

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42298  
Docket No. MW-41181  
16-3-NRAB-00003-100022**

**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 (Ed Garrow & Sons) to perform Maintenance of Way work (operate excavator) to assist B&B forces installing french drains at Mile Post 106.5 on the Canadian Main Line near Crown Point, New York on July 8, 9, 10, 11 and 14, 2008 (Carrier’s File 8-00624 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, Claimant J. Reightmeyer shall now be compensated for forty (40) 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.

On May 20, 2008 the Carrier issued a notice to contract for cutting two French drains perpendicular and approximately eight to ten feet below track and five feet below two pair of fiber optic plants” at Mile Post 106.5 on the Canadian Mainline. According to the Carrier, “This is precision work requiring experience with this type of excavator. All other work on the project will be performed by the Carrier’s forces.” The work was scheduled to commence on or about June 5, 2008.

The Organization objected, stating there are qualified System Equipment Operators (SEO’s) available to perform this scope-covered work, but the Carrier fails to plan and schedule the work for its own personnel to perform. No attempt was made to rent the equipment without an operator. Thus, there is no good-faith reason to contract out. The Organization requested a conference along with certain information and documents. A telephone conference was convened on May 27, 2008.

By letter dated 23, 2008 the Carrier stated that precision work - not the lack of available forces - was the reason for contracting with the outside contractor determining the equipment needed for this type of work and providing the operator. The Carrier stated, in response to BMW’s contention, that there were no SEO’s available with sufficient experience and expertise performing this precision work during the time set for this project. Requesting information does not constitute a contractual obligation for the Carrier to disclose.

On August 3, 2008 the Organization filed a claim for scope-covered work performed by an outside contractor assisting B&B Department employees with the excavation of French drains. According to the Organization, this violates Rule 1 and Appendix H, among others, and there was no good-faith attempt to plan and use the Carrier’s workforce. The Carrier denied the claim on September 16, 2008

by reiterating the reasons set forth in its letter dated June 23, 2008 and asserting timely notice and a good-faith attempt to reach an understanding.

On November 4, 2008 the Organization filed an appeal, which the Carrier denied on January 5, 2009. A conference was convened on May 22, 2009, wherein each Party reaffirmed its position. The Organization submitted a post-conference summary letter dated July 10 and the Carrier's post-conference summary letter followed on July 31, 2009.

The following is a summary of the Organization's position regarding the alleged Rules violations, specifically Rule 1 and Appendix H: (1) qualified SEO's were available with experience operating an excavator, (2) lack of available SEO's to perform the claimed work reflects the Carrier's failure to plan and schedule and results each year with employees being placed on furlough for lack of work, (3) no good-faith reason to contract inasmuch as the Carrier made no effort to rent equipment for its own SEO's to operate, (4) withholding requested information constitutes a lack of 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 BMWWE-represented employees is the Carrier's normal course of business, (6) the Carrier's workforce is not increasing to match the work (traffic doubling) thereby creating the impetus to contract out, (7) there is no Rule or provision in the Collective Bargaining Agreement authorizing contracting out, (8) Rule 1 does not authorize the Carrier to contract out even when it meets requirements therein, (9) unavailable or insufficient manpower, abolishment of facilities, unnecessary depletion of skilled forces, exhausted rosters and a lack of proper training and (10) the Organization is not required to present alternatives to contracting out, which is problematic given the Carrier's refusal to provide requested information. 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, 35773, and 35975.

The following is a summary of the Carrier's position regarding the alleged Rules violations, specifically Rule 1 and Appendix H: (1) issued timely notice with reasons for contracting, (2) promptly met with the Organization to discuss reasons, (3) the Organization presented no viable alternatives during conference, (4) Rule 1 does not require agreement on the reasons and does not eliminate outsourcing, (5) there is a practice for using a contractor's excavation equipment with an operator,

(6) the Organization fails to consider the phrase “to the extent practicable” in the context of outsourcing and increasing the use of force employees, (7) significant increase in capital outlays in recent years to handle increased traffic necessitated outsourcing some projects and (8) the Carrier is not required to disclose documents under the Agreement or to divulge the specifics of the Carrier’s process sought by BMW for determining whether to contract out. A sampling of precedent relied on by the Carrier to support its position are on-property Third Division Awards 35084 and 38146 along with off-property Third Division Awards 26864 and 29981.

The Board finds that the claimed work is scope-covered under Rule 1.1 (construction, repair and maintenance of culverts, buildings and other structures, tracks and roadbed) and that it has historically and customarily been performed by BMW-represented forces.

In accordance with Rule 1.3 and 1.4, the Carrier issued a timely notice setting forth the reason for subcontracting and, thereafter, promptly met with the Organization. The Carrier’s reason to contract was “precision work” of a certain size required the use of an excavator (which was not owned by CPR) and operated by the contractor.

The Organization disagrees with the Carrier’s description of “precision work” and maintains that the claimed work is routine excavation. The record does not reflect comparable projects with slope and fiber optic cables or similar considerations where the Carrier’s forces operated an excavator (CPR’s excavator or one leased or rented and operated by the Carrier’s personnel). The Carrier has contracted with this outside contractor in the past notwithstanding objections from the Organization. Whether claims were filed and sustained in those past situations is unclear. Regardless, the Carrier contends that it made a good-faith attempt to reach an understanding and reduce the incidence of subcontracting and, at the same time, increase the use of its forces by limiting the role of outside contractors and maintaining the presence of BMW-represented employees to perform work on the project. BMW’s response is that the Carrier failed to exert any good-faith attempt to reach an understanding. The Parties’ opposing views of what constitutes a good-faith attempt to reach an understanding in the circumstances of this claim are assessed in the framework of BMW’s position reflected in on-property exchanges that no outsourcing is authorized by any Rule or provision in the Collective Bargaining Agreement and the Carrier’s view that Rule 1 does not prohibit or

eliminate outsourcing, but rather, it places prerequisites to be met prior to engaging an outside force.

The Board finds that CPR did not own the excavator it required for performing the claimed work and, in the past, it has contracted for an excavator operated by a contractor. This finding, as well as the Organization's burden to prove its allegations, are considered under on-property Third Division Award 35084:

**"After carefully reviewing the record evidence, we have determined that the Organization's claim must be denied. We find that the Carrier did not violate the Scope Rule. Record evidence demonstrates that the Carrier has established a past practice of renting equipment and an operator when its own equipment is unavailable. We therefore conclude, under the facts of this case, that the Carrier's use of an outside contractor did not violate the Agreement."**

Applying on-property Award 35084 in this 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.