

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41478
Docket No. MW-41137
12-3-NRAB-00003-090507**

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 (LaChase Construction) to perform Maintenance of Way work (building interior upgrade/repair, including repair and painting of walls and floors, tiling, installing new sink and replacing cabinets) at the Rouses Point Yard Office in Champlain, New York on November 5, 6, 7 and 8, 2007 (Carrier’s File 8-00601 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 D. Miller and E. Woodruff shall now each be compensated for thirty-two (32) hours at their respective straight time rates of pay and for twenty-three (23) 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 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 work was performed by two contractor employees over the course of four days.

On September 27, 2007, the Carrier issued the following notice to the Organization:

**“RE: Contracting Out – Replace Dock Plate and Binghamton Yard;
Renovations and repairs at Saratoga Yard Building; Repairs at
Rouses Point Station**

Please be advised that under the provisions of the Collective Agreement we intend to contract out work at Binghamton Yard, Saratoga Yard and the Rouses Point Station. Please see scope below for details of the work.

This work must be undertaken for the safety of railway employees and is based on issues raised by the local Health and Safety Committees.

As our forces are currently working on main line bridge and structures work, we do not have the men available to perform these repairs at this time.

The scope of the work will be:

* * *

- Paint the floor and lunch room wall and install new counter cabinet at the Rouses Point Station kitchen area. This work will include any work normally associated with this type of renovation and repair project.

The work is anticipated to start on or about October 8, 2007 and will continue until complete. All work will be done under the Safety Rules For Contractors.”

Following receipt of the notice, the Organization requested the following information:

- “1. When was this work first considered and planned.
2. Include all internal memos as to the planning of accomplishing this work and as to the planning of the contracting of this scope covered work.
3. What is the estimated man hours that would be needed to do this work.
4. What specific equipment is needed for this work.
5. A copy of the proposal that was put out for bid to contractors. Including the proposed work to be performed.
6. A list of all the contractors contacted to perform this work.
7. A list of all the contractors who made a response.
8. The name of the contractor who was awarded this project.
9. A complete and accurate copy of the Safety Rules for Contractors.”

In response to the Organization's request, the Carrier identified the contractor (Item 8) and provided a copy of the Safety Rules for Contractors (Item 9). The Carrier stated that information requested in Items 1 through 7 is confidential and "there is no provision, or requirement, in the Collective Agreement that requires the Carrier to provide the information requested."

A conference was convened on November 1, 2007. The Organization noted that the Carrier made no effort to schedule the work for performance by BMW-represented employees; the Carrier cited the unavailability of its forces because its employees were fully engaged with programmed work and could not complete the work in question during their regular hours or within the time constraints for the project.

On December 27, 2007, the Organization filed a claim asserting that the Carrier violated Rules 1, 3, 4, 11, 28 and Appendix H because this involves scope-covered work. The Organization asserts that the Carrier was predisposed to contract out by not providing the requested information which, if provided, would have demonstrated openness towards discussion. Thus, the Carrier did not engage in a good-faith effort to use its own BMW-represented employees and reduce the incidence of subcontracting.

The Carrier denied the claim on January 17, 2008 by noting that it complied with all governing Rules such as providing at least 15 days' advance notice and engaging in good-faith discussions, but BMW-represented employees remained unavailable as evidenced by the Claimants working overtime during the time period in this claim. Occasions arise in a work season when Carrier forces are unavailable to perform work on a regimented schedule and rescheduling is not an option. Time constraints and periodic shortfalls in manpower availability cannot be dismissed.

On March 17, 2008 the Organization appealed the claim. It acknowledged that the 15-day notice obligation was met, but it reiterated that the Carrier did not engage in good-faith efforts to reduce the incidence of contracting. For example, Rule 1.4 requires the parties to cooperate, which means sharing information. Instead, the Carrier refused to provide or disclose the requested information and show openness to the Organization's ideas for using BMW-represented employees on the weekend or during a time other than normal work hours, such as occurs now with switch installation in the Track Department.

On June 11, 2008, the Carrier denied the claim appeal. The Carrier stated that it maintains an adequate workforce and is hiring more employees. "Simply stated the Collective Bargaining Agreement is a set of rules and restrictions agree[d] upon by the Carrier and Organization, if there [are] no provisions in the CBA, it DOES NOT forbid or restrict the Carrier." [Emphasis supplied.]

The Board reviewed the record established by the parties in this proceeding. According to the Carrier, the request for information tendered by the Organization prior to and during conference discussions encompasses confidential matters and the Carrier is not required pursuant to the Agreement or any Rule to release such information upon request.

Information, such as when scheduling of the work commenced, the estimated number of work hours required, as well as the type of equipment needed pursuant to the Carrier's determination that its own employees are unavailable, can be readily disclosed without releasing any document during conference.

Discussion of these items supports the intent and purpose for a good-faith effort under Rule 1 and Appendix H because it assists the parties at the local level with increasing the use of Carrier forces and, to the extent practicable, reducing the incidence of outsourcing.

This information, moreover, is of evidentiary value for sustaining an affirmative defense for the unavailability of BMW-represented employees and time constraints that preclude other options, such as the Organization's unrebutted example where switch installation is being performed by Carrier forces during other than normal work hours. The record shows no time requirements established by the local Safety and Health Committees for completing this work.

Given these findings, the Board concludes that the Carrier's affirmative defense constitutes an assertion without evidentiary support. The Carrier did not substantiate its contention that its own employees were unavailable to update the Rouses Point Yard Office.

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.