

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42330
Docket No. MW-41329
16-3-NRAB-00003-100226**

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 to perform Maintenance of Way work (sheet piling and related work) in the vicinity of Mile Post 106.5 Crown Point, New York, on the Canadian Main Line on September 29, 30, October 1, 2, 3 and 6, 2008 (Carrier’s File 8-00656 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 E. Woodruff, J. Crandall, E. Sawyer, S. Trippi and J. MacDougall shall now each be compensated for ‘*** forty-eight (48) hours at straight time and twenty-two (22) hours at time and one-half rates (Standard Overtime rates as per the Collective Bargaining Agreement)’.”**

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 3, 2008, the Carrier issued a notice advising the Organization of its intent to contract out stating:

“RE: Contracting Out – Track Stabilization at MP 106.5 on the Canadian Main Line.”

Please be advised that under the provisions of the Collective Agreement the Carrier intends to contract out track stabilization work at MP 106.5 on the Canadian Main Line.

This work is being contracted out due to the urgent nature of the repairs and the Carrier’s forces and equipment being unavailable in the time needed to carry out said repairs.

The scope of the work will include all work normally associated with the stabilization of track using sheet piling.

The Contractor will be using various equipment at his disposal to carry out the repairs.

The work is anticipated to start on, or about, September 19, 2008.”

The Organization opposed the notice and requested certain information and documents be provided at a conference on held on October 6, 2008. Following that conference, the Organization filed a claim on November 3, 2008 alleging numerous Rules violations, such as Rule 1 and Appendix H. The Organization alleges the Carrier refused to plan and schedule the claimed work for performance by its own workforce and it refused to disclose requested information and documents.

The Carrier denied the claim on February 3, 2009, stating its forces were “busy elsewhere and could not complete the work on schedule due, in part, to the urgent nature of these repairs,” which is “specialty work requiring special tools and/or skills.” Rental equipment was unavailable and BMW-represented employees had not performed this type of work. Therefore, use of an experienced crew is “good safety practices.” The Carrier notes:

“The original repair design for this location was a rock berm constructed at the toe of the slope. However, when Adirondack Park Agency would not approve this type of repair because of sensitive wetlands, the design was changed to sheet pile wall.”

On April 13, 2009, the Organization filed an appeal to the claim denial. On July 29, 2009, the Carrier denied the appeal. Thereafter, a conference was convened but without resolution.

Essentially, the Organization alleges the Carrier failed to establish the emergent nature of the work and demonstrated a pre-determined intent to contract out because the work commenced one week prior to the claim conference convening. The notice to contract did not state that specialized equipment (pile driving equipment and related tools) was a reason for contracting. Equipment at the worksite consisted of two Carrier-owned cranes and an excavator. The Carrier counters by noting that BMW-represented employees had not performed this work in the past because the Carrier does not own the specialized equipment. Thus, the BMW-represented employees are not qualified to operate it. Moreover, the equipment was not available to rent. The Carrier submits that Third Division Awards 32434 and 37220, as well as Public Law Board No. 7100, Award 7 to support its position that the emergency nature of the work insulates it from a violation of Rule 1 and Appendix H.

Having reviewed the record evidence, the Board finds that the claimed work is of the type historically and customarily performed by BMW-represented employees and, thus, is scope-covered subject to Rule 1 and Appendix H. In this regard, the notice to contract states that the work subject to outsourcing “. . . will include all work normally associated with the stabilization of track using sheet piling” and employees’ statements show that they have been involved with similar work in the past. The claimed work is arguably scope-covered and, thus, within Rule 1 (Third Division Award 40456). In response to the Carrier’s position that it

does not own the specialized equipment necessary for performing the claimed work - thereby indicating BMW-represented employees have not performed this kind of work - the record in this proceeding does not establish the use of specialized equipment. On the contrary, the equipment at the worksite was an excavator and two cranes owned by the Carrier.

As for the Carrier's "emergent nature" of the situation defense as justification for the contractor commencing work prior to the claim conference, the Carrier relies on a letter dated August 29, 2008, issued by Clough, Harbour and Associates LLP to the Adirondack Park Agency. The letter establishes that the Carrier was aware of and involved with planning as early as April 29, 2008, "... to reduce the possibility of further track settlement and possible derailment, emergency measures are required to ensure safe train operation." As a result of that meeting the Carrier recognized that the cost of an environmental study and wetland compensation far exceeded the cost of a berm wall. Consequently, the Carrier decided to proceed with sheet piling rather than a berm. More than four months passed before the Carrier informed the Organization with the notice to contract (September 3, 2008) wherein it stated that the "urgent nature of repairs" justified or necessitated commencing work prior to the claim conference convening.

None of the precedent relied on by the Carrier finds an "urgent nature of repairs" exists when more than four months are dedicated to planning the response and service continues on the track. Because there was no "emergency" as that term is defined and applied in Rule 1, authorizing the outside contractor to perform the work prior to the Parties' conference violated Rule 1. In other words, the Board finds that the Carrier violated the notice and conference requirements.

In view of the foregoing, the claim will be sustained and the requested remedy granted, because on-property Third Division Awards 39490, 40320 and 40456, among others, show that the violation constitutes a loss of work opportunity warranting a monetary award.

AWARD

Claim sustained.

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.