Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41444
Docket No. MW-40907
12-3-NRAB-00003-090201

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 to perform Maintenance of Way work (excavating and install drench [sic] drains) at Mile Post 584.78 on the Freight Main Line at Afton, New York beginning on December 4, 2006 and continuing. (Carrier's File 8-00526 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 T. Tarchak, B. Cooper, R. Penzone, A. Kovaleski, J. Hurlburt, E. Nicholson and P. Smith shall now each be compensated at their respective and applicable rates of pay for all straight time and overtime hours expended by the outside forces in the performance of the aforesaid work, beginning on December 4, 2006 and continuing."

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.

The claim, dated December 4, 2006, was timely handled in the usual manner on the property up to and including the highest designated officer of the Carrier.

The Organization alleges that beginning December 4, 2006, and continuing thereafter, the Carrier contracted with outside forces for the excavation and installation of French drains. The claim reads, in relevant part, as follows:

> "The Organization has just been informed that the Carrier has hired a contractor to perform work at Mile Post 584.78 on the Freight Main Line, in Afton, New York.
>
> * * *
>
> The Organization would like to point out that the Carrier has not notified the Organization that the Carrier planned on hiring a contractor to perform this work.
>
> As for information, the Carrier has violated . . . Rules [1, 3, 4, 11, and 28] of the current Agreement between the parties.
>
> The Organization has been informed that there is a B&B Foreman at this location providing on track-protection for this contractor while working.

> Also, the Organization has been informed that there are 5 operators operating different types of equipment. Also, there are a couple of laborers working on this project as well."

In denying the instant claim, the Carrier acknowledged that the contracted work falls within the scope and coverage of Rule 1. That is, "work generally recognized as Maintenance of Way work, such as, inspection, construction, repair and maintenance of. . . . structures, tracks. . . and roadbed" is customarily, historically, and traditionally performed by BMWE-represented employees. There is, furthermore, no dispute that each Claimant maintains seniority as a System Equipment Operator.

Because the claimed work is scope-covered, compliance with the notice and conference provisions prescribed in Rule 1 is required for the contracting transaction. The Organization asserts that the Carrier did not issue a notice. However, the Carrier points to its notice issued May 19, 2004, which addressed excavation for a geotechnical investigation between Mile Posts 584 and 585.

According to the Organization, the Carrier's purported notice dated May 19, 2004, was issued more than 30 months prior to the contract work, which commenced on December 4, 2006, and it, as well as the conference of May 24, 2004, do not encompass this contracted work. Furthermore, the notice expired at the end of calendar year 2004. Notwithstanding its expiration, the notice is deficient because the Carrier failed to identify any reason(s) for contracting out scope-covered work, thereby showing a lack of a good-faith effort to reduce the use of outside forces.

Initially, the Carrier asserts that during the parties' conference discussions on November 20, 2006, the claimed work was discussed. Conversely, according to the Organization, that conference was requested by the Organization to discuss two separate projects. The Carrier did not provide any notice to the Organization that the conference would encompass the notice of May 19, 2004. Without advance notice, the General Chairman could not prepare to discuss the project for excavation and French drains installation.

Finally, the telephone contact by the Carrier to the Organization on December 4, 2006, did not constitute good-faith discussion, because the contractors commenced work on that date, thereby undermining the advance notice and conference requirements.

As for the Carrier's assertion that the Claimants were unavailable due to full employment as well as lack of manpower, the Organization contends that the Carrier had more than two years to plan and schedule its forces, but failed to do so. Seven of the Claimants are qualified to perform excavation and French drains installation. Also unpersuasive is the Carrier's assertion that funds were not budgeted until 2006; budgetary matters are within the Carrier's discretion to establish and cannot be a subterfuge to escape the parties' Agreement by using outside forces.

The Carrier's assertions are affirmative defenses without substantiation. On-property Awards, the Organization argues, uphold the principle that assertions, alone, do not sustain an affirmative defense. (See, Third Division Awards 36851, 36937 and 37287.) The Carrier's assertions, moreover, must be considered in the context of its actions. For example, the Carrier asserts a lack of manpower, but it never followed Rule 3 to post a bulletin for the jobs performed by outside forces.

Although the Carrier states that the claim lacks specific dates and hours, the Organization points out that during the on-property claim processing, the work location was identified and the number of contractors and date for commencement of work were discussed. The Carrier has records of dates and hours for payments to outside forces. Because the Carrier did not deny this aspect of the claim when responding to it, the Organization "requests payment in full as outlined in the original time claim."

In response to the Organization's claim regarding whether advance notice was issued to contract out excavation and drain installation, the Carrier refers to its notice dated May 19, 2004:

> "We will be contracting out the excavating work for a geotechnical investigation between mile post 584 and 585 on the Freight Main Line.
>
> All work will be done under the C.P. Safety Rules for Contractors and a BMWE employee will protect the track and train operations at the work site when the contractor is on the property."

Conferences occurred on May 24, 2004, and November 20, 2006, during which the parties engaged in good-faith discussions. The Organization did not present alternatives for utilizing Carrier forces to perform the claimed work. In this regard,

Appendix H does not eliminate contracting out, but contains an assurance that the Carrier will ". . . assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable. . . ." The Carrier asserts that System Equipment Operators were on furlough and all B&B forces were scheduled for maintenance and capital projects. Thus, there was no available manpower.

As the Carrier advised the Organization, there was no need to meet regarding this claim given its prior notice (May 19, 2004) and two conferences (May 24, 2004 and November 20, 2006). Contrary to the Organization's argument, there is no expiration date for the notice dated May 19, 2004. The Carrier complied with Rule 1 and Appendix H.

The Board's review of the record reveals that on May 25, 2004, the Organization issued a letter to the Carrier itemizing topics discussed during the parties' conference on May 24, 2004. The Organization requested a conference to discuss the notice issued May 19, 2004.

The Organization's letter reads, in relevant part, as follows:

> "Mr. Conroy stated that the bank along the tracks at Mile Post 584 to Mile Post 585, on the Freight Main Line was sliding toward the Susquehanna River. There is a contractor that is going to do a Geotechnical Investigation at this location.
>
> The work that the contractor is going to perform is to drill some test holes and French drains.
>
> In the test holes, the contractor is going to install equipment to transmit how much water is there and how much the bank is moving from the track at this location.
>
> The contractor is also going to install four (4) Drench Drains with the possibility of more French Drains being installed.

* * *

> Mr. Conroy acknowledged that yes, the B&B Mechanics have performed this work in the past.
>
> Mr. Conroy stated that the contractor will have a drilling machine with the operator for the test holes, which is not a problem with the Organization.
>
> Mr. Conroy stated that there would be an excavator, bulldozer, and a front end loader on this project.
>
> The Organization informed Mr. Conroy that the Carrier has System Equipment Operators on the property who are qualified to operate the machines that are referenced.
>
> Mr. Conroy stated that he was going to advertise a B&B Foreman to protect this contractor while at this location.
>
> It is the position of the Organization that the B&B Department and M/W Department employees are qualified and historically have performed this work in the past."

Thus, there was timely notice and conference in May 2004 about the Carrier's intentions to have outside forces perform scope-covered work. Thirty months passed without outside forces performing any of the work discussed in May 2004.

During the conference on November 20, 2006, which was requested by the Organization to address two projects unrelated to the discussions in May 2004, the Carrier initiated discussion regarding "our coming work at Mile Post 584.70 (Afton)." Topics discussed are described in the Carrier's letter to the Organization dated December 27, 2006:

> "We mentioned to you that budgets were not available in years 2004 – 2005 to perform the work, but that a budget was available in 2006 to complete a portion of the project.
>
> We also re-enforced this topic in our conference call of December 4, 2006[.]

In addition, there were no furloughed operators available on the System Equipment Operator roster at that period of time and all our B&B forces were currently working on other projects.

We feel that we have met the spirit of the fifteen (15) days Notice Rule and there is no violation of Rules 1, 3, 4, 11, 28 and Appendix "H" of the Agreement between the parties by having the contractor performing the work at Mile Post 584.70.

Therefore, we don't foresee, at this present time, a need to meet with the Organization to discuss this issue since that has already been done on November 20 and December 04, 2006.

Should you have any questions regarding this matter or if you feel that a meeting should still be held, please do not hesitate to let us know."

Conference requires discussion and disclosure as an integral part of the good-faith attempt to reduce contracting "to the extent practicable." Rules 1.3 and 1.4 do not require the parties to reach an understanding during the conference as a condition precedent prior to the Carrier proceeding with outside forces; however, Rule 1 and Appendix H do require a good-faith attempt at every conference without regard to discussions at prior conferences involving similar or the same topics addressing claimed work.

A party, moreover, cannot minimize its good-faith obligations under Rule 1 and Appendix H when it elects to discuss an item at conference that the Organization would not be prepared to discuss due to lack of notice. Discussion at the conference in May 2004 did not insulate either party from its good-faith obligations at the November 2006 conference.

The Carrier's decision not to notify the Organization prior to conference (November 2006) that the Afton project would be discussed – including the Carrier's asserted reasons for deploying outside forces in lieu of BMWE-represented employees – foreclosed discussion, because the Organization was not prepared to address the Carrier's reasons for contracting.

The Board follows on-property Awards standing for the principle that affirmative defenses must be substantiated and applies that principle in this claim to

find that the Carrier's affirmative defenses in November 2006 are assertions without substantiation in the record. Manpower and its availability are dependent on the Carrier's budgeting, planning and scheduling to use its forces. Furthermore, new arguments such as flooding in 2006 to show lack of manpower and unavailable BMWE-represented employees are not considered at this late stage of the Board's proceedings.

Based on the record established by the parties, the Board concludes that the Carrier did not meet its good-faith obligations in November 2006 when it unilaterally asserted reasons for subcontracting on the Afton project without prior notice to the Organization. This situation is unlike the situations in the "Newman Awards" cited by the Carrier; those Awards show that, at all times over the course of several successive conferences, there were advance notices (without regard to prior notices on the same project) discussion and disclosure, whereas this situation does not. Accordingly, the claim is sustained.

The Carrier is the custodian of the records for the dates and hours on which contractors received compensation for which the Organization seeks a remedy. Thus, the requested remedy can be fashioned for the Claimants based on those records.

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 16th day of October 2012.