

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42511  
Docket No. MW-41923  
17-3-NRAB-00003-120239**

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

- (1) The Agreement was violated when the Carrier assigned outside forces (ING Civil Construction) to perform Maintenance of Way work (remove access road to culvert and site cleanup) at Mile Post 503.7 on May 10, 11 and 12, 2010 (Carrier’s File 8-00782 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 T. St. Dennis and T. Hurlburt shall now each be compensated for twenty-four (24) 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 October 30, 2009, the Carrier states it discovered a “large sinkhole” in the vicinity of Mile Post 503.7 which posed an “emergent situation.”

On November 13, 2009, the Carrier issued to the Organization a notice “RE: Contracting Out – Culverts replacement at FRMA 503.77” wherein the Carrier stated “[t]his culvert work is being contracted to a third party due to the degree of difficulty of this highly specialized work” with the work scheduled to begin on November 30, 2009.

The Carrier defined the “scope of the work” as –

- Using the “Jack and Bore” method. 503.77 will be replaced by a 72-inch steel pipe. The Carrier will be contracting this project in its entirety to a third party including all necessary excavation.

On November 13, 2009, the Organization informed the Carrier that it opposed contracting 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 but not owned by the Carrier. 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.**

**The Organization requested a conference "to meet and confer in good faith" before the claimed work commenced on November 30, 2009. The Carrier proceeded to contract without conference.**

**On April 27, 2010, the Carrier notified the Organization that the contractor would complete the work "as soon as practicable" as weather conditions had prevented completion as scheduled. "Said work was covered under, and is not in addition to, the scope of work as described in the Carrier's original Contracting Out Notice."**

**On May 12, 2010, the Organization requested a conference on the "Contracting Out Notice Dated April 27, 2010." This is scope covered work that employees perform if the Carrier would schedule it for the force. The Carrier failed to make a good faith effort to use the force. The Organization renewed its request for documents and information.**

**On June 11, 2010, the Organization filed a claim alleging the Carrier violated Rule 1 and Appendix H, among others, when it used an outside force "at Culvert**

503.7 removing access roads and final site cleanup for a culvert project at Esperance, NY.” According to the Organization, “the work performed by the contractor included removing access road to culvert, reseeding the bank, repair right of way and cleanup and restore the area near CPF 503 where material had been stock piled during the culvert project last winter, work that wasn’t complete due to the cold and frozen conditions at the end of Dec. 2009. The contractor used a front loader, Uck truck and excavator to perform this work.”

On June 16, 2010 the Carrier denied the claim asserting it complied with Rules 1.3, 1.4 and 1.5. That is, the notice set forth the reason for outsourcing, the scope of work stated the contractor would perform “all necessary excavation.” The Carrier states “small parcels of the work included in the original contract could not have been apportioned off.” The Carrier enters conference for good-faith discussion but the only measure of good faith, under the Organization’s standard, is cessation of all contracting.

On August 4, 2010, the Organization filed an appeal and the Carrier denied the appeal on January 19, 2011.

Conference convened on June 14 and June 15, 2011 but the claim remains unresolved. This matter is before the Board for a final decision.

The Board finds this claim (“remove access road to culvert and site cleanup”) is intertwined with and connected to two other claims involving culvert installation at Mile Post 503.7. One of the two intertwined and connected claims (“install culvert and related work”) is pending before the Third Division. The other claim (“build road, cut trees and related work”) was adjudicated in Third Division Award 42412 where the Board found “insufficient evidence for the Carrier’s affirmative defense of an emergency” and sustained the claim on that basis.

The Carrier, in this claim (“remove access road to culvert and site cleanup”), also invokes the “emergent situation” affirmative defense. Positions argued in this claim are comparable to, if not identical, to those argued in Third Division Award 42412. The Board applies the decision in Award 42412 that there is insufficient evidence to sustain the Carrier’s affirmative defense of an emergency in this claim. The Carrier contracted out scope covered work prior to conference convening and, in doing so, violated Rule 1. Given the violation of Rule 1, this claim will be sustained. The requested remedy is granted as it is consistent with on-property Third Division Awards 36851, 40453, 40454, 40456 and 40457.

**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.**