

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40458
Docket No. MW-40858
10-3-NRAB-00003-090155**

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 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 (Innovative Rail Services and G.W. Peoples Contracting) to perform Maintenance of Way work (anchoring track, dismantling track and realigning switch panel) at Bevier Street Yard in Binghamton, New York from November 27 through December 1, 2006 (Carrier's File 8-00541 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. Bogart, W. Miller, B. Cooper, W. Scott, D. Underwood, S. Hanyon, S. Abdu-Shahid and B. Beamer shall now each be compensated for forty (40) hours at their respective straight time rates of pay and for ten (10) 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.

The instant subcontracting claim was filed on January 27, 2007 on behalf of Binghamton section and extra crew employees protesting specific Robinson Street Project work performed by Innovative Rail Services and its subcontractor G. W. Peoples from November 27 through December 1, 2006. It sets out the number of hours of straight time and overtime work performed on each of the five claim dates, as well as the nature of the work performed, and alleges a violation of Rules 1, 3, 4, 11, 28 and Appendix H.

The record reflects that an initial contracting notice was sent on January 24, 2005 covering the installation of two new bridges and the removal of the existing bridges on the main line over Robinson Street in Binghamton, New York. After the exchange of additional correspondence and telephone conversations a contracting conference was held on the bridge replacements on March 7, 2005. A second contracting notice was sent on August 24, 2006, covering three separate projects, one of which was the realignment of the approaches to the new Robinson Street Bridge, the construction of 1800 feet of track and the assembly of three panelized turnouts. The stated reason for the intention to contract was that all employees were currently working and additional manpower and equipment was needed to complete the projects that year. On October 27, 2006, the General Chairman confirmed that a subcontracting conference was held on October 3, 2006 where the parties discussed the possible rental of equipment, the diminished work force insufficient to perform all of the work on this project by the end of the year and the

Carrier's plan to hire more employees, as well as which main line work would be done by BMW-represented employees. A third contracting notice covering track work at the Robinson Street Bridge Project was sent on November 7, 2006, specifying the disassembly, anchoring, and removal of track work that was to commence around November 13 and to last six days. The notice stated that all employees were currently working and additional manpower was needed. The Organization responded with arguments including the reservation of this work to BMW-represented employees and their historical performance of it and the Carrier's improper scheduling of work or attempts to lease equipment without operators; it requested copies of the contracts and a conference.

By letter dated November 28, 2006 the Carrier responded that less than 200 feet of the 950 foot track in the Binghamton Yard remained and that the contract for this work was being significantly reduced, because employees performed most of it. It furnished a copy of the contract with Innovative Rail Service on December 19, 2006. The instant claim resulted, asserting that the Claimants were denied a work opportunity which was unfair and not in accordance with the Agreement. The Carrier's February 7, 2007 declination is based on the fact that all Claimants were working during the claim period including on overtime and suffered no loss of work opportunity. The Organization's appeal argued that because the work was covered by the Scope Rule, any contracting automatically violated the Agreement. It asserted that the notice was untimely and was sent to the wrong address, and confirmed that because most of the work identified in the original notice was completed by BMW-represented employees (specifying what was done by Carrier forces and what was done incorrectly by inexperienced contractor employees) the Carrier's defense of insufficient manpower was misleading and false. The Carrier's declination noted that the original notice was given more than 22 months prior to the disputed work, and both subsequent notices and conferences occurred more than 15 days prior to the start of the work. It stressed that this project was a huge undertaking and that its own forces were used wherever possible, and asserted that it had hired more than 100 new employees in the past few years and was continuing to do so. Finally, the declination mentioned the summer flood that shut down the main line and hampered its ability to use its own forces to get all work done.

A careful review of the record convinces the Board that the Organization failed to sustain its burden of establishing a violation of the Agreement in relation to the

contracting in issue. We find it unnecessary to address the Carrier's argument that the Organization substantially changed the nature of the claim filed before the Board from what was argued on the property, because it is clear that Rule 1 and Appendix H were mentioned during the on-property handling, although the notice contention appeared to be limited to its untimeliness rather than its adequacy. What is clear from this record is that the Carrier met its notice and conference obligations with respect to the disputed work involved in this claim on three different occasions, as early as 22 months before the specific work started, and as recently as 20 days before the actual commencement of the functions in dispute. Not only does the evidence reveal that the Carrier dealt with the Organization in good faith with respect to this project, but that most of the anticipated work covered by the contracting notice ended up being performed by the Carrier's own forces, not contractors. The Organization failed to establish that the Agreement prohibits the contracting of scope-covered work, that the Carrier violated any of the cited Agreement provisions, that the Claimants lost any work opportunity, or that the reasons asserted by the Carrier for having to contract some of the work in this case were inaccurate. The Carrier made every effort to use its own employees where possible in compliance with its responsibilities in Rule 1 and Appendix H. For all of these reasons, the claim must be 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 14th day of May 2010.