Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41481
Docket No. MW-41296
12-3-NRAB-00003-100149

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 (Railworks) to perform Maintenance of Way work (track construction and related work) for a side track extension in the vicinity of Mile Post 5 on the Colonie Main Line in Watervliet, New York on June 16, 17, 18, 19, 20, 23, 24, 26, 27 and 30, 2008 (Carrier's File 8-00631 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 G. Morehouse, M. Berner, J. Lavin and N. Smith shall now each be compensated for eighty (80) hours at their respective straight time rates of pay and for twenty (20) hours at their respective time and one-half rates of pay, Claimant D. Jordan shall now be compensated for seventy-two (72) hours at his

respective straight time rate of pay and eighteen (18) hours at his respective time and one-half rate of pay, Claimant J. Christman shall now be compensated for sixty-four (64) hours at his respective straight time rate of pay and sixteen (16) hours at his respective time and one-half rate of pay, Claimant F. Lipka shall now be compensated for forty (40) hours at his respective straight time rate of pay and for ten (10) hours at his respective time and one-half rate of pay and Claimant J. Rich shall now be compensated for eight (8) hours at his respective straight time rate of pay and for two (2) hours at his respective time and one-half 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 a claim dated August 8, 2008, which was timely processed in the usual and customary manner during on-property exchanges up to and including the highest designated officer of the Carrier.

On March 26, 2008, the Carrier issued the following notice to the Organization:

"This is to advise the Organization that, under the provisions of the Collective Agreement, it is the Carrier's intent to use a contractor to construct a 1,600 foot extension to the Watervliet siding in New York.

The Carrier will be utilizing its own forces elsewhere and will be unavailable.

The scope of the work will include all work normally associated with the construction of a track extension, including but not limited to:

Site work – grading for track roadbed
Removal of old ties on roadbed
Build 1600' siding track
Re-habilitate/relocate existing #16 ML Turnout
Loading, moving and unloading Rail and OTM

Various machinery and equipment will be used that will belong to, or be secured by, the contractor in order to complete the project.

The work is anticipated to start on, or about, May 1, 2008."

On April 14, 2008, the Organization responded in writing to the Carrier's notice. The Organization objected to subcontracting scope-covered work. It alleged numerous Rules violations and asserted that lack of manpower is due to the Carrier's failure to maintain an adequate workforce and plan for its use.

The Organization asserts that the Carrier reversed course from a prior notice of March 14, 2007 wherein it stated that its own forces would perform work for the General Electric Track Project. Also, the Organization requested information such as a list of contractors, estimated hours for projected work and internal memoranda on planning this scope-covered work. The Carrier did not provide the requested information prior to or during conference discussions regarding the notice.

On August 8, 2008, the Organization filed this claim asserting violations of Rule 1 (Preamble) Rule 3 (Vacancies and New Positions) Rule 4 (Seniority) Rule 11 (Overtime) Rule 28 (Rates of Pay) and Appendix H.

On October 20, 2008, the Carrier denied the claim based on the contention that it had complied with Rule 1 and Appendix H. The Carrier asserts that its letter dated

March 14, 2007 was not a notice of intent to contract, but a letter to share information. According to the Carrier, it is not relevant to this claim.

> "It is the Carrier's position that it did not send a 'Contracting Out Notice,' but an information letter on March 14, 2007 due to the fact that the land was leased to General Electric and that none of the contractors present were hired by the Carrier has been constant throughout our responses on the matter."

The Organization appealed the claim denial on December 16, 2008 reiterating its arguments submitted with the filed claim. That is, unavailability of BMWE-represented employees is not a reason to contract out because it is the Carrier's obligation to maintain an adequate workforce.

The Carrier denied the appeal on April 29, 2009 relying on its claim-denial arguments with further explication regarding the availability of its own employees and their use with contractor forces.

> ". . . BMWE forces were involved with in 2008 were continuing basic maintenance of the railway, ballast programs, shoulder cleaning programs, spot ballast program on switches at various location[s] in NY and PA., cross ties on the main line, siding and yard tracks, bridge ties, gauging gangs, new rail installation, joint elimination, installation of relay rail on the main line, in siding and yards, road crossing installations, culvert replacements in NY and PA., general surfacing and lining in various locations in NY and PA., to mention a few.
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> The construction of a 1600 foot siding is a major undertaking. Once it goes to a contractor, it is difficult to infuse Carrier forces every now and then, when they may become available. Nor is there any requirement for the Carrier to do so."

The parties met in a claim conference on May 29, 2009 without resolution of this matter.

Having reviewed the record established by the parties, the Board finds that the 1600 foot track construction for a siding extension is scope-covered under Rule 1. The Carrier's letter dated July 23, 2009 acknowledges that BMWE-represented employees have constructed track in the past. In other words, the work is historically and customarily performed by BMWE-represented personnel.

Notwithstanding the finding that the claimed work is scope covered, the Carrier provided at least 15 days' advance written notice to the Organization of its intent to contract out and, as requested by the General Chairman, met with the Organization and engaged in good-faith discussions.

For example, the Board finds that the Carrier issued an informational letter and a notice of intention to contract out work on October 7, 2007 and March 14, 2008 informing the Organization of the project's dimensions and reasons for subcontracting by noting that its own employees were deployed elsewhere, itemizing the work they performed in 2008 and stating that the machinery for use would be determined by the contractor. This is a good-faith effort to enhance communication to reduce the incidence of contracting to the extent practicable.

The Carrier's decision not to disclose its list of contractors or internal memoranda is not dispositive in the circumstances of this claim. In this regard, the Organization's institutional memory is not tabula rasa when it receives notice and engages in good faith exchanges with the Carrier. BMWE-represented employees historically and customarily perform this claimed work. Based on that historical and customary performance, the Organization has an experiential understanding for estimating the duration and dimensions to construct 1600 feet of new track.

With respect to track construction, the Board concluded the following in on-property Third Division Award 38151:

> "There is no mandate in the contract language cited that, after the required discussion opportunity, the Parties have to agree on the contracting out (or not) of the work at issue. Further, there is no indication in the record that either the Carrier's notice to the Organization or its participation in subsequent discussions regarding contracting out was on any basis other than good faith."

The Board's conclusions in Award 38151 are applicable in this proceeding. There was timely notice and conference with good faith discussion regarding track construction. Apparent from the arguments are the enduring differences between the parties when contracting out is at issue; however, once notice, conference and good-faith discussions occur, the Carrier can proceed with contracting out scope-covered work. Accordingly, the instant claim is 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 13th day of December 2012.