

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42416
Docket No. MW-41922
16-3-NRAB-00003-120232**

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 Employees 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/New Century Contracting) to perform Maintenance of Way work (concrete patch and related work) on the Nicholson Viaduct in the vicinity of Mile Post 653.22 on the Sunbury Subdivision beginning on October 16, 2009 and continuing (Carrier’s File 8-00738 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 R. Ossig, K. Chilson, R. Vanderpool and E. Nicholson 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 on October 16, 2009 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.

On June 8, 2009, the Carrier issued to the Organization a notice "RE: Contracting Out Notice - Concrete Scaling, Removal, Fence construction Sunbury 653.22" wherein the Carrier stated:

"... the carrier intends to hire a contractor to carry out concrete scaling, removal and fence construction at approximately MP 653.22 of the Sunbury Subdivision.

The contract scope will include all work normally associated with this type of work.

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

The work is anticipated to start on, or about, August 1, 2009.

The Carrier's qualified structures crews will be unavailable to perform the work as they will be utilized elsewhere."

On June 13, 2009, 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 owned by the

Carrier or available by rental arrangement. The Carrier asserts a lack of manpower which shows its failure to maintain adequate manning levels.

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. What existing equipment does the Carrier have on hand?
6. Who are the equipment rental dealers the Carrier has contacted? And the renter's response for renting this equipment.
7. A copy of the proposal put out for bid to contractors. Including the proposed work to be performed.
8. A list of the contractors contacted to perform this work.
9. A list of the contractors who made a response.

On June 30, 2009, conference convened to discuss the notice; however, there was no resolution to the Organization's concerns and request for information.

On December 7, 2009, the Organization filed a claim alleging the Carrier violated Rule 1 and Appendix H, among others, when it used an outside force at Nicholson Viaduct for concrete patch and scale work beginning October 16, 2009. There is no practice to outsource this work which is not of a specialized nature. The Carrier fails to train the force, maintain an adequate level of manning or engage in good-faith effort during conference.

On December 8, 2009, the Carrier denied the claim stating it complied with Rules 1.3, 1.4 and 1.5; the only good-faith effort recognized by the Organization would be cancellation of the notice. The Organization fails to advance or offer viable alternatives during conference. There is a past practice to contract out.

On January 19, 2010, the Organization filed an appeal. Manning, training and replacement of retiring employees are relevant as the Carrier's reason for outsourcing is unavailable structure crews. The Carrier acknowledged in conference it would not add to the force in 2009. There is no wording in the Agreement that recognizes contracting out as a past practice.

According to the Organization, the Carrier fails to exert good-faith effort to reduce the incidence of contracting.

“At conference, the Carrier outlined that this work was part of an overall long term project that could be taken on over the next ten (10) years at this location. The Carrier further laid out that this phase of the work was anticipated to last anywhere from four (4) to six (6) weeks. The Carrier stated that they were aware of and submitted applications and/or requests for funding for this work in August 2008.

The Carrier outlined that the budget and/or funding for this phase of the work was approved in March 2009. This is seven (7) months before any work at this location was started, going back to August of 2008 when the Carrier started contemplating this project funding was requested it is fourteen (14) months.”

Given this chronology, the Organization states the Carrier cannot meet its burden of demonstrating it attempted to reduce the incidence of contracting out.

On August 21, 2010 the Carrier denied the appeal by reiterating arguments in its claim denial and noting that the Organization failed to demonstrated during conference that the contracting out was unnecessary.

“. . . the restoration and stabilization of this viaduct was very large and extensive in scope requiring working at extreme elevations for extended periods, which D&H/BMWE forces have never performed in the past. As the concrete scaling work progress it was found that upper sections of the viaduct were deteriorated beyond repair and required replacement. The Carrier does acknowledge in the past the Carrier’s force has performed only minor scaling and sealing, but not to the degree of this project, surely not established scope work.

This project is unique, as there are only two concrete viaducts on its entire system. The Carrier purchased this line in the early 1980’s, and has only performed minimal amount of work required to keep this viaduct safe. The Carrier does not have enough qualified employees, which includes the Claimants, equipment or Supervisors

staff to perform the work on this project in the required time frame.”

Appendix H does not eliminate the use of contractors and it obligates the Organization to consider ways and means to enhance the efficiency and productivity in use of the force. Funding for capital projects are based on the capital plan which considers traffic volumes, Federal and State funding and the condition of the economy. Submitting an application for a project does not ensure funding. The force was working fulltime including planned overtime; it was unavailable for this project regardless of the lead time between project planning to implementation.

The Carrier states two employees have performed concrete patch work and the Carrier trains the force but, once trained, employees move to different positions and the cycle of training restarts. According to the Carrier -

“ING Civil Inc. (contractor) was selected, due to the fact that it is a certified bridge builders with expertise in new bridge construction and rehabilitation of all types of bridges, and have the required specialized equipment, and qualified work force.”

On September 20, 2010, conference convened but a resolution to this dispute was not attained. In February 2011 the Organization submitted employees’ statements and pictures attesting to structures crews using the bridge inspection vehicle to work on the bridge in years past. A meeting convened on March 3, 2011 for further discussion.

On April 18, 2011, the Carrier responded to the employees’ statements by observing that the force performed work that was of an “emergent and temporary” nature whereas this project is “rehabilitation of the entire structure, including side walls/parapets.”

On June 14 and 15, 2011, the parties met in conference but did not resolve this claim which is now before the Board for a final 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, the Board finds that “concrete patch and related work” is covered by Rule 1.1 (“inspection, construction, repair and maintenance of . . . bridges . . . and other structures”) and is the kind of work customarily and historically performed by the

force. Contracting-out scope-covered work under Rule 1 requires notice and conference absent an emergency which is not present or proclaimed in this proceeding by the Carrier.

The Carrier met in conference with the Organization on June 30, 2009 and June 14 and 15, 2011. During on-property exchanges leading up to and during conference the discussion addressed whether the claimed work was specialized, e.g., skills and equipment. The Organization submitted employees' statements attesting to performing concrete patching on the viaduct and, on March 3, 2011, the Organization met with the Carrier to present a proposal and suggestions for the claimed work.

The Carrier's letter dated April 18, 2011 summarizes the Carrier's consideration of and response to the proposal and suggestions discussed at the March 3 meeting.

“. . . use of the bridge inspection vehicle would not be feasible, as weight restriction, limits the productivity required on this complex project.

The scope of the work involves the rehabilitation of the entire structure, including the side walls/parapets. This requires testing of concrete areas to determine the degree of deterioration. This takes a level of experience that our work force and supervisors don't have, and the contractor possess.

The contractor was required to design, engineer and build a movable work platform that is used in the installation of the stationary work platform attached to the side of the bridge . . . in order to meet safety regulations. This equipment and platform is something that Carrier does not own or could not rent or purchase.

The stationary work platform, securement brackets and railing system, required the contractor to design, engineer and build. This is not a scaffolding system that could be purchased or rented by the carrier. This system . . . is far safer than any equipment the Carrier owns or could rent.

The installation of the stationary work platform requires the evaluation of the strength of the concrete, and is critical for the proper placement of the support brackets, that were also designed by the contractor, for use in inclement weather and high wind conditions. Any variances in the design plan required the approval of the contractor's engineering department, which has the ability to approve within hours.

. . . The contractor's supervisor has to ensure that all procedures/specifications of this project were being met on a daily basis, and in critical areas of extension concrete deterioration, every hour.

The contractor's supervisor also has to have alternate procedures at hand, to handle any unforeseen complications, that deals with the installation of the work platforms, re-bar placement, milling work, concrete form design, ECT.

The solutions to any unforeseen complication are derived from previous experiences of this nature to anticipate them and respond accordingly."

As noted in Third Division Award 32251, the burden of proof resides with the Organization in this proceeding to establish the alleged rules violations. In assessing the evidentiary record, the Board finds that the work involved under the general scope rule was subject to notice and conference including good-faith discussion all of which occurred in this claim. That is, the contracting transaction and reasons for it - specialized equipment and skills and force availability - were discussed during conferences and in the meeting of March 3, 2011. Rule 1 and Appendix H do not compel the parties to resolve their differences.

Given these findings, instructive for the Board is Third Division Award 40800:

"Our review of the relevant evidence establishes that the work in question required special skills not possessed by [the force] and special equipment not owned by the Carrier."

The Board follows precedent in Third Division Awards 32251 and 40800 in this claim and concludes that the Organization has not met its burden of proof to establish the alleged rules violations and, concomitantly, the Carrier did not violate Rule 1 and Appendix H. Therefore, the claim is 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 31st day of October 2016.