Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41447
Docket No. MW-40938
12-3-NRAB-00003-090226

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 (Steve Fuller Excavating and Contracting) to perform Maintenance of Way work (culvert work, install gabion baskets and related work) between Mile Posts 148.6 and 150.7 on the Canadian Main Line in Chesterfield, New York beginning on August 27, 2007 and continuing (Carrier's File 8-00589 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. Miller, E. Woodruff, A. Mosley and J. Crandall shall now each be compensated at their respective and applicable rates of pay for an equal and proportionate share of the total straight time and overtime man-hours expended by the outside forces in the performance of the aforesaid work, beginning August 27, 2007 and continuing."

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 involves a claim arising from the Carrier's decision to contract out culvert work as well as the installation of gabion baskets for stabilizing the bank at Rockland Siding. The Organization alleges the Carrier's action constituted a violation of Rule 1 and Appendix H. The claim was processed on the property in the usual manner up to and including the Carrier's highest appellate officer.

On June 29, 2007, the Carrier issued the following notice to the Organization:

> "RE: Contracting Out, Rockland Siding, NY
>
> Please be advised that under the provisions of the collective agreement the Carrier intends to hire contractors to construct roadbed and track for the new Rockland Siding in NY.
>
> Roadbed construction includes grading, sub-base material, ditching and culvert extensions for a new 10,000' track adjacent to existing mainline and a back track. Track work includes constructing 10,000 feet of track, four turnouts, two track throws and 1,000' of double-ended back track. The grading work is scheduled to begin approximately July 30 and continue until done. Track work is scheduled to start approximately September 1 and continue until done."

Following receipt of the notice, the Organization requested a conference, which convened on July 17, 2007. The Organization sought to increase the use of BMWE-represented forces; the Carrier cited lack of manpower and equipment because its employees were fully employed with capital and maintenance projects. Project completion by the end of 2007 was required for the Carrier's anticipated increased CSXT traffic by that time. The Organization requested copies of documents, such as contracts, but none was disclosed during conference.

On October 22, 2007, the Organization filed this claim for culvert work as well as the installation of gabion baskets for bank stabilization. Aside from reiterating arguments presented during the parties' conference, the Organization asserted that the Carrier failed to engage in good-faith attempts to reduce the incidence of contracting by refusing to disclose project specifications and not planning for the use of BMWE-represented employees. It summarized its position by stating: "If the Carrier properly planned its work and allowed senior employees to fill positions to which they are entitled, it would eliminate much of the aforementioned negative impacts forced upon the Carrier's forces."

On October December 12, 2007, the Carrier denied the claim. Aside from reaffirming its arguments as presented during the parties' conference discussions, the Carrier asserted that Rule 1 provides for contracting out with a 15-day advance notice and stated that its reasons for contracting out were clearly explained during conference. The Carrier engaged in good-faith attempts by "readily discuss[ing] any matters brought to the table, including details of the project" while, at the same time, recognizing time constraints for project completion and manpower availability. The Carrier noted that it offered employment to more than 130 applicants in 2006 - 2007.

The denial concludes, in relevant part, as follows:

> "As per Appendix 'H,' we continue to make good faith efforts to ensure that contracting out is held to a minimum and would not allow this goal . . . thwarted through the unnecessary depletion of skilled force[s], abolishment of facilities, or lack of proper training programs."

On January 25, 2008, the Organization appealed the claim. It states that during the past two years, the Carrier contracted out 11 projects. According to the Organization, this is not an indication of good faith because BMWE-represented employees were on furlough in December 2007 while outside forces remained on the property performing scope-covered work. The Organization asserted that the alleged lack of manpower was due to the Carrier's lack of planning and inability to properly schedule its employees. Although the Organization recognized the Carrier's hiring, it contended that such efforts fall short and late for maintaining an adequate workforce to handle capital projects such as Rockland Siding.

On March 10, 2008, the Carrier denied the Organization's appeal. According to the Carrier, the Claimants were not on furlough, and if other BMWE-represented employees were on furlough in December 2007 while contractors remained on the property, then it was an unanticipated situation given the time frame for project completion (November 2007).

The Carrier asserts that throughout the work season management personnel decide whether there is ample time to complete scheduled projects given the available manpower.

The construction of a 10,000 foot siding is a major undertaking. Once a project goes to a contractor, it is difficult to infuse Carrier forces every now and then, when they become available. Nor is there any requirement for the Carrier to do so."

As for the documents, such as contracts requested by the Organization, the Carrier stated that it would release them "in due course."

According to the Organization, the claimed work is within the scope and coverage of Rule 1.1 inasmuch as it is "work generally recognized as Maintenance of Way work, such as, inspection, construction, repair and maintenance of . . . tracks . . . and roadbed[.]" [Emphasis added.] The Carrier acknowledges that the claimed work is scope-covered under Rule 1.

Because the claim involves scope-covered work, certain prerequisites must be met by the Carrier under Rule 1 and Appendix H (December 11, 1981 Letter of Agreement) before scope-covered work can be subcontracted. That is, Appendix H created and placed binding commitments on the Carrier that, when not met, limit the Carrier's right to contract out scope-covered work.

Specifically, the commitment and requirement is a good-faith effort to use BMWE forces and Carrier-owned equipment, or to rent the equipment for BMWE-represented employees to use, "to the extent practicable" before the Carrier exercises its right to contract out. When the good-faith effort is not established, the legitimacy of the contracting-out arrangement is undermined, resulting in a violation of Rule 1 and Appendix H.

Applying Rule 1 and Appendix H to this claim, the Board must determine whether the notice of intent to contract was timely under Rule 1.3 ("as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto").

Rule 1.3 is self-evident for the Carrier's obligation to issue advance written notice "prior thereto" - before the "contracting transaction." Along with Rule 1.3 is Appendix H, which states "the advance notice shall identify the work to be contracted and the reasons therefore."

The other prerequisite arises under Rule 1.4 and that is whether there was a good-faith attempt to reduce the incidence of contracting and increase the use of BMWE forces "to the extent practicable, including the procurement of rental equipment and operation thereof" by BMWE-represented employees. Good faith does not mandate agreement over claimed work, for "if no understanding is reached, the Carrier may nevertheless proceed" to contract out.

Having reviewed the record established by the parties, the Board finds that the Carrier issued a timely notice of its intent to contract out scope-covered work, but the notice failed to "identify the . . . reasons" for subcontracting the Rockland Siding work as required by Appendix H. The intent underlying the identification of the Carrier's reasons is "[i]n the interests of improving communications between the parties on subcontracting[.]" The absence of any reasons in the notice violates Appendix H. This violation, standing alone, is not dispositive of the claim, but when considered in the totality of the circumstances present in this case, the Board finds that the violation constitutes a lack of good faith effort.

The totality of circumstances encompasses the consideration whether there were "good-faith efforts to reduce the incidence of contracting and increase [the] use of" BMWE forces "to the extent practicable including the procurement of rental equipment and operation thereof, by carrier employes." A review of the case record and the time line of events therein brings clarity to this consideration.

On April 8, 2005, the Carrier commenced its initial planning or preliminary discussions with contractors. Discussions and planning continued through 2006 and into 2007 and included requests for proposals. Documents such as "Supplementary General Conditions" and "Specification" were agreed upon with the contractor on July 6, 2007. On July 17, 2007, the parties' conference convened. The effective date of the contract is August 7, and outside forces commenced work on August 13, 2007.

From the inception of the notion or plan for Rockland Siding, the Carrier engaged contractors for discussion of scope-covered work. When the Carrier issued the notice of intent to contract out on June 29, 2007, Rockland Siding was a fait accompli for contracting out without regard "to the extent practicable" to increase the use of BMWE forces for this project, including any consideration for procuring rental equipment that they could operate.

Upon receipt of the notice, the Organization requested documents pertaining to Rockland Siding, reiterated that request in its claim and repeated the request during the parties' conference discussions, as well as in its appeal. The Carrier does not contest the propriety of disclosing the documents but, at all times, replied "in due course," which led to disclosure beyond the period for discussions designed to reduce the incidence of contracting. This unexplained delay is not construed favorably for the Carrier.

When the parties' conference convened on July 17, 2007, the Carrier had already executed general conditions and work specifications with the contractor and initialed documents dated July 6, 2007. In other words, the scope-covered work made basis for the contracting transaction was committed to the contractor prior to conference. The contract's effective date of August 7, 2007, does not diminish the import of these pre-conference commitments.

The planning and scheduling for the Rockland Siding project occurred over a period of time measured in years and not months. The record is void of any documented demonstration, other than assertion, that available BMWE-represented employees in 2005 remained unavailable at all times thereafter. The Carrier's argument that it decided during the work season to contract out this project after it assessed manpower does not coincide with the time line of events and is not credited.

Rule 1 expressly states that the Carrier can proceed with contracting out even if there are no understandings reached during conference provided all prerequisites have been satisfied, including those in Appendix H. Restated, the obligatory prerequisites must be met prior to the contracting transaction. Based on the time line of events, the prerequisites in Rule 1 and Appendix H were not satisfied in the circumstances of this claim. Therefore, the Agreement was violated.

The Claimants may have been fully employed but, as noted in Public Law Board No. 6493, Award 24, full employment does not preclude monetary relief as it serves to reinforce contractual obligations for notice, conference and the good-faith discussion requirements in Rule 1 and Appendix H. An equal and proportional share of time requested as relief for each Claimant can be readily constructed from the records maintained by the Carrier for the claimed work.

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.