

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42507  
Docket No. MW-41593  
17-3-NRAB-00003-110225**

**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 on behalf of the System Committee of the Brotherhood:**

- (1) The Agreement was violated when the Carrier assigned outside forces (New Century Construction) to perform Maintenance of Way work (construct a retaining wall) at Bridge 558.83 beginning on March 23, 2009 and continuing through April 7, 2009 (Carrier’s File 8-00677 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 K. Chilson, R. Vanderpool, L. Martin and R. Nichols shall now be compensated at their respective and applicable rates of pay for all straight time and overtime hours expended by the outside forces in the performance of the aforesaid work beginning on March 23, 2009 and continuing through April 7, 2009.”**

**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 October 2, 2007, the Carrier issued to the Organization a notice of "Contracting Out - Various B&B Projects" identifying at least eight projects at multiple locations. One of the projects was "Project 558.83 - Repair of retaining wall" which is the subject of the claim in this proceeding.

The Carrier's notice stated, in part, as follows:

"This work must be undertaken for the safety of railway employees and the safety and fluidity of the trains. This work needs to be completed in the current year. As our forces are currently working on main line bridge and culvert work, we do not have the required manpower available.

\* \* \*

The work is anticipated to start on, or about October 18, 2007, continuing until completed."

On October 3, 2007, the Organization informed the Carrier that it opposed "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 using Carrier equipment or leased equipment; however, the Carrier exerted no effort to obtain equipment for use by the force. Given the expected start date (October 18, 2007) and the date of the notice (October 2, 2007), the Carrier did not

“attempt to properly schedule the work” for the force which would reduce the incidence of outsourcing and increase the use of the force. The Carrier’s assertion of unavailable manpower shows its failure to maintain the requisite level of manpower to perform scope-covered work.

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[.]
8. The Organization requests a complete copy of the Safety Rules For Contractors.”

Aside from information and documents, the Organization requested conference which convened on November 1, 2007.

Although the notice to contract set forth an anticipated start date of October 18, 2007, weather conditions precluded starting or performing any work on Project 558.83 during October, November and December 2007. No work was started or performed during calendar year 2008 because the Carrier did not provide funding for the project in the capital budget. In 2009 the Carrier provided funds for Project 558.83 and work commenced on March 23, 2009 and continued until completed on April 7, 2009.

On April 9, 2009, the Organization filed a claim alleging the Carrier violated Rule 1 (notice and conference) and Appendix H (reduce incidence of contracting), among other rules, when it used an outside force to construct the retaining wall beginning on March 23, 2009 and continuing through April 7, 2009.

On May 12, 2009, the Carrier denied the claim stating it provided a notice and reasons for outsourcing the retaining wall on October 2, 2007. After issuing the notice the Carrier participated in conference on November 1, 2007.

On June 22, 2009, the Organization filed an appeal. The Organization states that the notice dated October 2, 2007 stated the contracted work would begin October 18, 2007 and the claimed work “needs to be completed in the current year [2007]” but the work did not start until March 23, 2009. Since the work did not commence as advertised in the notice, the notice expired and was void after 2007. Another notice and conference was required for Project 558.83 when the outside force began constructing the retaining wall on March 23, 2009.

Additionally, the Carrier’s asserted urgency and need to complete the work by the end of calendar year 2007 are without merit or substance since no work was performed until March 2009. This exposes the Carrier’s reasons for outsourcing - safety of employees and equipment and fluidity of trains - as arbitrary and self-serving. Also, reasons for contracting in 2007 must be considered with the changed circumstances, i.e., furloughs of the B&B and Track Departments in 2007 and 2008. This shows the Carrier made no effort to reduce the incidence of subcontracting and increase the use of its force. As of June 2009, the Carrier had not disclosed information and documents requested at conference on November 1, 2007.

On October 8, 2009, the Carrier denied the appeal. Repairs to the retaining wall could not begin in 2007 due to weather. There was no funding for this work in the capital budget for 2008; however, funding was available in the 2009 capital budget whereupon the work commenced on March 23, 2009. Rule 1 and Appendix H do not place an expiration date on a notice and, during conference in November 2007, the Organization presented no viable alternatives to outsourcing which would have enabled the Carrier to use its force “to the extent practicable.” The Carrier states it did not have the requisite manpower available for performing this work, nor did it have equipment available or supervisory staff. Finally, there is no requirement under the collective Agreement for the Carrier to disclose third-party contracts.

On April 28, 2010, a claim conference convened but an understanding was not attained. As this matter remains deadlocked, it is now before the Board for a final decision.

The Organization's submission to the Board reiterates its position in on-property exchanges. It states the reasons for subcontracting set forth in the notice dated October 2, 2007 are dependent on the work being performed in 2007. These reasons "cannot validly stand for the reasons for subcontracting in 2009 . . . because the Carrier's purported reason in 2007 was . . . grounded in the proven inaccurate premise that the work had to be performed by the end of 2007."

A notice and conference was required to discuss the changed circumstances for outsourced work performed in March 2009. "The bootstrapped urgency and manpower contention were proven untrue when the work was not performed by the end of 2007." Weather and economic conditions were not considerations in 2007 for outsourcing but they were in 2009 and appropriate for discussion in conference.

The Carrier's submission to the Board reiterates its position in on-property exchanges. Its reason for outsourcing was it did not have the requisite manpower available in 2007 and, it asserts, the force would not have been available in 2009 without regard to any changed circumstances. The notice of October 2, 2007 represents an expectation that the work will be completed in 2007. Discussion at conference in November 2007 addressed force availability, equipment and maintenance work. Those remain considerations for the work performed in March 2009.

According to the Carrier, "there [are] no rules [stating] that a contracting out notice has a time limit or expires, the weather did not permit the completion of this work in 2007, and there was no capital funding to pay for the project in 2008." Nothing in Appendix H voids the contracting notice issued in October 2007. "The Carrier's position is that no amount of planning would have led to the conclusion that the work was within the capabilities of the work force on the D&H, all employees including the Claimants were in fact working their normal hours including planned overtime, and no employees were furloughed." The Carrier maintains an adequate workforce to maintain the railway and perform regular maintenance work.

Having reviewed the record, the Board finds there is no dispute the claimed work is scope covered. That is, repair of the retaining wall is the kind of work that

is historically and customarily performed by the force. To contract out scope covered work, Rule 1 requires the Carrier to issue notice and conference upon request.

Under Rule 1.3 the Carrier issued a timely notice on October 2, 2007 which stated, in part, the following:

**“This work must be undertaken for the safety of railway employees and the safety and fluidity of the trains. This work needs to be completed in the current year. As our forces are currently working on main line bridge and culvert work, we do not have the required manpower available.**

\* \* \*

**The work is anticipated to start on, or about October 18, 2007, continuing until completed.”**

In response to the notice, the Organization requested information and conference. The Organization and the Carrier met in conference on November 1, 2007 to discuss the Carrier’s reasons for contracting - the force was not available in 2007 as it was “working on the main line bridge and culvert work.” On-property exchanges show the Carrier citing other reasons such as equipment and supervisors not available for this project.

Rule 1, nor Appendix H, compel the parties to reach an agreement during conference. Rule 1 and Appendix H do require a good-faith discussion of all reasons identified by the Carrier as the bases for contracting out.

The notice shows that the reason for outsourcing (“This work must be undertaken for the safety of railway employees and the safety and fluidity of the trains. This work needs to be completed in the current year [2007]”) were subject to discussion during conference on November 1, 2007. The Carrier represented to the Organization that the claimed work “needs to be completed in the current year [2007]” which is a time that the force was not available because of “mainline bridge and culvert work.”

The notice and reasons for outsourcing discussed in the November 2007 conference do not reveal the Carrier disclosing that the outsourced work, if not

started and completed by the end of 2007, would be scheduled and performed at an unknown later date depending on the Carrier's decision when to fund this project. Instead, the Carrier's representation to the Organization was the imperative need to complete the work in 2007 to ensure "safety of railway employees and the safety of and fluidity of the trains." Discussions occurred during conference in November 2007 in that context of circumstances with the Carrier asserting unavailable manpower. Since discussions focused on unavailable manpower in 2007, there could not have been any discussion of the Carrier's assertion in its submission to the Board that the force was unavailable in 2009 notwithstanding any extended planning. Although the project could not be completed in 2007, due to a factor beyond the Carrier's control, the Carrier's discretion with funding this project shows that scheduling of the force to perform this scope-covered work was solely controlled by the Carrier into 2009.

This situation of unavailable manpower and funding is similar to the situation in on-property Third Division Award 40453 where a violation of Rule 1 and Appendix H occurred. In that case, the Carrier "informed the Organization that the work needed to be done by the end of the year" and asserted funding would be foregone if the work was not completed as schedule. The funding deadline was exposed as a malleable deadline (analogous to the Carrier's funding discretion in this claim) which supported the Organization's position that the Carrier possessed flexibility to plan and schedule the work such that the force could be available. BMW also argued then, as now, that the Carrier's assertion of unavailable manpower must be considered with the Carrier's decision to furlough manpower. In this claim furloughs occurred in 2007, 2008 and early 2009. The precedent in on-property Third Division Award 40453 is applicable to the similar and analogous circumstances in this claim.

The Board finds that the imperative of safety concerns to complete the work as represented in conference during 2007 was dissipated and diminished by the Carrier's decision not to move forward in 2008. Topics of unavailable manpower in 2009 considered in the context of furloughed employees and funding discretion showing flexibility in scheduling the work are appropriate subjects for a post-2007 contracting conference. Those topics and the changed circumstances in 2009 were not subject to good-faith discussion. When that post-2007 conference did not occur to assess the changed economic circumstances, the Carrier violated Rule 1 and Appendix H. As there is a violation of Rule 1 and Appendix H, the requested remedy in Part 3 of the claim 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 11th day of January 2017.**