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

Award No. 42321
Docket No. MW-41283
16-3-NRAB-00003-100138

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

(Brotherhood of Maintenance of Way Employes
(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 (rail welding/joint elimination and related work) between Mile Posts A79 and A192 on the Champlain Subdivision beginning on September 30, 2008 and continuing (Carrier's File 8-00652-1 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. Bedard, F. Jefferson, M. Cazassa, J. MacDougall and A. Therrien 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 September 30, 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 positions. 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 information and stating its opposition "to contracting out any work." Available employees are qualified inasmuch as they customarily and historically perform joint elimination work. The Carrier failed to schedule or make a good-faith attempt to use its own workforce. The Organization states that outsourcing represents the Carrier's failure to maintain an adequate level of manpower.

Following the conference on August 14, 2008, the Organization filed a claim dated November 25, 2008 alleging the Carrier violated the Agreement "when it assigned outside forces to perform Thermite Welding and related work." Such scope-covered work "consists [of] welding rail to remove rail joints on the track" and is customarily and historically performed by the craft. Special tools and skills are not required for "removing spikes; removing and if necessary replacing angle bars; heating the rail, (dependent on climate and weather); Thermite Welding; rail grinding, spiking and other associated work." According to the Organization, the Carrier did not consider using BMWE-represented employees on "nights and/or weekends" inasmuch as four of the five Claimants perform this work and the fifth could qualify with training, which was not offered.

The Carrier denied the claim on January 9, 2009, stating:

"Out of the five bidders that did bid on the positions available none of them have any rights on the welder's roster and have not been trained in Thermite Welding. None of the bidders have more than 15 months of service or are FRA qualified to inspect track or supervise the renewal of track.

The organization has brought up the topic of training, which there was no time to do and complete the project. Since the spring of 2004 the Carrier has trained 27 employees in this craft and at the date of the advertisement only 5 of them are working in this craft. This has been an ongoing problem since 2004, of the Carrier training employees putting them on the welder/welder helper rosters and then having them never bid the position again. The Carriers' position is that they have gone above and beyond in their efforts to train employees.

As for the 6 employees the organization has submitted this claim for, except for Ms. Therrien, they are now all qualified to do the work but chose not to bid it."

On February 27, 2009, the Organization filed an appeal. According to an employee's written statement, the Track Coordinator stated on June 26, 2008 that the advertised positions would not be awarded if there were no qualified bidders. There were no qualified bidders and no positions were awarded. Thus, the Track Coordinator's statement shows that the Carrier's decision to contract occurred prior to notice (July 28, 2008) and conference (August 14, 2008). If the Carrier awarded positions, employees would have 45 days to qualify, which could have occurred during the 64 days from the issuance of notice (July 28, 2008) to the contractor's start (September 30, 2008).

Although the notice was issued within the 15-day window, it was improper because there were no good faith reasons for contracting. The Carrier did not provide the requested information or documentation. Although the Carrier stated during conference that no furloughs would occur while contractor forces were on the property, furloughs began on November 26, and the contractor remained on the property until December 22, 2008.

The Carrier denied the appeal on June 29, 2009. The Organization presented no viable alternatives during conference enabling the Carrier to use its forces to reduce the incidence of contracting "to the extent practicable." Appendix H does not require the Carrier to eliminate its use of contractors. There are 31 Welders on the inter-division roster, but they "bid to other positions" rather than the advertised Welder position and there were no qualified bidders. To complete the claimed work by the end of calendar year 2008, the Carrier contracted out the work.

A conference was convened on August 28, 2009 without resolving the dispute.

In its Submission to the Board, the Organization defines the claim in this proceeding as "rail welding/joint elimination and related work" that began on September 30, 2008. The Organization distinguishes this claim from another claim involving rail-plug installation (Third Division Award 42320. The work involved in that Award began on October 30, 2008. The Organization contends there is no dispute that the claimed work in this proceeding (in-track thermite rail welding) has been historically and customarily performed by BMWE-represented employees inasmuch as it is regular track maintenance performed by joint elimination crews.

The Carrier's outsourcing is not in good faith because four of the five Claimants qualify as Welders or Welder Helpers and the fifth Claimant was not afforded 45 days to qualify for the position with training. The Carrier's justification for contracting – training applicants – is without grounds given qualified Claimants and "the fact that other employees made application for these positions and the Carrier violated the Agreement by not assigning them thereto does not make the named Claimants unqualified. Nor does the Carrier's reference to training and qualifications of employees not named in this claim establish that the Claimants did not have a right to this work or that the Carrier could contract it out.

The Organization asserts that the notice to contract was vague and, upon receipt of it, the Organization requested information for a conference, but the Carrier never provided it. "Therefore, the Carrier did not meet in good faith (and in general failed to substantiate its alleged need to contract out this work) which is a violation of the Agreement." The Organization contends that all plans, documents and records it requests must be provided; otherwise there is no good faith by the Carrier.

Awards relied on by the Organization relating to document disclosure follow. Third Division Award 18447 held that ". . . the Carrier acts at its peril if it fails or refuses to adduce its records which contain material and relevant evidence" because "[n]either party can be permitted to evade its contractual obligations and avoid the consequences of violation because it fails or refuses to make full disclosure of material and relevant facts." Third Division Award 30944 establishes the Carrier's obligation to support its assertion of unavailable manpower with probative evidence. When the Carrier fails to "satisfy its burden of going forward with evidence" as occurred in Third Division Award 15444, the Organization's claim is unrebutted.

The Carrier's failure to release documents and information within its control renders its claim denial suspect. Third Division Award 35773 held that ". . . the [1981] Letter obligates the Carrier to undertake good faith efforts to . . . reduce contracting by increasing the use of its own forces to the extent practicable" and it "failed to provide any evidence to establish that it had undertaken the requisite good faith efforts" and "apparently refused to disclose the terms of its contracting transaction to support its contentions." The Organization contends that the Carrier cannot assert that it did not provide alternatives to contracting when it withholds information requested by the Organization.

The Organization asserts that the Carrier acknowledged it made no effort to schedule the claimed work for its own forces because the Carrier stated in its claim denial that it proceeded to contract once it received no qualified bidders for the bulletined positions. Thus the Carrier violated the 1981 sidebar Agreement (Appendix H) where ". . . carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable."

The Carrier's defense for its lack of good-faith efforts to reduce contracting is unqualified applicants; however, that is not a defense for its failure to assign the work to the qualified Claimants given their availability had the Carrier planned or scheduled the work for them. The Carrier's defense – not training applicants – does not override the Claimants "entitlement to this work" or validate contracting. The Carrier failed "to identify evidence of a right or source for contracting out scope covered work." The Carrier alleges shortage of manpower; however, there was no shortage, because there were applicants for the advertised position and sufficient

time between the July notice and the start of work in September to train applicants, but the Carrier refused training on the basis it was "late in the season (July)."

Notwithstanding the Carrier's referral to unqualified applicants, this claim was filed on behalf of the Claimants and the lost work opportunity they suffered. The Claimants could have performed the work on weekends or on overtime, or employees on furlough could have performed the claimed work "or alternatively they could have performed other Maintenance of Way work that would have been postponed to perform the thermite welding work earlier." Any time the Carrier siphons scope-covered work from its own workforce to a contractor, the Claimants suffer a loss of work opportunity and a monetary remedy is due as shown by on-property Awards 31386, 32681 and 39490, among others.

Without any evidence showing that the Carrier attempted to reduce the incidence of contracting and increase the use of its forces, the asserted reasons for contracting out are not based on legitimate details supported by probative evidence. The fabricated reasons conveniently enable the Carrier to undermine good faith notice and conference requirements. Finally, the Carrier raised new argument in its Submission to the Board when it asserted that there is a practice to contract for thermite Welders to perform work involved with joint elimination. Because this new argument was never presented during the on-property handling, the Board is foreclosed from considering it.

In its Submission to the Board, the Carrier states that it has contracted out scope-covered work in the past, the Organization filed claims and each claim was addressed on its merits. As in the past, the instant claim will be addressed on its merits. The Carrier states that thermite welding is used when the ends of two rail joints do not align. When that occurs, a plug is inserted between the ends - prior to welding - to ensure alignment in accordance with track safety standards.

The Carrier acknowledges that this claimed work is covered by Rule 1; however, it denied the claim "on the basis that proper notice was provided and claimants were fully employed and unavailable, the work was not exclusive to the BMWED and there is a past practice of utilizing contractors." The Carrier met its obligation for outsourcing with timely notice, identifying the work and reasons.

On-property Third Division Awards 36604 and 36852 do not require the Carrier to piecemeal the joint elimination project and Appendix H does not require

the Carrier to eliminate the use of contractors. On-property Third Division Award 38151 confirms ". . . [t]here is no mandate in the contract language cited that, after the required discussion opportunity, the Parties' have to agree on the contracting out (or not) of the work at issue." During conference on August 28, 2009 "[i]t was discussed . . . that the Carrier did not have qualified employees available, or had the ability to properly train employees to perform this work, in the required time frame." As quoted in on-property Third Division Award 35083, ". . . the Carrier 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."

In this regard, 31 employees on inter-division Welder rosters exercised their seniority to bid for other positions instead of the advertised thermite Welder positions. The Claimants did not exercise their seniority for these positions; their duties working other maintenance projects ensured no loss of compensation to them. "No amount of planning or rearranging of employees' schedules and assigning work on overtime and weekends would have led to the conclusion that thermite welding was within the capabilities of the work force." On-property Third Division Award 35083 does not obligate the Carrier to provide training.

In sum, the Carrier complied with Rule 1 and Appendix H by issuing a timely notice to contract, which identified the work and reasons for outsourcing. Thereafter, the Carrier participated in good-faith discussions during conference.

The Board notes that the Carrier acknowledged the claimed work ("rail welding/joint elimination and related work") is scope-covered and the Organization acknowledged that the notice was timely issued. Given those acknowledgments, the Organization focused on the Carrier's reasons for contracting which, it asserts, violate Rule 1 and Appendix H because (1) the notice did not include good faith reasons to contract and (2) the Carrier failed "in its obligation to embrace its good-faith obligations" during conference and failed to "make good-faith efforts to reduce the incidence of subcontracting and increase the use of its own forces." Because the Carrier did not provide any information or documents requested by the Organization, there is no support for its assertion that a lack of qualified manpower left it with no recourse other than contracting.

The Board observes that the Agreement does not require the Carrier to provide the documents requested by the Organization; however, the Carrier is required to establish its reasons for contracting once the issue is joined by the

Organization on the property. Disclosure of relevant information in documents enhances communications (Appendix H). The notice to contract identified the claimed work subject to outsourcing and the reasons therefore. The Organization disagreed with the Carrier's reasons in the notice.

With respect to the five applicants, the Carrier stated in its claim denial that "none of the bidders have more than 15 months of service or are FRA qualified to inspect track or supervise the renewal of track." The Organization did not rebut this statement and, furthermore, the record evidence does not indicate to the Board whether the Claimants could have been FRA qualified during a 45-day training period. Also unrebutted is the statement in the notice that 15 employees had departed since June 1, 2008. Considered jointly, the unrebutted statements support the Carrier's reasons for contracting and advertising the position shows an intent to plan for the use of its own forces to perform the claimed work. The Carrier disclosed sufficient and relevant information to establish its reason for contracting. As occurred in Third Division Award 5880 (bulletined position, no qualified bidders), the Carrier "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." Given these findings, the Board finds no violation of Rule 1 or Appendix H. Accordingly, 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.