

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42320
Docket No. MW-41282
16-3-NRAB-00003-100137**

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 (Railworks) to perform Maintenance of Way work (replace rail plugs and related work) between Mile Posts A79 and A192 on the Champlain Subdivision beginning on October 29, 2008 and continuing (Carrier’s File 8-00645 DHR).**
- (2) The Agreement was further violated when the Carrier failed to provide a proper advance notice of 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. Jerdo, K. Bigelow and T. Connelly shall now each be compensated at their respective and applicable rates of pay for an equal and proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning October 29, 2008 and continuing.”**

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.

By letter dated July 28, 2008 the Carrier informed the Organization as follows:

“This is a 15-day letter of notice to inform you that the Carrier will be contracting out the remainder of the joint elimination project for 2008 due the shortage of manpower by 15 employees leaving the company since June 1st and the welding crew over the season bidding to other position. At this late stage of the season the Carrier does not feel comfortable that the work will get completed on time or safely by training employees with no welding experience at all.”

The Organization responded on July 30, 2008 by requesting a conference and certain information while stating its opposition “to contracting out any work that accrues” to BMW-employees. Available employees are qualified as they customarily and historically perform the work handled by a joint elimination crew. The Carrier failed to make a good-faith attempt to schedule its forces and contracting out demonstrates that the Carrier does not maintain an adequate level of manpower.

Following conference on August 14, the Organization filed a claim dated November 26, 2008 alleging that the Carrier failed to provide advance notice and conference the claimed work that it describes as “removal of old worn rail and installation of replacement pieces (plugs) of rail.” Special tools and skills are not required for “cutting out and removing the defective rail, removing spikes, anchors; removing and if necessary replacing angle bars, drilling new bolt holes on the plug to match or meet the existing rail, rail grinding, spiking and other associated work.” The Claimants perform this work when “changing out defective rails found by the Sperry Car.” Instead of the Carrier using its own forces to replace plugs, it placed

its employees on furlough beginning November 26, while the contractor continued performing the claimed work until December 22, 2008.

The Carrier denied the claim on January 12, 2009, stating:

“Ever since 1991 I have been involved with Joint Elimination crews on [the] CP rail system. The work of changing out rail plugs to be welded has always been done by the Joint Elimination crew.

The work performed by Rail Works was part of the joint elimination. The Carrier did in fact advertise these positions, per the Collective Agreement, the Carrier received no qualified bidders, and the Carrier had no alternative but to contract this work out.

In your claim you accuse the Carrier of not providing proper notice, which is not true. The Carrier sent out a notice to contract out the joint elimination work on July 28, 2008 and had a conference call to discuss on August 14, 2008.”

The Organization filed an appeal on March 5, 2009, contending: “The Organization is not in agreement with any segment of the Carrier’s denial” because it is “inadequate and fails to satisfactorily dispute any violations laid out in the original claim.” The notice to contract “does not outline the scope of work for the contracted welding entailing the changing out of rail [plugs] . . . If the Carrier had intentions of Railworks . . . changing out and installing rail [plugs], the . . . Notice . . . should have outlined [it].” Because rail plug work was not identified in the notice, it was not subject to conference for good-faith discussion to increase the use of BMWE-represented forces and reduce the incidence of contracting.

The Carrier denied the appeal on June 15, 2009, stating: “The Organization is well aware of the fact that the joint elimination project includes the changing out of rail ends that cannot be welded; this has historically been performed by these crews, and this was the work performed by Railworks per the July 28, 2008 contracting out notice.” The Carrier states that the Organization presented no viable alternatives during the notice conference, such as how to accomplish the work by the end of calendar year 2008 while, at the same time, completing the work scheduled for the Maintenance or Track Program crews, as well as training the crew.

A claim conference convened on August 28, 2009 without resolving the dispute. The Board observes that the notice in this proceeding (rail plugs) is the same notice contained in Third Division Award 42321 (thermite welding). The same notice in two separate claims covers work performed by the crew for the joint elimination project. The Parties' positions and arguments are duplicated for each claim.

The notice refers to contracting the "remainder of the joint elimination project for 2008," which indicates that the project had been in place or occurring prior to July 28, 2008 (date of notice). In this regard, the record evidence shows that for more than 20 years, joint elimination crews performed "the work of changing out rail plugs to be welded" based on the Manager's experience "changing out rail plugs" since 1991. When the Carrier denied the appeal on June 15, 2009, it stated: "the Organization is well aware of the fact that the joint elimination project includes changing out rail ends (plugs) that cannot be welded as this has historically been performed by those crews." There is no rebuttal evidence exposing the statement as inaccurate.

The practice – set forth in the claim denial and appeal denial – addressing the work (rail plugs) performed by a joint elimination crew was established during on-property exchanges prior to the Parties' conference. The Organization's assertion that "it [rail plug work] was never subject to conference and good faith discussions" is not supported by the record.

The Board finds that the claimed work ("replace rail plugs and related work") is scope-covered and integral to – not severable from – the welding work performed by the joint elimination crew. Replacing the rail plugs started on October 29, 2008, whereas the thermite welding involved in Award 42321 started on September 30, 2008. Although each claim involves the same notice, the Organization relies on the different start dates to support its contention that there was no notice and no conference regarding rail plugs, but notice and conference regarding thermite welding. The notice of intent to contract does not identify an anticipated start date for the contractor to replace and weld rail plugs. Different start dates are not dispositive as to whether work in two claims is different and requires separate notices and conferences.

The Carrier's notice covers replacing and/or installing rail plugs, which work has been performed by the joint elimination crew since 1991. This claimed work

was identified and discussed during on-property exchanges and conference during which the Parties attempted to reach an understanding. The Carrier engaged in a good-faith effort to assign the claimed work to BMW-employees when it bulletined for Welders but received no qualified applicants because “none of the bidders have more than 15 months of service or are FRA qualified to inspect track or supervise the renewal of track.” This point (unqualified bids) was un rebutted; the Claimants did not bid. In these circumstances, the Carrier has “exhausted its reasonable efforts to have the work done by the Organization to no avail, and after having done so let the work to a contractor.” See Third Division Award 5880. Applying this precedent to the findings in this proceeding (notice, conference, good-faith attempt), coupled with the reasons the Board denied the claim presented in Award 42321, leads the Board to deny the instant claim because there was no violation of Rule 1 or Appendix H.

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.