

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42317  
Docket No. MW-41139  
16-3-NRAB-00003-090516**

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

**(Brotherhood of Maintenance of Way Employees  
( Division – IBT Rail Conference  
PARTIES TO DISPUTE: (  
(CP Rail System/Former 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 (building new sub grade and related work) for the Rouses Point siding project between Mile Posts 188.3 and 189.3 in Champlain, New York beginning on July 7, 2008 and continuing through July 21, 2008 (Carrier’s File 8-00619 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 W. Pelkey and J. Reightmyer shall now each be compensated for eighty-eight (88) hours at their respective straight time rates of pay and for two (2) hours at their respective time and one-half rates of pay, Claimant P. Jerdo shall now be compensated for eighty (80) hours at his respective straight time rate of pay and for two (2) hours at his respective time and one-half rate of pay and Claimants R. Lindsay, T. Aurilio and T. Vincelette shall now each be compensated for seventy-two (72) hours at their respective straight time rates of pay and for two (2) hours at their respective time and one-half rates 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.

The claim in this proceeding involves the Carrier's decision to contract out the building of new sub-grade and related work between MP 188.32 and MP 189.39 (CPC 189) at the Rouses Point Siding Extension. This claim (new sub-grade) is separate and apart from two other claims also pending before the Board involving this siding extension at Rouses Point. Although each claim is considered separately, the common linkage is the Carrier's use of an outside force to perform scope-covered work.

On May 5, 2008 the Carrier issued a "Contracting Out Notice - Rouses Point Siding Extension MP 188.32 to MP 189.39 (CPC 189)" with an anticipated start date of May 21, 2008. The notice states "... the Carrier will be utilizing its own forces elsewhere and therefore will be unavailable to carry out the work in the time required."

Specifically, the notice stated:

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

**Extended Siding area, MP 188.32 to MP 189.39 (CPC 189)**

- Site-work - grade former track roadbed for new siding extension build (clearing/grubbing, cut/fill, ditching & culvert headwall modifications as required)

- Build approx. 5,200 LF of new siding track
- Install new No. 16-136# power Turnout
- Install new No. 16-136# HT Turnout
- Crossing closure (remove surface/blacktop, install turn-around/signage)
- Replace old Turnout timbers in mainline with cross ties-south of Hayford Rd. crossing.
- Ballast/surface all new track.

**Extension Siding area, MP 189.29 to MP 190.58 (CPC 191)**

- Install 400 new ties
- Re-hab 2 pri. Xings
- Ballast/surface existing siding
- Install 2 ea. No. 9-115# Turnouts (Replace existing 90# Turnouts)

**Misc.**

- Material unloading/movement as required.

Various machinery and equipment will be used belonging to, or secured by, the contractor to complete the project.”

By letter dated May 5, 2008 the Organization informed the Carrier that it was opposed “. . . to contracting out any work that accrues to the Bridge and Building (B&B) and the (M/W) Maintenance of Way Departments.” BMW-represented employees were available, qualified and have historically and customarily performed this scope-covered work. The Carrier exerted no effort to rent or lease equipment for its employees to operate and it failed to identify equipment not owned but allegedly needed for this project. Given the anticipated start date (May 21, 2008) and the contract notice (May 5, 2008), the Carrier “made no attempt to properly schedule the work” for performance by BMW-represented employees, which reflects a “predetermined intent” to outsource. In the Organization’s view, the Carrier “has not made a good faith attempt” to use BMW-represented employees and, should the Carrier assert a lack of manpower, that assertion represents a failure to maintain adequate levels of manning. The

Organization requested information pertaining to planning, scheduling, manning, equipment and contracts.

On May 9, 2008 a conference convened by telephone during which the Organization requested documents such as contracts and an increased use of BMW-represented employees for this project. In this regard, the Organization noted that the Carrier “slated” this work as a “2008 project with 2008 Capital Money” so there was sufficient time to plan and schedule its forces. The Carrier denied the Organization’s requests; funds became available on April 21, 2008, which was at a time when BMW-represented employees were performing work elsewhere and, therefore, unavailable to carry out this work. On July 7, 2008 the contractor commenced work.

The Organization filed its claim on August 3, 2008 “for lost work opportunity for work contracted out (new siding) in the Town of Champlain, New York, on the Canadian Main Line approximately MP 188.3 to MP 189.3” and alleged violations of numerous Rules including Rule 1 and Appendix H. According to the Organization, “The Carrier has made no efforts to take steps to reduce outsourcing and increase the use of its own forces, including the planning of aforementioned contracted out work so that its own employees could perform” the work. The Carrier’s notice provides no reason why the work must be outsourced; the Organization renewed its request for a copy of the contract. Lack of training, insufficient manning and improper planning of projects that renders employees placed on furlough each year does not justify outsourcing.

The Carrier denied the claim on September 15, 2008 asserting proper notice was issued, its own forces were fully employed and unavailable to carry out this project, the work is not exclusively reserved to BMW-represented employees and contracting is consistent with past practice. The Carrier complied with Rule 1 and Appendix H inasmuch as it engaged in good-faith discussions; the Parties are not required to agree on the reasons for contracting. Furthermore, Rule 1 does not prohibit or eliminate contracting and the notice identified the reasons. Finally, there has been no depletion of skilled forces or abolishment of facilities by the Carrier. The Carrier concluded that the contracts would be provided to the Organization “in due course.”

On October 27, 2008 the Organization filed an appeal to the claim denial reiterating the arguments previously presented. The Carrier denied the appeal on

November 27, 2008 by reiterating the arguments previously presented to the Organization. A conference convened on May 22, 2009 without resolution of the claim. Thereafter, the Organization issued a post-claim conference letter dated July 9, 2009 and the Carrier responded by letter dated July 27, 2009.

Based on the on-property record, the Board finds that the claimed work involves the construction, repair and maintenance of tracks and roadbed, which is generally recognized as M/W work. The Carrier does not dispute the written statements from BMW-represented employees that they have historically and customarily performed this type of work. Thus, the claimed work is scope-covered under Rule 1. The record evidence reflects that the Claimants maintain seniority in the proper classifications and were qualified to perform the claimed work.

In accordance with Rule 1.3 the Carrier issued its notice to contract, which identified “the work to be contracted and the reasons therefor.” That is, in October 2007, the Carrier included the Rouses Point Siding Extension in its planning and budgeting of capital projects. Funds became available on April 21, 2008. The notice of intent to contract issued on May 5, 2008. Although the Carrier anticipated that the work encompassed within this contracting transaction would commence on May 21, 2008, the work did not begin until July 2008. The Carrier states that its forces were unavailable for this project; the Organization disagrees. The Carrier met the 15-day window for issuing notice and included reasons in the notice.

Pursuant to Rule 1.4 the Parties met to discuss the notice and made “a good faith attempt to reach an understanding concerning said contracting.” There was no resolution. When that occurs, Rule 1.4 states that “. . . the Carrier may nevertheless proceed with said contracting and the organization may file and progress claims in connection therewith.”

The Organization states that the Carrier did not provide any of the requested information - such as the contract - and the reason for contracting (unavailable manpower) is unproven; thus, contracting in this situation contravenes Rule 1 and Appendix H. In the Organization’s view, the Carrier exerted no effort to plan and schedule the work for performance by BMW-represented employees. Full employment because Carrier forces are performing M/W work elsewhere is not a good-faith reason to contract. Some of the Awards relied on by the Organization to support its position are on-property Third Division Awards 6305 and 32861 and off-property Third Division Awards 29512, 30944, 35773 and 36851.

With respect to the information and documents, on-property Third Division Award 41478 observes that discussion of planning, scheduling, available force employees, reason for contracting and alternative arrangements to contracting “support the intent and purpose for a good-faith effort under Rule 1 and Appendix H because it assists the parties at the local level with increasing the use of the Carrier forces and, to the extent practicable, reducing the incidence of outsourcing.” Appendix H indicates that information disclosed is for enhancing communications. In this context, the notice for building sub-grade is part of the siding construction project and related work. The notice contains sufficient details signifying a large-scale undertaking not readily susceptible to completion on a piecemeal basis by inserting BMW-represented employees when available on overtime, off hours or rest days. As observed in Third Division Award 35384, “. . . the Carrier in this record is not required to piecemeal this instant work from the major project.”

The record evidence reflects an extended history between the Parties involving Rule 1 and Appendix H; they do not enter discussions or conferences with blank slates about the requirements for contracting out and circumstances under which it occurs. For example, there is no dispute that capital outlays in the late 1990’s into 2004 were minimal whereas, at the time of this claim, a capital outlay program larger in scope - compared to the prior decade - was in effect and was accompanied by efforts to increase the Carrier’s forces, albeit the number of new hires was fewer than the numbers offered employment. Along with hiring and capital projects was the maintenance work of 2006 rescheduled into 2007 or later due to floods.

The Carrier’s reason to contract was the unavailability of its employees at the time funding became available because they were working on other mainline capital and maintenance projects. The Organization states this is not a “good-faith reason” and asserts that contracting the claimed work reflects no planning and scheduling by the Carrier to use BMW-represented employees. The Organization further argues that the Carrier fails to maintain an adequate workforce and has engaged in actions to deplete its skilled forces and demolish facilities so as to create an impetus for contracting out BMW scope-covered work. Although the Board recognizes the Organization’s concerns about subcontracting during 2007 - 2008, there is insufficient evidence in this record to warrant a finding that the Carrier is intentionally creating an impetus to contract without regard to Rule 1 and Appendix H.

The record evidence shows that the Carrier plans or programs the use of its employees when the Engineering Department schedules M/W work for mainline capital and maintenance projects. BMW-employees received programmed assignments during 2007 – 2008. The Carrier’s letter denying the claim appeal describes the M/W work:

“A few of the projects that the Carrier’s BMW 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 locations 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 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., along with the day-to-day maintenance of the railway to mention a few. The capital spending for 2006 to 2009 is the most extensive and most aggressive that the Delaware and Hudson has seen in the last ten (10) years.”

The planning, scheduling and manning of work outlined in the Carrier’s letter is not exposed as embellished; it represents information related to the Organization’s requests addressing the reason for outsourcing (unavailable forces). For example, there were ongoing efforts to increase Carrier force levels in 2007 and 2008. In January 2008, the Carrier hired 35 BMW-employees. During another round of hiring, the Carrier scheduled 73 interviews, but only 13 were hired because applicants withdrew or did not appear for the interview and others failed medical or background checks. Another round of recruitment followed with 13 hires from among 48 applicants. A third round of recruitment resulted in another 12 hires out of 64 scheduled.

The Organization asserts that the Carrier engaged in actions to deplete its skilled forces and demolish facilities so as to create an impetus for contracting out. New hires prove that the Carrier made an effort to maintain and increase its force level - not deplete it - and the programmed assignments for maintenance and capital projects are not demolishing or degrading its facilities. The Organization does not rebut the Carrier’s statement that the Carrier has “worked crews overtime, the Carrier has worked off hours and the Carrier has hired new BMW employees, the Carrier has done everything the Organization has suggested.” Thus, alternative

arrangements have been considered and “to the extent practicable” followed which increases the use of the Carrier’s forces.

Given the circumstances present in the record of this proceeding, the Board concludes that the Carrier did not violate Rule 1 and Appendix H. Therefore, the claim must be 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 28th day of July 2016.**