

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40456
Docket No. MW-40856
10-3-NRAB-00003-090139**

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

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(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 (Railworks) to perform Maintenance of Way work (track welding) between Mile Posts 683 and 684 on the Freight Main Line at Laflin, Pennsylvania on October 29, 30, 31 and November 1, 2006 (Carrier's File 8-00533 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 B. Gardner and C. Gill shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay and for seventeen (17) 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 Rule 1 and Appendix H, protesting the Carrier's contracting of track welding work on the track construction taking place between Mile Posts 683 and 684 at Laflin, Pennsylvania, on four claim dates in October and November 2006. As was the situation in Third Division Award 40454, this case raises the issue of whether timely notice was served and good faith discussions occurred prior to the commencement of the work at issue. Because it involves the same notice and conference as that discussed in Third Division Award 40453, the facts concerning the August 24 notice, the Organization's August 29 response and request for conference, the October 3 conference, and the Organization's October 11, 2006 correspondence are incorporated herein by reference.

The instant claim was filed on December 2, 2006 for all track welding work performed by Railworks on October 29, 30, 31 and November 1, 2006 on new track construction at Laflin, Pennsylvania, protested in Third Division Award 40455. It sets out the number of hours of straight time and overtime work performed on each of the four claim dates, the first of which was a Sunday. Most of the assertions and arguments set forth in the correspondence on the property in Awards 40453 and 40455 are similarly contained in the instant case record, and the Board's discussion of their contents are also incorporated herein by reference.

A careful review of the record convinces the Board that the Organization presented a prima facie violation of Rules 1.4 and Appendix H. Rule 1.1 reserves to BMWF-represented employees the work generally recognized as Maintenance of

Way work (including maintenance of track) and work performed by employees in the classifications set forth in Rule 28. Rule 28.2C sets forth the classifications of Welder Foreman, Welder and Welder Helper. The Claimants herein are classified as Welders. During the processing of the claim on the property, the Organization noted that on two specific projects during the summers of 2001 and 2002 after employees constructed two mile sidings, any welding work that was needed was performed by either Headquartered or Interdivisional Welding crews. The Carrier's April 20, 2007 declination denial acknowledged that this type of work was performed by employees in the past, as well as by contractors. In light of this acknowledgement, the absence of statements from employees or photos establishing employee performance of this type of welding work is not fatal to the Organization's claim, as it was in Third Division Awards 38146 and 38150. Because the record establishes that the work is arguably scope-covered, compliance with the notice and conferencing provisions is required. (See Public Law Board No. 6493, Award 45.)

The Carrier asserted that the welding work was a vital part of the overall completion of the Laflin construction project, and was encompassed within the August 24, 2006 notice. While the contracting notice specifically referred to the Laflin project and the construction of an industrial lead track, we are unable to agree with the Carrier that the August 24, 2006 notice implicitly encompassed the disputed welding work performed on the mainline. The construction of the new track at Laflin occurred between October 16 and November 30, 2006, as noted in Third Division Award 40455. Those claims protested the contracting of track construction "and related work." If the disputed welding was a necessary part of the completion of the overall construction project, it was performed on only four dates toward the beginning of the construction project, not at its completion. The Carrier never argued that the welding was an integral part of the construction making the filing of the instant claim duplicative of the one processed in Award 40455. However, even if we were to find that the original notice encompassed this work, for the reasons stated in Award 40453, the Board concludes that the October 3 conference did not satisfy the Carrier's obligation to discuss the Laflin project in good faith prior to the contract being signed and the work commencing. Thus we conclude that the Carrier violated both Rule 1.4 and Appendix H by contracting out the track welding work between October 29 and November 1, 2006. (See Public Law Board No. 6493, Award 44 and Third Division Award 36851.)

Despite the fact that the Claimants were fully employed, in the absence of a specific challenge by the Carrier, there is no basis in the record to conclude that the

amount of work involved did not encompass the hours listed on each claim date, or that the monetary remedy requested was excessive. (See Third Division Awards 36851 and 37287.) In fact, the Organization noted that the first claim date was a Sunday, when the Claimants were not scheduled to work and were available to perform the disputed welding. Accordingly, the claim will be sustained.

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 14th day of May 2010.