be feasible or practicable. Nevertheless, the Carrier is the custodian of records in the normal course of its business operations and inherently familiar with the plans and details underlying the contracting notice such that only it knows the integral work to disclose for discussion. In the circumstances presented by this claim, the Organization established a prima facie finding that "ditching" was not set forth in the notice and the Carrier did not submit sufficient argument or evidence to rebut that argument. Thus, Part 4 of the claim as to "ditching" is sustained and the remedy granted as requested by the Organization.

As for that part of the claim focusing on track construction, in on-property Third Division Award 38151 the Board stated:

> "There is no mandate in the contract language cited that, after the required discussion opportunity, the Parties have to agree on the contracting out (or not) of the work at issue. Further, there is no indication in the record that either the Carrier's notice to the Organization or its participation in subsequent discussions regarding contracting out was on any basis other than good faith."

The Board's conclusions in Award 38151 are equally applicable in this proceeding. There was timely notice and conference with good faith discussion regarding track construction. Apparent from the arguments are the enduring differences between the parties when contracting out is at issue; however, once notice, conference and good faith discussions occur the Carrier can proceed with contracting out scope covered work. Therefore, except as noted hereinabove, the claim is denied.

AWARD

Claim sustained in accordance with the Findings.

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.