

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41479
Docket No. MW-41138
12-3-NRAB-00003-090513**

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 (interior and exterior building repair and renovations) at the Kenwood Yard Office in Albany, New York beginning on June 6, 2008 and continuing through July 11, 2008 (Carrier’s File 8-00626 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. Jordan, M. Cole and D. Sheldon shall now each be compensated for two hundred (200) hours at their respective straight time 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 subcontract interior and exterior building repair and renovations at the Kenwood Yard Office in Albany, New York. The Organization alleges that the use of outside forces violates Rule 1 and Appendix H. The claimed work was performed by three contractor employees during regular hours over the course of five weeks.

On May 14, 2008, the Carrier issued the following notice to the Organization:

"Please be advised that the Carrier intends to have a contractor on the property at Kenwood for building renovations.

The Carrier will be utilizing its own forces elsewhere and therefore will be unavailable to carry out the work in the time required.

The scope of the work will include:

- Demolition work
- Interior – Plumbing, electrical, painting, patching, flooring
- Exterior – Windows, doors, roof, landing pads at Entrance
- Heating system evaluation

The start date of the work is scheduled to begin on, or about June 9, 2008.”

The Organization promptly submitted a written opposition to the Carrier’s notice. Among its arguments, the Organization contended that there was no attempt to rent or lease equipment for use by BMW-represented employees to perform this scope-covered work and the Carrier has not maintained an adequate workforce. 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.”

A telephonic conference occurred on May 27, 2008 during which the Organization sought to increase the use of BMW-represented employees and it requested, when available, copies of the involved contracts.

On June 23, 2008 the Carrier responded to the Organization’s opposition to contract out. To wit, the notice contained the reason for contracting out and complies with Rule 1; the contractor will determine equipment use; the Carrier does not assert lack of manpower; it conducted an internal review and determined that BMW-represented employees were not available due to other assignments which renders

them unable to timely complete the work; there is no requirement for the Carrier to share internal deliberations about subcontracting with the Organization; the parties' Agreement does not require the Carrier to disclose the requested information.

On August 6, 2008, the Organization filed its claim asserting that the work was scope-covered and the Carrier's actions constituted violations of Rule 1 and Appendix H. The Organization states that the subcontracting commenced on June 2, 2008, establishing that a contract had been awarded (but not disclosed as requested by the Organization) thereby showing a pre-determined intent to contract, which precludes good-faith discussions.

On September 22, 2008 the Carrier denied the claim. It provided advance written notice and engaged in good-faith discussions during conference on May 27, 2008 by explaining that its own employees were assigned to main line bridges and structures. The contractor commenced work on or about June 11, 2008, and not on June 2, 2008 as alleged by the Organization. A redacted copy of the contract was provided to the Organization on September 17, 2008.

As for information in Items 1 - 7 requested by the Organization in its letter dated May 14, 2008, the Carrier notes that the bidding process is confidential and the contract states "[n]either party shall disclose the terms of this agreement or amounts paid under to any person without the other party's written consent."

On November 17, 2008 the Organization appealed the claim denial and reiterated its arguments in the claim filing. The Organization states that the Carrier provided timely notice, but exerts only motions of good-faith discussion. The Carrier justifies contracting out by relying on its inactions as reflected in a failure to maintain an adequate, trained workforce. A redacted copy of the contract is not a good-faith effort to reduce the incidence of contracting; however, providing the information requested by the Organization in Items 1 through 7 shows good-faith discussions because it enhances prospects for BMW-represented employees to perform scope-covered work.

The Carrier denied the claim appeal on January 14, 2009 by restating the claim-denial reasons. That is, BMW-represented employees were assigned to capital and maintenance projects. Also, the Carrier contended that it does use the

Organization's suggestions for reducing the incidence of contracting by assigning crews overtime and off hours as well as new hires. Nevertheless, its own employees continue seven-day workweeks and 16-hour days.

On May 22, 2009 the parties met in a claim conference, but did not resolve this matter. Thereafter, the parties exchanged correspondence in July 2009 wherein the Organization argued that the Carrier does not maintain an adequate workforce. The Carrier responded that it maintains a workforce for normal maintenance requirements, but during a work season, it must determine whether there are sufficient employees to complete the work and, if not, considers other measures such as subcontracting.

The Board reviewed the record established by the parties in this proceeding. There is no dispute that the claimed work is scope-covered under Rule 1 and Appendix H inasmuch as employees have historically and customarily performed repairs and renovation work. The Carrier issued timely advance written notice with sufficient detail, including a reason for subcontracting. Based on the Organization's historical and customary record of performing the claimed work the Organization has an institutional base of knowledge for assessing the duration and dimensions of the project detailed in the notice.

During conference discussions and on-property exchanges the Organization suggested alternatives to accomplish the project with Carrier forces – alternate schedules, weekend assignments and overtime. In response to the Organization's suggestions the Carrier noted it already deploys these suggestions and its employees continue to work extended days and weeks.

Rule 1 requires good-faith discussions and Appendix H seeks to enhance communications between the parties at the local level by requiring the Carrier to state its reason for subcontracting in the notice as a means to reduce the incidence of contracting and, correspondingly, increase the use of BMW-represented employees to the extent practicable. Disclosure of information requested by the Organization in Items 1 through 7 may contribute to good-faith discussions, but is not necessarily dispositive whether there is compliance with Rule 1 and Appendix H.

The totality of the circumstances establishes that the parties engaged in good-faith discussions, including the reason for contracting and the use of Carrier employees on capital projects and maintenance assignments. There is no indication, based on the contract disclosed to the Organization, that the Carrier consummated the contracting transaction prior to fulfilling its obligations under Rule 1 and Appendix H. Rather, the record reflects the parties' enduring differences as to each party's interpretation and application of Rule 1 and Appendix H.

Good-faith discussions are not necessarily attained only when there is a whole or partial resolution over the claimed work. In the circumstances of this claim, the Carrier proceeded to subcontract in accordance with Rule 1 and Appendix H.

Given these findings about Rule 1 and Appendix H, the Board concludes that the Organization's asserted Rules violations are not established. Therefore, the claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of December 2012.