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

Award No. 42323
Docket No. MW-41295
16-3-NRAB-00003-100148

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 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 (install switch panel and related work) in the vicinity of Mile Post 29.5 on the Canadian Sub on September 25, 26 and 27, 2008 (Carrier's File 8-00650 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 J. Christman, D. Jordan, F. Lipka, R. Lindsay, J. Lavin and N. Smith shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and for fifteen (15) hours at their respective time and one-half rates of pay, Claimant M. Berner shall now be compensated for sixteen (16) hours at his respective straight time rate of pay and for five (5) hours at his respective time and one-half rate of pay and Claimant T. Aurilio shall now be compensated for eight (8) hours at his respective straight time rate of pay and for four (4) 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 August 13, 2008, the Carrier issued a notice advising the Organization of its intent to contract out work stating, in part, as follows:

> **"RE: Contracting Out - Various Turnouts - Eight (8) on the NEUS Service Center**
>
> **Please be advised that under the provisions of the Collective Agreement it is the Carrier's intent to complete the installation of eight (8) turnouts on the NEUS Service Area.**
>
> **This 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 removal and installation, including, but not limited to:**
>
> - **assembling turnouts or track panels**
> - **removing existing turnouts or track panels from track**
> - **installing turnout or track panels with associated OTM, welds, surfacing and lining, etc.**
> - **dismantling and stock-piling removed turnouts or track panels**
> - **replacing connecting rails between turnouts**

- **At Binghamton Yard, work will include construction of steel cross tie connecting track between the three steel tie turnouts**

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

*** * ***

The work is anticipated to start in late summer, early fall."

On August 14, 2008, the Organization informed the Carrier that it was opposed to contracting out scope-covered work. At no time did the Carrier attempt to schedule or plan this work for the available and qualified Carrier forces; the Carrier fails to maintain an adequate or sufficient force. Although there are no good faith reasons to outsource this work, the Organization requested conference and certain information and documents.

On August 22, 2008, a telephone conference was convened. Numerous topics were discussed including, but not limited to, hours estimated for this work, equipment required, bids and contracts, the economics of employees performing work on overtime or weekends. Nevertheless, no resolution was forthcoming.

On November 6, 2008, the Organization filed a claim alleging violations of Rule 1 and Appendix H to name a few. "The claim is … for all time worked by Railworks installing a prefabricated switch panel" near Mile Post 29.5. The Organization asserts that the Carrier does not maintain an adequate workforce and refuses to assign this work to qualified employees on overtime. Employees who left the Carrier's service in 2008 have not been replaced, because the Carrier was not hiring until 2009. There is no good faith reason to outsource, nor a demonstrated effort to reduce the incidence of outsourcing and increase the use of its own forces. The impetus to contract is present with rosters exhausted leading to an unnecessary depletion of skilled forces exacerbated by a lack of proper training and the abolishment of facilities.

On January 22, 2009, the Carrier denied the claim. It complied with Rule 1 and Appendix H, which do not eliminate contracting. The Carrier contends a mixed practice to contract out work exists on this property. Providing reasons in the notice is designed to improve communications, but agreement on the reasons is not

required. At the time of this project (September 25, 26 and 27, 2008) there was an insufficient number of qualified employees to complete the work during the required time frame, e.g., by the end of calendar year 2008, because its crews were fully employed and working overtime on maintenance and track programs. The Carrier initially intended to use its own forces, but the loss of 30 employees during the work season contributed to contracting. The use of BMWE-represented employees on overtime is not a viable option because the Carrier cannot ensure a sufficient number of employees will volunteer. Overtime expense, however, is not the reason for outsourcing. The Carrier selects the lowest bid, which is based on the scope and timing of the work as well as cost; the contractor does not estimate hours in the bid. Once the contractor is engaged, the Carrier cannot apportion some of the work to BMWE-represented employees (should its own forces become available) or intersperse its own personnel with the outside contractor's forces. Sanitized copies of contracts will be provided "in due course" and Carrier forces have not been depleted, nor have facilities been abolished. Good faith discussions occurred, but did not resolve the differences.

On March 14, 2009, the Organization filed an appeal. The Organization's position on appeal restates arguments in the initial claim addressing violations of Rule 1 and Appendix H and responded to the Carrier's statements in its denial of the claim. In summary fashion, the Organization states that there is no established or proven mixed practice to outsource. When the Carrier requests volunteers to work overtime, there always have been volunteers available. Because this work was planned in January 2008, it did not unexpectedly arise and cause a spike in work. During the conference, the Carrier's representative stated that its forces were depleted because there were insufficient numbers of employees to perform all work scheduled for 2008. Because the Carrier's representative at the conference did not have the authority to commit the Carrier to any option in lieu of contracting, the Carrier did not engage in good faith discussions.

On June 27, 2009, the Carrier denied the appeal. The Carrier's position restates its arguments presented in the claim denial and responds to the statements set forth in the Organization's appeal. In summary fashion, the Carrier states that it maintains the proper number of employees to handle regularly scheduled maintenance for continuing operations. No viable option was presented by the Organization which demonstrated that Carrier forces could complete their scheduled, programmed assignments and complete this claimed work, which was one of five projects subject to a notice dated August 13, 2008. "To ask our

employees who already work overtime to work seven days a week and in some cases would be required to travel, certainly would have a negative effect on safety and productivity." In this situation, the Carrier determined that it was not practicable to use its personnel on overtime and no amount of planning would have made BMWE-represented employees available because 30 employees left the Carrier's service during the work season and, despite efforts to hire that number, only 24 new hires reported. The 1981 Berge-Hopkins letter states that the Organization ". . . indicated a willingness to explore ways and means of achieving a more efficient and economical utilization of the workforce and to explore ways to improve the Carrier's productivity by providing more flexibility in the use of employees." The period of 2006 - 2008 reflected the most aggressive campaign of capital projects to rebuild track and siding to handle increased traffic. The Carrier "cannot afford the luxury of hiring surplus employees to handle out of the ordinary situations (derailments, delays in basic maintenance or capital projects)" and then furlough those new hires thereafter.

On August 28, 2009, a claim conference convened without resolving the deadlock.

In its Submission, the Organization states that switch installation is scope-covered work that has been historically and customarily performed by BMWE-represented employees. Requests for documents, such as contracts, have not been provided; a negative inference is warranted for failure to disclose. The 15-day notice was improper because it did not contain good-faith reasons for outsourcing. For example, the Carrier's assertion that it is not economically feasible to assign its own personnel on overtime or weekends is not a valid reason for outsourcing. The claimed work consumed eight employees for only three days; any planning by the Carrier would have rendered employees available inasmuch as the Carrier knew about this project in January 2008 - some nine months prior to issuing the notice of intent to contract out.

The Carrier does not maintain an adequate force; thus, it creates an impetus to contract out scope-covered work. Employees were unavailable only due to the Carrier's failure to plan to schedule them, which contravenes its obligation to reduce the incidence of outsourcing and increase the use of its own forces, including renting equipment for its forces to use. During conference, the Carrier could not provide an estimate of the number of hours needed to perform the work in question, but it concluded, without that information, that its own forces were not available to

perform the work on overtime or rest days. In this regard, BMWE-represented employees on the Saratoga Division completed a project on weekends in 2007. In response to the Organization's question as to whether BMWE-represented employees would be subject to furlough while the contractor's forces remained on the property, the Carrier could not ensure no furloughs. Affirmative defenses, such as insufficient forces, have not been established.

Contrary to the Carrier's assertion during on-property exchanges, the Organization is not required to show where the Carrier can obtain equipment for the work or to identify any equipment whether the Carrier has it or not. The lack of equipment was not a reason identified by the Carrier for contracting out. This was addressed during conference at which time the Carrier stated that it had the equipment.

A sampling of precedent relied on by the Organization in support of its claim include on-property Third Division Awards 2701 and 6305 (scope-covered work), 36937 and 37287 (insufficient force is affirmative defense), 31386 and 39490 (fully employed and monetary relief), as well as off-property Third Division Awards 15444, 20892 and 29512 (failure to produce relevant evidence is at its own peril), 30944 and 35337 (reduce incidence of contracting).

In its Submission, the Carrier states that it engaged in good-faith discussions during conference when, at that time, there were no bids or contracts. The Carrier explained that there was an insufficient number of qualified employees, equipment and supervisory staff to perform the claimed work during the required time frame. In this regard, installing eight turnouts was a major undertaking when considered in the context of the Carrier's forces performing other regularly scheduled maintenance and planned capital projects during the same period of time plus the other five projects of similar work covered by the same notice to contract issued the same time as the notice in this claim. The Carrier states that it was not practicable to use its personnel in this situation because this project had to be completed before winter weather set in; completing the project by the end of calendar year 2008 ensured funding would not be lost.

The Carrier's obligation under Rule 1 is to provide notice, identify the work made subject for outsourcing and the reasons for doing so. The Carrier complied with Rule 1 and Appendix H. Neither Rule 1 nor Appendix H eliminates contracting. Capital spending during 2006 – 2008 was the most expansive in at least

a decade. The Carrier engaged in a good-faith attempt to hire 30 employees in 2008 to handle normal maintenance and work such as in this claim. Although BMWE-represented employees have installed switches, none of the employees' statements establish that they have installed eight switches in a work season or performed such work on overtime, weekends or rest days. Regardless, the Claimants suffered no monetary loss because they were fully employed at all times. Furthermore, seeking volunteers to perform this work is problematic, because employees already work seven days a week, overtime and some of them travel for work. There could be a negative effect on safety and productivity. Cases relied on by the Carrier to support its position include on-property Third Division Awards 36852, 38149 and 38151, as well as off-property Third Division Awards 24481, 33645 and 39662.

A careful review of the record evidence establishes that the claimed work is within the scope of Rule 1.1 ("construction, repair and maintenance … tracks"). Fifteen employees' statements establish that Carrier forces have historically and customarily performed the work of constructing and installing switches. The Carrier acknowledges that BMWE-represented employees have performed the claimed work under general Scope Rule 1.

The Carrier noted, and the Organization does not dispute, that the claim in this proceeding is one of five claims – the others are Third Division Awards 42322, 42327, 42328 and 42329 – involving the installation of switch panels, turnouts and related work scheduled for completion during the fall of 2008. Although each claim has been processed separately, the notice of intent to contract issued for each claim is dated August 13, 2008. Within that context or framework, the Carrier states that the its forces were not available on September 25, 26, and 27, 2008 to perform the claimed work.

Reasons for the unavailable Carrier forces included their assignment to scheduled maintenance and capital projects. That is, Carrier forces were working programmed assignments, some of it in an overtime status, to complete them. Assigning the crew this claimed work to perform on overtime while concurrently working overtime on programmed assignments raised safety and productivity concerns. The record shows that in 2007, the Carrier assigned work intended for outsourcing to its own personnel to complete on overtime or weekends with the Saratoga Division, but obtaining a sufficient number of volunteers to work overtime is problematic when funding and time restraints are superimposed. Unknown for the Board is whether the Saratoga Division was working in an overtime status at the

same time they performed the project subject to outsourcing. During 2008, the Carrier offered employment to 30 new hires, but only 24 reported for duty and, also during 2008, approximately 30 employees left the Carrier's service. The Carrier made the decision, at some point after January 2008, that the fluctuation in force size, the workload carried by its own forces on current assignments and the problematic nature of training a sufficient number of new hires in a timely manner so as to ensure this work was completed in 2008 indicated that contracting out would be considered under Rule 1 and Appendix H. Given these circumstances, the Carrier states that increasing the use of its own forces "to the extent practicable" was not feasible.

Fundamental to the adjudication of this claim is the fact that the Organization bears the burden of proof to establish the alleged violations of Rule 1 and Appendix H. The robust responses during on-property exchanges reflect the Organization's frustration for the Carrier to maintain and expand its workforce during 2006 – 2008, which was a period of time marked by increases in capital projects funded when compared to the period of the late 1990's through 2004. Although the estimated number of hours to perform this claimed work was not provided by the Carrier, unrebutted is its statement that BMWE-represented employees were working overtime on scheduled projects at the time of this claimed work, thereby rendering their availability on overtime problematic as well as implicating safety and productivity concerns. This claim, like others concurrently presented to the Board, occurs during reconstruction of the railroad accompanying increased traffic following a period of minimum maintenance and stagnant traffic. The Carrier did not increase its workforce to a level satisfactory to the Organization, but there is insufficient evidence to warrant a finding that the Carrier acted in such a manner so as to intentionally deplete its forces or intentionally exhaust rosters; and there is no evidence, contrary to the Organization's assertion, that the Carrier abolished facilities.

The Organization asserts that there is no right under Rule 1 for the Carrier to outsource scope-covered work, whereas the Carrier contends that it complied with Rule 1 and Appendix H. On-property Third Division Award 38151 addresses the Parties' competing concerns:

> **"There is no mandate in the contract language cited [Rule 1 and Appendix H] that, after the required discussion opportunity, the**

Parties' have to agree on the contracting out (or not) of the work at issue."

Supplementing and complementary to on-property Award 38151 is on-property Third Division Award 38149, wherein the Board held:

". . . the Board concludes that the Carrier gave the Organization ample notice and opportunity for discussion before contracting out the work in question . . . . While it is clear that the Organization did not agree with the Carrier's position and continued to disagree even after discussions between the Parties, there is no showing that the Carrier acted in other than good faith . . . . Therefore, we find that the Carrier did not violate the Agreement when it contracted out the work in this case."

These on-property precedents are applied to the circumstances in this claim where there was timely notice issued with reasons followed by the Parties' efforts to reach an understanding during conference about the contracting transaction whereupon no resolution was attained and the Carrier proceeded to contract out and Organization proceeded to file a claim. In the final analysis, the Board finds no violation of Rule 1 or 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.