Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42297
Docket No. MW-41178
16-3-NRAB-00003-100012

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

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes**
(Division – IBT Rail Conference
(
(CP Rail System (former Delaware and Hudson
(Railway Company)

STATEMENT OF CLAIM:

"Claim on behalf of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Innovative Rail Contracting Firm) to perform Maintenance of Way work (switch panel and turnout construction and related work) between Mile Posts 672 and 674 at Taylor, Pennsylvania on November 26, 27 and 28, 2007 (Carrier's File 8-00608 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 E. Hermanofski, G. Hobbs, A. Kovaleski, R. Penzone, D. Kovaleski, P. DeFazio, E. Nicholson, A. Thomas, C. Gill, S. Bologansky, R. Vanderpool and D. Lattimer shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay and for six (6) hours at their respective time and one-half rates of pay and Claimant K. Chilson shall 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.

On September 24, 2007 the Carrier issued a notice to contract for "Various Turnouts (15) on the NEUS Service Center" with details of the work "anticipated to start on, or about, October 8, 2007" and continuing until completed. CPR contended "[t]his work must be completed on schedule and there are insufficient forces available to complete the work in the required timeframe. All of our forces are currently working and scheduled to continue working." To perform the claimed work - which commenced on November 26, 2007 - required eight employees for three days.

The Organization objected, stating there are qualified and available BMWE-represented employees to perform this scope-covered work. Unavailable or insufficient personnel is due to the Carrier's failure to plan and schedule the force.

A conference was convened on November 1, 2007. The Organization contends:

> **"At such conference the Parties discussed the reasoning behind why the Carrier felt it was necessary to contract out this work at these locations.**
>
> **The Carrier had discussed this work in good faith and committed to use CPR Forces to piece together and install the switch Panel Turnouts on the Mainline in various locations. It was agreed that the Carrier's forces would install the mainline switches when time was allotted for them to do so. Some of this work was performed on Saturdays and Sundays.**
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> **It should be noted that although the Carrier allowed their M/W forces to install the Mainline Switches, it was never agreed to by the Organization**

that Yard Switches go to an outside contractor as it is our position that to piecemeal scope work would damage the integrity of the scope rule and hinder our position that this work belongs to the BMWE if not now, later down the line."

On January 24, 2008 the Organization filed a claim for "switch panel and turnout construction and installation contracted out at the Taylor Yard Facility in Taylor, Pennsylvania." Employees endured a loss of work opportunity when the Carrier violated numerous Rules such as Rule 1 and Appendix H. The Carrier denied the claim on March 15, 2008.

On May 13, 2008 the Organization filed an appeal, which the Carrier denied on September 5, 2008. The Organization submitted additional documentation on October 23, 2008 and the Carrier responded on February 27, 2009. A conference was convened on May 22, 2009 wherein each party reaffirmed its position. The Organization submitted a post-conference summary letter on July 2, and the Carrier's post-conference summary letter followed on July 23, 2009.

The following is a summary of the Organization's position on the alleged Rules violations and, in particular, Rule 1 and Appendix H: (1) qualified BMWE-represented employees were available with experience installing pre-fabricated equipment and constructing switch panels without assistance from a manufacturer's representative, (2) lack of available manpower to perform claimed work reflects the Carrier's failure to plan and schedule its forces and results in employees being placed on furlough each year due to a lack of work, (3) no good-faith reason to contract, (4) withholding requested information and providing misleading information during conference prevents a good-faith attempt to reach an understanding, (5) failure to reduce the incidence of contracting (11 outsourced projects in two years) and increase the use of BMWE-represented employees is the Carrier's normal course of business, (6) BMWE-represented personnel not increasing to match the work (traffic doubling) thereby creating an impetus to contract out, (7) any increase in the force level is insufficient to handle all scope-covered work, (8) Rule 1 does not authorize the Carrier to contract out even when it meets requirements therein, (9) unavailable or insufficient manpower shows abolishment of facilities, unnecessary depletion of skilled forces, exhaustion of rosters and lack of proper training, (10) manufacturer's representative on-property to train outside force on proper installation of steel switches was not disclosed during conference, (11) the Carrier provides time to train outside forces with the manufacturer's representative on-property, but CPR asserts that such time is not available to train its own BMWE workforce to complete switch installations during the

work season, (12) mainline flooding in 2006 is not relevant and (13) employees' statements show experience and skill replacing switches as part of the normal production and maintenance work. A sampling of precedent relied on by the Organization to support its position are on-property Third Division Awards 6305, 36851, 36937, 37287, 39490 and off-property Third Division Awards 15444, 18447, 21678, 35337, and 35975.

The following is a summary of the Carrier's position regarding the alleged Rules violations and, in particular, Rule 1 and Appendix H: (1) issued timely notice with reasons for contracting, (2) promptly met with the Organization to discuss reasons, (3) Rule 1 does not require agreement on the reasons and does not eliminate outsourcing, but it does require the Organization to examine ways to enhance force productivity, (4) insufficient BMWE-represented forces available to complete one-time upgrade of worn switches during the required timeframe ("before the ground freeze"), (5) the Organization fails to consider the phrase "to the extent practicable" in the context of outsourcing and increasing the use of Carrier employees whereas CPR had to make a decision how to complete this project during the limited time remaining in the work season, (6) CPR maintains an adequate workforce for work-season production and maintenance, but construction and installation of a one-time upgrade on switches was not regular maintenance or production work, (7) significant increase in capital outlays in recent years to handle increased traffic necessitated outsourcing some projects; (8) hiring only for the duration of the project or a spike in work followed by furloughing new hires is unreasonable; (9) floods in 2006 required CPR to reschedule maintenance into subsequent years, (10) employees utilized at the yard working nights and on overtime were unavailable, (11) recruiting and hiring is ongoing, (12) manufacturer's representative was on the property only to ensure that all material was inventoried and did not train outside forces and (13) CPR is not required to disclose documents under the Agreement or to divulge the specifics of the Carrier's process sought by BMWE for determining whether to contract out. A sampling of precedent relied on by CPR to support its position are on-property Third Division Award 38149 and off-property Third Division Awards 26481, 35384, 36604, and 39662.

The Board finds there is no dispute that the claimed work is scope-covered under Rule 1.1 ("construction, track and roadbed"). BMWE-represented employees have historically and customarily performed the work of constructing and installing switches on the main line and in yards. Regardless of the use of newly-designed steel switch panels (constructed by assembling the chronologically-numbered parts or components of the panel) the work remains scope covered.

In accordance with Rule 1.3 and 1.4, the Carrier issued a timely notice to contract out setting forth the reasons and, thereafter, promptly met with the Organization. The Carrier's reason to contract was unavailable Carrier personnel to complete the work ("before the ground freeze") during the remaining time in the work season. During that remaining time, BMWE-represented employees handled scheduled maintenance and capital projects programmed for completion by the Engineering Department. In addition to the programmed work, BMWE states that the Carrier's workforce constructed and installed turnouts on the mainline on overtime and weekends. The Carrier notes that BMWE-represented employees at the yard were working overtime and nights on scheduled work in addition to the mainline turnouts. BMWE and CPR agreed to the mainline turnouts work for the BMWE-represented workforce, but disagreed over the construction and installation of switches at the yard.

During on-property exchanges and conference, the Organization asserted that unavailable or insufficient manpower demonstrates CPR's failure to plan and schedule its forces and indicates its abolishment of facilities, unnecessary depletion of skilled forces (static, declining numbers of force employees) and a lack of proper training programs. CPR responded with numbers of new hires to increase its workforce and its maintaining and upgrading of facilities and equipment, which require less manpower. The presence of the manufacturer's representative on the property is contested. Regardless, information exchanged during conference about the nature of the work involved with the steel switch panels is not dispositive in the resolution of this claim.

This claim represents the Parties' opposing views of contracting. Based on the on-property exchanges, the Organization opposes <u>any</u> outsourcing and asserts that neither Rule 1, nor any other provision in the Collective Bargaining Agreement, authorizes it, whereas the Carrier contends that Rule 1 does not prohibit or eliminate outsourcing as long as CPR satisfies certain prerequisites spelled out in the Rule. One of the prerequisites is the good-faith attempt to reach an understanding. Notwithstanding two conferences and lengthy and detailed written responses to the claim representing each Party's good-faith attempt to reach an understanding, an understanding was not reached. Rule 1.4 states "if no understanding is reached the Carrier may nevertheless proceed with said contracting and the organization may file and progress claims in connection therewith."

The Board's findings, as well as the Organization's burden to prove its allegations, are considered within the context of on-property Third Division Award 38149:

> **"After carefully reviewing the record, the Board concludes that the Carrier gave the Organization ample notice and opportunity for discussion before contracting out the work in question . . . . While it is clear that the Organization did not agree with the Carrier's position and continued to disagree even after discussions between the Parties, there is no showing that the Carrier acted in other than good faith . . . . Therefore, we find that the Carrier did not violate the Agreement when it contracted out the work in this case."**

Applying Award 38149 in the instant proceeding, the Board denies the claim because the Carrier did not violate the Agreement in the circumstances of this claim.

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 15th day of June 2016.