

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 41477  
Docket No. MW-41136  
12-3-NRAB-00003-090505

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

(Brotherhood of Maintenance of Way Employees 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 (remove/replace gunnite and reconstruct bearings) on a bridge at Mile Post 589.29 in Afton, New York beginning on September 12, 2007 and continuing through September 21, 2007 (Carrier’s File 8-00594 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 and K. Chilson shall now each be compensated for sixty-four (64) hours at their respective straight time rates of pay and Claimants R. Vanderpool, W. Scott and B. Cooper shall now each be compensated for forty (40) hours at their respective straight 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 claim arises from the Carrier's decision to contract out scope-covered work and the Organization's allegations that the use of outside forces violates various governing Rules such as Rule 1 and Appendix H. The claim was processed on the property in the usual manner up to and including the Carrier's highest designated officer. There is no dispute that the work is scope-covered and the Claimants were qualified to perform it.

On August 9, 2007, the Carrier issued the following notice to the Organization:

**"RE:Contracting Out – Bridge Repairs BR589.29 and BR 592.52**

Please be advised that under the provisions of the Collective Agreement we intend to contract out bridge repairs at BR589.29 and BR592.52. This work must be undertaken for the safety of railway employees and the safety and fluidity of the trains passing over these bridges. As our forces are currently working on main line bridge and culvert work, we do not have the men available to perform these repairs.

The scope of the work will be:

- Br 589.29 – Remove old gunnite from span & reconstruct bearings – Gunnite falling in roadway. Possible damage and injury to highway vehicles[.]

\* \* \*

This work is anticipated to start by the end of August, 2007, continuing until complete. All work will be done under the Safety Rules for Contractors and a B&B Foreman will be on site for protection at all times when the contractor is on the property.”

Following receipt of the notice, the Organization requested copies of contracts executed with subcontractors and a complete copy of the Safety Rules for Contractors.

A telephone conference convened on August 31, 2007. The Organization stated that BMW-represented employees were on furlough from the B&B Department; the Carrier stated that these employees would not be recalled and all other BMW-represented employees were fully engaged.

During a face-to-face conference held on November 1, 2007 for the purpose of addressing other subcontracted projects, this claimed work arose for discussion with the Organization noting that contractors had performed the work on September 4, 2007. The Organization reiterated its request for copies of the contracts, as well as a complete copy of the Safety Rules for Contractors.

On November 12, 2007 the Organization filed its claim for the scope-covered work at MP 589.29. According to the Organization, the Carrier has a pre-determined intent to subcontract and shows no effort to use BMW-represented employees as a means to reduce the incidence of contracting. In this regard, Carrier employees were working on the mainline where BR589.29 is located; they are qualified and available for this work.

The Carrier denied the claim on December 14, 2007 by noting that it complied with all governing Agreement Rules. A 15-day advance notice issued; a telephone conference convened on August 31, 2007 and good-faith discussions occurred. Contractor forces were on the property in early September 2007; however, because this matter was discussed in conference on August 31, 2007, contractor forces were not on the property prior to the parties’ conference discussion of the matter. Safety is the reason for completing the claimed work and the unavailability of BMW-represented employees is the reason for the subcontracting.

On February 14, 2008 the Organization appealed the claim denial stating that the Carrier exerted no effort to recall any B&B employees on furlough in other Departments so as to increase the use of its own employees and reduce the incidence of subcontracting. This shows lack of good faith and violates Appendix H, because intentionally operating short-handed cannot support outsourcing. In recent years the Carrier relied on subcontracting based on the same reason – lack of manpower or unavailability of BMW-represented employees. The Carrier’s employees were performing work on the mainline where this claimed work is located; the Carrier attempts to remove it from its own employees on the basis that it did not assert that BMW-represented employees were working on “ALL bridges[.]” [Emphasis added.]

On May 7, 2008, the Carrier denied the claim appeal. The Carrier stated that it maintains an adequate workforce and is hiring more employees, but at some point during the work season, the Carrier has to make a decision as to whether there are sufficient employees to complete the scheduled work and, if not, then it must subcontract. Employees are hired to fill the required maintenance schedule set by Engineering Department; the Carrier does not hire to fill a special project should one arise. At no time did the Carrier inform the Organization that BMW-represented employees were working on all of its bridges. In citing other projects outsourced during prior years the Organization failed to mention the floods in 2006. There are BMW-represented employees on furlough; however, “these employees are currently working in the Engineering Department covered under the BMWED agreements.” Information about contracts “will be submitted to the Organization shortly.”

The Board reviewed the record established by the parties in this proceeding. In this regard, the Carrier’s extended delay in providing the Organization with pertinent information – the executed contract – is not construed favorably in view of the close proximity in time between the conference (August 31, 2007) and contractor performance (September 4, 2007). The Organization made its request in August 2007 and the Carrier acknowledged the request and expressly stated that it would be released “shortly.” Nevertheless, as of May 2008 it had not divulged it.

There is no evident mitigating or extenuating circumstance for this extended delay for a material document that contains information (date executed) which may be dispositive of the claim, that is, whether the contracting transaction was in effect prior to convening the conference. The responsibility to establish compliance with Rule 1 and Appendix H with respect to the contracting transaction resides with the Carrier.

On that basis, the Board concludes that the Carrier's extended, unexcused delay does not comport with the purpose and intent of Rule 1 and Appendix H.

Accordingly, the claim is sustained and the requested remedy is granted in line with precedent established by on-property Award 45 of Public Law Board No. 6493, as well as Third Division Awards 2701, 6305, 32861 and 39490.

**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 13th day of December 2012.