

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42508
Docket No. MW-41754
17-3-NRAB-00003-110381**

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 (New Century Construction/ING CIVIL Inc.) to perform Maintenance of Way work (build access road, bridge seats, concrete work on back wall and piers on Towers 1 and 2) on the south end of Bridge 592.52 on May 11, 2009 and continuing through June 12, 2009 (Carrier’s File 8-00707 DHR).**
- (2) The Agreement was violated when the Carrier assigned outside forces (New Century Construction/ING CIVIL Inc.) to perform Maintenance of Way work (repair work on piers on Towers 1 and 2) on the south end of Bridge 592.52 on June 15, 2009 and continuing through June 24, 2009 (Carrier’s File 8-00709).**
- (3) 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’.**
- (4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants T. Delamater, K. Chilson, B. Cooper and R. Penzone shall now be compensated at their respective and applicable rates of pay for their respective share of the six**

hundred and forty (640) total straight time hours and the forty-three (43) total overtime hours expended by the outside forces in the performance of the aforesaid work on May 11, 2009 and through June 12, 2009.

- (5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants T. Delamater, K. Chilson and R. Penzone shall now be compensated at their respective and applicable rates of pay for their respective share of the one hundred and four (104) total straight time hours expended by the outside forces in the performance of the aforesaid work on June 15 through June 24, 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.

This proceeding addresses two claims handled separately during on-property exchanges but joined and consolidated for presentation to the Board. The joined claims involve the same contractor, same work, same location and the same issues and arguments arising from the Carrier’s use of an outside force to perform work on a bridge at Mile Post 592.52 in Harpursville, New York, beginning on May 11, 2009 and continuing through June 24, 2009.

On April 20, 2009 the Carrier issued to the Organization a notice “RE: Contracting out Notice BR 592.52” stating as follows:

“Please be advised that under the provisions of the collective agreement, and per past practice, the carrier intends to hire a contractor to carry out bridge repairs at BR 592.52.

The scope of the work will include:

Reconstruct Bridge Seat of south abutment and reconstruct tower pedestal at tower #1.

The work is scheduled to begin on or about May 6, 2009.

The carrier’s forces will be unavailable to perform the work as they will be utilized elsewhere.”

On April 27, 2009, 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.” The Organization requested the following information:

- “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 the contractors.
Including the proposed work to be performed.**
- 6. A list of the contractors contacted to perform this work.**
- 7. A list of contractors who made a response.”**

A telephone conference convened on May 5, 2009 wherein the Organization stated the work involved routine bridge repairs and it requested a copy of the signed contract. During conference the Organization informed the Carrier that “B&B Department Employees performed this same work in 2005, either in the spring or summer, in 2006 in the fall around November and then in the fall of 2007 into 2008, January and February.” According to BMW, employees on furlough could perform the claimed work.

On June 16, 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 an outside force constructed an “access road, bridge seats, concrete work on back wall and piers on tower 1 and 2 on the south end of Bridge 592.52. This work in the past has been performed by B&B forces.” Information obtained by the Organization during the telephone conference on May 5, 2009 shows that the Carrier exerted no effort at any time to plan and schedule the claimed work for the force.

On September 8, 2009, the Carrier denied the claim stating it complied with Rule 1 and Appendix H as it provided notice on April 20, 2009 and engaged in a good-faith conference on May 5, 2009; however, the Claimants were not available for this work as the Carrier planned to use them elsewhere. The Claimants may have performed this work in prior years but there is a mixed practice on property for using an outside force.

On September 18, 2009, the Organization filed an appeal reiterating arguments from its claim filing and asserting there is no past practice to contract scope-covered work. The second subdivision roster was not exhausted and employees on furlough could perform the claimed work. Numerous Awards recognize that Claimants full-time employment is not dispositive of their availability to perform the claimed work.

On May 8, 2010, the Carrier denied the appeal on the basis that proper notice was provided, the Claimants were unavailable as they were fully employed elsewhere and there is a past practice to use contractors. The Carrier provided the Organization with the work schedule showing Claimant’s planned assignments through the end of the year. As for those B&B mechanics on furlough, the Carrier states that “employees listed on multiple seniority rosters listing does not mean that there should be multiple jobs.” 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.”

On September 20 and 27, 2010 a claims conference convened by telephone but no understandings were attained. The claim is before the Board for a final decision.

The Board reviewed the on-property exchanges and submissions including precedent cited by each party in support of its position. The Board finds the claimed work - described by the Organization as routine bridge repairs and not disputed by the Carrier - is scope-covered under Rule 1. In this regard, the Organization asserts that the force has performed this repair work in the past at this bridge. Since the work is scope covered, the Carrier is required to issue notice and conference, if requested, prior to contracting out.

The Carrier issued notice on April 20, 2009 identifying the work and reasons for outsourcing. A telephone conference convened on May 5, 2009. Prior to the conference, the Organization requested information focused on planning this work, equipment needed for this project and a copy of the contract.

In response to the Organization’s request for information, the Carrier disclosed during conference that the force was unavailable as the entire second sub-division gang was scheduled through the end of calendar year 2009 including overtime hours, the claimed work would require an estimated 1,000 hours to complete, funding for the project was approved in 2008, equipment required for the claimed work would be a drilling rig for horizontal drilling, excavator, front-end loader and iron workers’ tools. Although requested by the Organization, the Carrier did not disclose the Carrier’s proposal released to contractors nor did it identify the contractors responding to the proposal. The Organization requested a copy of the contract; however, conference was held on May 5, 2009 and the contract was not executed until June 12, 2009. After conference, the Carrier provided the Organization with a copy of the third-party contract and other documents showing planned capital projects for 2009 along with the Claimants’ payroll records and work history. The Board finds that good-faith discussions occurred during conference such that the intent and purpose of conference - as noted in on-property Third Division Award 41478 - was met.

The Organization asserts in its Submission that the Carrier exerted no effort, prior to the telephone conference on May 5, 2009 to comply with Appendix H and reduce the incidence of subcontracting. The disclosure and exchange of information shows facilitation of communication and the Carrier's consideration of the force, its planned project schedule through the end of calendar year 2009 and its scheduling the force for that work on regular and overtime hours. The Board finds there was consideration of the force in the context of the 1,000 hours estimated to complete this project. Use of the force on daily overtime or on weekend overtime rendered its use on this project not practicable.

The record reveals a good-faith difference between the parties over the B&B roster - whether it was exhausted or not exhausted - and further differences between the Organization's position that employees were on furlough and the Carrier's position that no employees were on furlough during the time covered by this claim. These types of discussions and considerations are appropriate for discussion, and were discussed, under Rule 1.4 and Appendix H. In this regard, Appendix H does not foreclose or eliminate contracting out but subjects it to a case-by-case fact determination balancing force usage with outsourcing "to the extent practicable" which occurred with this claim.

Precedent in on-property Third Division Award 38149 provides guidance for the Board's review in this proceeding.

"After carefully reviewing the record, the Board concludes that the Carrier gave the Organization ample notice and opportunity for discussion before contracting out the work in question . . . the Organization . . . had multiple discussions with the Carrier concerning the matter. While it is clear that the Organization did not agree with the Carrier's position and continued to disagree 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 this work."

Applying the precedent of on-property Third Division Award 38149 to the circumstances in this claim, the Board finds that the Organization has not established the alleged rules violations. Thus, the Carrier did not violate Rule 1 and Appendix H. Accordingly, this 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 11th day of January 2017.