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

Award No. 42413
Docket No. MW-41898
16-3-NRAB-00003-120214

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 (ING Civil Construction) to perform Maintenance of Way work (build road and related work) to access Bridge 518.7 at Warnerville, New York on May 13 and 14, 2010 (Carrier's File 8-00781 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. Hurlburt and T. St. Dennis shall now each be compensated for sixteen (16) hours at their respective straight time rates 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 April 27, 2010, the Carrier issued to the Organization a notice "RE: Contracting Out - Emergency Repairs at BR 518.65" wherein the Carrier stated:

> **"These repairs are required to maintain the safety of the operations. The Carrier's forces are not available to carry out the work in the tight timeframe needed.**
>
> **The work is scheduled to begin as soon as possible."**

On May 12, 2010, the Organization informed the Carrier that it was opposed "to contracting out any work that accrues to the Bridge and Building (B&B) and the (M/W) Maintenance of Way Departments." Force employees were available, qualified and have historically and customarily performed this scope covered work (Rules 1 and 28). The Carrier exerted no effort to schedule the work for the force nor did it identify equipment required for this work which was not the Carrier owned or available by rental. The Carrier is asserting a lack of manpower as a reason to outsource shows its failure to maintain an adequate force.

The Organization requested the following information and documents:

1. **When was this work first considered and planned.**
2. **Include all internal memos as to the planning of accomplishing this work and as to the planning of the contracting of this scope covered work.**
3. **What is the estimated man hours that would be needed to do this work.**
4. **What specific equipment is needed for this work.**
5. **A copy of the proposal that was put out for bid to contractors. Including the proposed work to be performed.**

6. A list of the contractors contacted to perform this work.
7. A list of the contractors who made a response.

As a result of the Carrier's issuing the notice to contract out, the Organization requested conference "to meet and confer in good faith" before the claimed work commenced. The Carrier did not respond to the Organization's request for conference.

On June 12, 2010, the Organization filed a claim alleging the Carrier violated Rule 1 and Appendix H, among others, when it used an outside force at Bridge 518.7 on May 13 and 14, 2010 to install an access road on the east side of the main track which would lead to the bridge abutments under the bridge and related work preparing the site. Equipment used was a front loader and two excavators. No emergency existed, the work was not specialized nor is there a practice for outsourcing this scope-covered work "that could very well be fit in the Carrier's work Schedule on the D&H Property." The Carrier exerted no effort to reduce the incidence or frequency of outsourcing.

On June 16, 2010, the Carrier denied the claim stating it complied with Rules 1.3, 1.4 and 1.5 as the contracting-out notice included a reason for outsourcing, start date for this work as well as the range of work to be performed. Claimants were fully employed, thus, they were unavailable. "The decision to contract out work is determined by many factors, including the degree of difficulty of the work, the timeline, availability of the Carrier's forces, etc. Each case is sui generis." The contractor used "various equipment at its disposal" and "small parcels of the work included in the contract could not have been apportioned off."

On August 5, 2010, the Organization filed an appeal. The Organization reiterates arguments in its claim filing and notes "the Organization has only claimed two days of the work at this location which consisted of building an access road to the work area and site preparation" which is work the force traditionally performs. Any good-faith effort exerted by the Carrier could have scheduled Claimants for this work; their full-employment status is not relevant. Since the Carrier refused to disclose the contract, the Organization "can only question the Carrier's statement that certain parts of the work could not be apportioned off."

On March 21, 2011, the Carrier denied the appeal by reiterating arguments in its claim denial and noting the Carrier's equipment and forces were unavailable as they were working their normal duties along with planned overtime. Claimant

Hurlburt was brush cutting from MP 557.0 to MP 617.0; Claimant St. Dennis was installing ties at MP 521.0 to 561.50 and, at MP 487.40, performing rail maintenance. The Carrier is not required to piecemeal or fragment the work.

Assigning the force for this emergent, unplanned work on the deteriorating concrete piers at water level "was not practicable, as they have historically never performed this type of repair work." As this was an emergency situation, there was no contract with the outside force when the notice issued on April 27, 2010. Regardless, once the Carrier complies with Rule 1 it is not prohibited from contracting out. The Carrier notes that the Organization omits the phrase in Appendix H "to the extent practicable" regarding contracting. the Organization also fails to recognize its obligation under Appendix H, e.g., present viable alternatives to outsourcing at conference such as scheduling Claimants "to the extent practicable" within the required timeframe given Claimants already were scheduled or programmed for planned maintenance work nor did the Organization show where equipment could be rented without an operator. Contrary to the Organization's position, there is sufficient M/W force to perform all of the regular, planned maintenance and capital work.

On April 8, 2011, the Organization responded to the Carrier's appeal denial stating that "the work performed in this dispute (Building of Access Roads) was not outlined in the Carrier's Notice dated April 27, 2010)" and the claim is not for the "work performed on the abutments at this location."

On July 5, 2011, the Carrier responded to the Organization's letter of April 8, 2011:

> **". . . building of the road way was part of the original contracting out notice dated April 27, 2010, how would the contractor get to the site without building a road, the roadway was an integral part of the overall project, there are on property awards that supports the carrier position. Carrier is not obligated to fragment any part of this project."**

On June 14 and 15, 2011, conference convened without attaining a resolution to this claim. The claim is now before the Board for a decision.

Having reviewed the record established by the parties during on-property exchanges as well as their submissions filed in support of their respective positions,

this Board finds that the claimed work ("build road and related work", i.e., site preparation) is covered by Rule 1 as such work is customarily and historically performed by the force. Contracting-out under Rule 1 requires notice and conference unless an emergency exists.

The Carrier did not contest the road construction and site preparation as M/W work; it denied the claim on the basis that the deteriorating concrete piers were an "unplanned event" constituting an emergency and the claimed work (road construction) was an integral, indivisible part of the emergent situation where "the work is scheduled to begin as soon as possible."

Third Division Award 24440 states that an "emergency is the sudden, unforeseeable, and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt." Since an emergency declaration is an affirmative defense, the Carrier must establish the "sudden, unforeseeable and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt."

Although the Carrier asserts the deteriorating concrete piers are an "unplanned event" there is no indication that the deteriorating piers interrupted operations or halted operations. The chronology of events is not indicative of an emergent situation where immediate action is necessitated. That is, the notice to contract out was issued on April 27, 2010 but the claimed work did not commence until May 13, 2010 which was more than two weeks after the notice and the restoration of the deteriorating concrete piers did not commence until sometime after May 13. Also, the Carrier describes the condition of the concrete piers as "deteriorating" which, by definition, connotes a wearing away over time and, thus, not an "unforeseeable and uncontrollable nature of the events." The Board finds insufficient evidence to sustain the affirmative defense that an emergency existed.

Aside from the finding that an emergency situation did not exist, the Carrier did not meet in conference with the Organization after issuing the contracting-out notice. Failure to meet in conference when outsourcing scope covered work violates Rule 1.3 and undermines Appendix H. Numerous on-property awards - Third Division Awards 26691, 39490 and 40457 to name a few - sustain claims on the basis of failure to conference upon request. This Board will not deviate from the on-property precedent; the claim is sustained on the basis of no conference.

With a violation of Rule 1, the Board finds that an appropriate remedy is compensation to preserve and protect the integrity of the Agreement, specifically Rule 1 and Appendix H. The Carrier's failure to meet in conference precluded an opportunity for discussing the range of work to be performed and whether the situation represented an indivisible sum of work that precluded any aspect of from being performed by the force.

In sum, Parts 1 and 2 of the claim are proven and the requested remedy in Part 3 is granted.

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 31st day of October 2016.