

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40453
Docket No. MW-40853
10-3-NRAB-00003-090113**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
(CP Rail System (former 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 (Scartelli Contracting Company) to perform Maintenance of Way work (track grade work) for a siding project at Laflin, Pennsylvania on October 30, 31, November 1, 6, 8, 10 and 13, 2006 (Carrier's File 8-00525 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. Kovaleski, A. Kovaleski and P. DeFazio shall now each be compensated for fifty-six (56) hours at their respective straight time rates of pay and for fourteen (14) 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 is a subcontracting claim filed under Rules 1 and 28 and Appendix H, protesting the Carrier's contracting of grading work at the Laflin, Pennsylvania, siding project in October and November 2006. It raises the issue of whether timely notice was served concerning this work and good faith discussions occurred prior to the commencement of the work in issue.

By letter dated August 24, 2006, the General Chairman was sent a contracting notice covering three separate projects, which are listed and described therein. The stated reason for the intention to contract was that all employees are currently working and additional manpower and equipment was needed to complete the projects that year. For purposes of this claim, the description of the project in issue was:

"Laflin PA - Industrial lead track - Construction of subgrade; 6600 feet of track, 1x#11 cross-over; 3x#9 turnouts, and realign 250 feet of track. Project to start October 1 for approximately 2.5 months. CPR forces will protect contractor where required."

While the notice was sent to a satellite office, the General Chairman responded to the notice on August 29, 2006, asserting that this was basic track work which is scope-covered and historically and customarily performed by employees, and requested copies of the contracts, information about what equipment was needed that the Carrier did not own or could not rent, and a conference prior to the start of the work.

On October 11, 2006, the General Chairman confirmed that a subcontracting conference was held on October 3, 2006 where the specifics of the other two projects were discussed, but that he was told that the Carrier representative did not know all of the details of the Laflin project, would gather the information and get back to him to continue discussion on this project. In this letter, the General Chairman noted that although he had not heard back concerning the specifics of the project, all materials were brought to the site by October 7 and contractor employees began working on October 9 and 10, installing cross ties on the main line. He posits that either this work is different from the grading work set forth in the notice and no notice was served on it, or that no good faith discussions occurred concerning this work, which commenced prior to any exchange of information or promised further discussion. The instant claim was filed on December 7, 2006 for all grade work done at the Laflin project, asserting a violation of the Scope Rule as well as advance notice and conference requirements.

Exchange of correspondence on the property establishes that the Carrier acknowledged that it was to furnish additional information after the October 3 conference but got delayed, that the contractor arrived on site earlier than anticipated, but that it met the spirit of the 15-day notice Rule "given the special circumstances," recognized that employees have done this work in the past, but claimed that it had also been contracted out, and asserted that the work was part of a major project that could not be piecemealed. Although documents revealed that the State funding contract for this work ran through June 2007 and had a provision for extension if necessary, the Carrier informed the Organization that the work needed to be done by the end of the year or it would lose its funding, and its subcontract called for the work to be done by December 31, 2006. There is no dispute that the Claimants were fully employed during the claim period, but the Organization asserted that there were qualified employees on furlough in February 2007 who could have been used. Correspondence addressed the Carrier's efforts to increase its work force by hiring new employees, the actual composition of the Track seniority roster, and the Organization's position that the Carrier had failed to maintain an adequate work force to accomplish anticipated scope-covered work and projects and did not properly schedule its work. Finally, the Carrier raised the fact that there was a flood in June and July 2006 which caused devastating damage to its main line and required that a multitude of man hours be expended in repairing it, as an explanation of why its own forces and equipment were not available for these special projects.

The Organization argues that the work in dispute - construction of track - is specifically encompassed within Rule 1 of the Agreement and has customarily and historically been performed by BMW-employees, citing Public Law Board No. 6493, Award 45; Third Division Awards 2701, 6305, and notes that this fact was not disputed by the Carrier. It asserts that the Carrier failed to comply with its notice and good faith obligations set forth in Rules 1.3, 1.4 and Appendix H, because no specifics were contained in the notice or discussed at the conference, the Carrier was not forthright about the time parameters for completion of the project, and it failed to get back to the Organization with information as promised prior to the contract being entered into or the work commencing, relying on Public Law Board No. 6493, Award 44; Third Division Awards 38010, 38012, and 39490. The Organization contends that the Carrier's affirmative defenses are without merit and are unsupported on the record, citing Public Law Board No. 6493, Award 45; Third Division Awards 36937, 37287, and that both the prior flood issue and the fact that the Claimants were fully employed are irrelevant and do not negate the appropriateness of a monetary remedy for its violations, relying on Public Law Board No. 6493, Award 45; Third Division Awards 2701, 6305, and 39490.

The Carrier contends that it sent timely notice encompassing the work in issue and held a pre-contracting conference with the Organization, thereby meeting its contractual obligations with respect to the contracting of this work. It notes that no viable alternative to contracting was proposed by the Organization, especially in light of the fact that all Claimants were fully employed and had no loss of earnings. The Carrier asserts that the Organization ignores the fact that it was seriously affected by major flooding in the summer, which required full use of its manpower and equipment to get the main line back in working order, as well as its consistent efforts to hire new employees over the past few years in an effort to permit more work to be performed by its employees. The Carrier posits that its forces are scheduled to perform all maintenance and repairs in the Engineering Department and cannot handle a project of this magnitude. Because it met its notice and conference obligations, the Carrier contends that there is no prohibition against its contracting this work, and because there was no loss of earnings established, it urges the Board to find no contractual violation and that a monetary remedy is inappropriate, citing Public Law Board No. 6493, Awards 23, 24 and Third Division Award 37287.

A careful review of the record convinces the Board that the Organization presented a prima facie violation of Rules 1.3, 1.4 and Appendix H. There was no

dispute that the work involved was scope-covered. The contracting notice specifically referred to the Laflin project and the construction of an industrial lead track, identified the type of work to be performed, the approximate starting time of the project, and the fact that there was a need to utilize additional manpower and equipment to complete the project this year because all employees were working. We concur with the Carrier that this notice encompassed the disputed grading work and was timely served. However, the record makes clear that the October 3 conference dealt primarily with the other two projects covered by the notice; the specifics of the Laflin project were not discussed. The Carrier's representative agreed to get back to the General Chairman to discuss the matter further once he obtained additional information about the project. It is undisputed that he did not do so until after the contractor's employees commenced work on October 9, 2006. Thus, although a conference was held, there was no good faith discussion concerning the Laflin project prior to the contract being signed and the work starting, negating the Carrier's compliance with such requirement set forth in Appendix H. See Public Law Board No. 6493, Award 44 and Third Division Award 36851.

The Carrier's defenses including the effect of the summer flood on manpower availability and its efforts to hire additional employees were all proper subjects of a contracting conference, where the parameters of the project, its funding deadline and possible work schedule could have been discussed. Public Law Board No. 6493, Award 45. Because this project was not properly conferenced, these factors cannot negate the Carrier's contractual commitment to make a good faith effort to reduce the incidents of subcontracting and to utilize employees to perform admittedly scope-covered work. Despite the fact that the Claimants were fully employed, and considering that there was a possibility that this project could have been delayed until such time as BMW-represented employees would have been available to perform the work, there is no basis to conclude that a monetary remedy would be inappropriate for the proven lost work opportunity. See Third Division Awards 36851 and 37287. Because the Carrier never contended that the remedy requested was excessive, the claim will be sustained.

AWARD

Claim sustained.

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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 14th day of May 2010.