

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42319
Docket No. MW-41226
16-3-NRAB-00003-100042**

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
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(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 (Innovative Rail) to perform Maintenance of Way work (construct and install switch panels and turnouts and related work) between Mile Posts 613 and 617 at Binghamton, New York on October 29, 30, 31, November 1, 5, 6, 7 and 8, 2007 (Carrier’s File 8-00607 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 P. Spisak, R. Penzone, G. Hutchings, K. Quinlivan and B. Cooper shall now each be compensated for sixty-four (64) hours at their respective straight time rates of pay and for sixteen (16) hours at their respective time and one-half rates of pay, Claimants D. Ambrose, J. Hurlburt, T. Blacknell, D. Lattimer, P. Delameter, R. Vanderpool, K. Chilson and F. Vanderpool shall now each be compensated for thirty-two (32) hours at their respective straight time rates of pay and eight (8) hours at their respective time and one-half rates of pay and Claimant T. Vanderpool 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.

On September 24, 2007 the Carrier issued notice to the Organization of its intent to contract out work stating, in part, as follows:

“RE: Contracting Out – Various Turnouts (15) on the NEUS Service Center

Please be advised that under the provisions of the Collective Agreement it is our intent to use a contractor to complete the installation of fifteen (15) turnouts.

The 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.

The contract scope for each turnout will include all work normally associated with turnout installation, including, but not limited to:

- assembling turnouts and track panels
- removing existing turnouts or track panels from track
- dismantling and stock-piling removed turnouts or track panels
- replacing connecting rails between turnouts

Various machinery and equipment will be used by the contractor to perform this work.

* * *

The work is anticipated to start on or about October 8, 2007 and will continue until complete.”

On September 26, 2007 the Organization objected to the notice by stating that there are qualified and available BMW-represented employees to perform this scope-covered work. Unavailable or insufficient Carrier manpower is due to the Carrier’s failure to plan and schedule its workforce. The Organization requested certain documents and information. Further, it specifically requested that the claimed work not start until it had been discussed at conference. A conference was convened on November 1, 2007; however, the outside contractor’s forces started work on October 29, 2007.

The Organization filed its claim on December 29, 2007 and the Carrier denied it on March 3, 2008. The Organization filed an appeal on May 3, 2008 and the Carrier denied the appeal on July 28, 2008. A claim conference convened on August 22, 2008, but no resolution was reached regarding the installation of the switch panels. The Organization submitted a post-conference letter on September 27 and the Carrier responded with a post-conference letter of its own dated November 15, 2008.

The notice and claim in this proceeding are materially similar to the notice and claim discussed in Third Division Award 42297 wherein the Board denied the claim involving scope-covered work. Each Party’s position and arguments as thoroughly outlined in that Award are substantially duplicated in this proceeding. For example, the Carrier states that its forces were (1) unavailable to perform the work inasmuch as they were performing scheduled maintenance and production work and (2) not capable of installing steel switch panels because BMW-represented employees had never constructed or installed them. The Organization asserts that an “unavailable” workforce demonstrates the Carrier’s lack of planning to schedule its forces and BMW-represented employees are capable of performing the claimed switch construction and installation because it involves the same standards for working with steel set forth in Section 10.6.0 (installation of steel ties), Red Book of Track Requirement. The record shows that the construction and installation of the pre-fabricated, newly designed steel switch panels involves assembly of chronologically-numbered components or parts; the claimed work does not require special training. The Board finds that the claim in this proceeding involves scope-covered work under Rule 1.1 (“construction, track and roadbed”). BMW-represented employees have historically and customarily performed the work of constructing and installing

switches. Regardless of the use of newly-design steel switch panels, the work remains scope-covered.

Although each Party's position and arguments as thoroughly discussed in Award 42297 are substantially duplicated in this proceeding, there is an argument presented in the Organization's Submission that was not addressed in the other proceeding. Specifically, the Organization alleges that the Carrier violated Rule 1.4 because the contractor started the claimed work on October 29, which was prior to the conference that convened on November 1, 2007.

When the Organization received the notice dated September 24, it promptly responded by letter dated September 26, 2007 requesting certain information and documents. The Organization specifically requested that the work not commence prior to convening the Parties' conference. That did not occur. On the contrary, the contractor started performing the claimed work on October 29 and the conference convened on November 1, 2007. Absent from the record is any indication regarding why the contractor arrived on the property prior to the Parties' conference discussions, or why the conference convened more than five weeks after the notice issued.

Rule 1.4 obligates the Carrier to meet promptly, when requested, with the Organization's representative to conference the "contracting transaction" wherein the Organization and the Carrier "shall make a good faith attempt to reach an understanding concerning said transaction." The design and purpose of this phrase in Rule 1.4 did not occur in this claim handling because the Carrier authorized the contractor to begin performing the claimed work on October 29, which was prior to the Parties' conference. In the absence of a mutual agreement between the Parties for the contractor to commence work prior to the conference, pre-conference discussion does not substitute for the contractual obligation in Rule 1.4. The fact that the contractor commenced the work in question prior to conference undermines the "good faith attempt to reach an understanding" inasmuch as any suggestions or alternatives from the Organization (which the Carrier asserts the Organization is required to present during conference so as to dissuade the Carrier from contracting out the involved work) are foreclosed as viable alternatives to outsourcing.

Furthermore, the Organization requested information about the contracting transaction - including a copy of any contract with an outside force, but the Carrier did not disclose the information or any portion of the contract. This is not construed favorably for the Carrier given the sequence or chronology of events which, in the

circumstances of this claim, are dispositive in determining whether the Carrier violated Rule 1 and Appendix H.

The Board finds that the Carrier engaged in a contracting transaction with an outside force wherein the Carrier authorized the contractor to begin performing the claimed work prior to conference. Rule 1.4 obligates the Carrier and the Organization to discuss the “contracting transaction” before an outside force is engaged as a means to further the design and purpose in Appendix H, e.g., to reduce the incidence of outsourcing by increasing the use of BMW-represented employees to the extent practicable. After the fact discussions about alternatives to contracting out that take place when the contractor is already engaged on the property are inconsistent with Rule 1 and Appendix H. Given these findings, the Carrier failed to comply with Rule 1 and Appendix H. Such action warrants sustaining the claim.

In the requested remedy the Organization identifies 14 Claimants; however, the Organization’s letter dated September 27, 2009 states that “. . . it must be noted that the work involved here was performed on a total of eight days and on four (4) of those days only four (4) employees were utilized.” The remedy is reduced in accordance with the Organization’s representation in its letter.

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 28th day of July 2016.