Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41445
Docket No. MW-40909
12-3-NRAB-00003-090204

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

(Brotherhood of Maintenance of Way Employes 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 (Sproul Contracting) to perform Maintenance of Way work (remove brush and related work) between Mile Posts 629 and 632 at New Milford, Pennsylvania on April 9, 10 and 11, 2007 (Carrier's File 8-00568 DHR).

(2) The Agreement was violated when the Carrier assigned outside forces (Sproul Contracting) to perform Maintenance of Way work (grade and related work) for the construction of a new siding between Mile Posts 629 and 632 at New Milford, Pennsylvania beginning on April 12, 2007 and continuing through May 30, 2007 (Carrier's File 8-00567).

(3) 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.

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants S. Nestico, M. Dilts and D. Thomas, II shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay.

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimant R. Penzone shall now be compensated for two hundred seventy-two (272) hours at his respective straight time rate of pay, Claimant F. Howatch shall now be compensated for two hundred forty-eight (248) hours at his respective straight time rate of pay and Claimant G. Hobbs shall now be compensated for two hundred twenty-four (224) hours at his respective straight time rate 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 proceeding addresses two claims, each of which is dated June 8, 2007. The claims were handled in the usual manner during on-property exchanges up to and including the highest designated officer of the Carrier. Both claims involve the same contractor, the same project at the same location and similar, if not identical, issues and arguments; the claims were consolidated for the purpose of Board adjudication.

The consolidated claim involves the Carrier's use of outside forces to remove brush and perform grading for the construction of a new siding between Mile Posts 629 and 632 at New Milford, Pennsylvania, beginning on April 9 and continuing through May 30, 2007. The Organization alleges that the Carrier violated Rule 1 (Preamble) Rule 3 (Vacancies and New Positions) Rule 4 (Seniority) Rule 11 (Overtime) Rule 28 (Rates of Pay) and Appendix H.

On February 20, 2007, the Carrier issued the following notice:

"RE: Contracting out grading at the New Milford Siding.

Please be advised that under the provisions of the collective agreement the carrier intends to hire contractors to perform grading and construct 10,000 feet of track at New Milford Siding in Pennsylvania. CPR forces will be installing the mainline turnouts. The grading work is scheduled to begin as soon as weather permits. The track construction is scheduled to start mid-April."

By letter dated February 21, 2007, the Organization requested a conference and lodged its objection to the Carrier's decision to contract out the work itemized in the notice. During the conference, which was held on March 22, 2007, the Organization requested that the Carrier increase its use of BMWE-represented employees on this project and provide copies of contracts for the claimed work. The Carrier disagreed with the requests based on the contention it did not have qualified employees or equipment available to perform the claimed work.

There is no dispute that the claimed work is scope-covered under Rule 1 and has been historically, traditionally, and customarily performed by BMWE-represented employees. There is, also, no dispute that the notice was timely.

According to the Organization, the absence or lack of wording in the notice that the contracted-out work included brush removal demonstrates that the notice does not fully encompass the claimed work. By contracting out the claimed work without providing notice to the Organization and affording it an opportunity to request a conference and engage in good-faith discussions, the Organization asserts that the Carrier violated Rule 1 and Appendix H, as well as other Agreement Rules. Also, it contends that the Carrier's assertion that brush removal is part of grade work constitutes "new" argument.

The Carrier contends that brush removal is part of grading work and such work is itemized in the timely notice. Rule 1 does not require that every level of detail be itemized in a notice. In the Carrier's view, support for its argument regarding brush removal is set forth in on-property Third Division Award 37499 wherein planting and seeding of wetland areas was an integral part of the contracted-out grading.

In reviewing the record evidence established by the parties, the Board finds that brush removal was not itemized in the notice of intent to contract out, nor was it discussed during on-property exchanges. The Carrier's argument that brush removal is part of grading work is new argument first presented at the Board level. Consequently, that argument cannot be considered pursuant to the rules for this appellate proceeding.

The Board recognizes that Rule 1 neither describes nor itemizes the level of detail required for a contracting notice. Nevertheless, the notice must be sufficient in clarity and purpose about the work subject to contracting out for the Organization to determine whether to request a conference.

Conference is the forum for disclosure and discussion of work encompassed by the notice. Although the Organization and the Carrier are mutually responsible for good-faith efforts during conference discussions, as the custodian of records in the normal course of its business operations, the Carrier is inherently familiar with the plans and details underlying each notice such that only it knows the integral and self-evident work to disclose for discussion. The record does not contain evidence pertaining to discussion during conference or on-property exchanges relative to brush removal in the context of grading work.

Based on the foregoing, the Board concludes that the notice does not address brush removal. Thus, the Carrier failed to comply with Rule 1 and Appendix H when it contracted-out brush removal work.

Accordingly, that aspect of the claim pertaining to brush removal is sustained and the remedy is granted. The Carrier's violation of the Agreement caused the Claimants to incur a loss of work opportunities. Numerous Third Division Awards support the Organization's requested remedy. (See, Third Division Awards 2701, 31386, 32861 and 39490.)

As noted in Public Law Board No. 6493, Award 24, the Claimants may have been fully employed on the claimed dates, but full employment does not preclude monetary relief as it serves to reinforce contractual obligations for the notice, conference and good-faith discussion requirements in Rule 1 and Appendix H. Without a challenge by the Carrier, the hours sought for each claim date are presumed accurate and will be granted as remedial relief.

As for that part of the claim focusing on grading work, the Board finds that the Carrier complied with Rule 1 and Appendix H. There was timely notice informing the Organization that scope-covered work would be subject to contracting out. Following exhaustion of good-faith attempts during conference discussions addressing grading work, the claim remained outstanding. Rule 1.4 provides for the Carrier to proceed with contracting in this situation. Accordingly, that aspect of the claim pertaining to grading work is denied.

AWARD

Claim sustained in accordance with the Findings.

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 16th day of October 2012.