

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42535
Docket No. MW-42622
17-3-NRAB-00003-140253**

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 of the System Committee of the Brotherhood:

- (1) The Agreement was violated when the Carrier assigned outside forces (ING/Civil Construction 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 September 26, 2011 and continuing (Carrier’s File 8-00893 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 M. Lawrence, M. Makos, J. Johnson, T. Vanderpool, K. Chilson and R. Nichols 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 September 26, 2011 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 July 21, 2011, the Carrier issued to the Organization a notice "RE: Contracting Out - Nicholson Bridge Concrete Remediation" stating as follows:

"CPR/DHR is planning to start concrete remediation on a portion of the Nicholson Bridge at Mile 653.22 of the Sunbury Subdivision, beginning around August 8, 2011.

Due to the complex nature and scope of this project involving specialized construction methods on one of the largest concrete railway bridges in the world, neither CP's workforce nor management possess the specialized equipment or skills to carry out this work. Therefore, CPR/D&H intends to contract this project out in its entirety and will not be fragmenting the work to involve D&H/BMWE employees. Should it become necessary for the contractor to foul tracks at any time during the project, the D&H/BMWE employees will be assigned to provide track protection at that time.

The work will commence around August 8, 2011 and be completed later in 2011.

Carrier's right to subcontract is based upon Agreement language, Board Award and past practice. Should you desire to discuss further, Carrier is available to do so at 11:00 a.m., August 3, 2011, in

conference room Clifton Park, NY. Engineering Representative will be available to address any questions.”

On July 23, 2011, the Organization informed the Carrier of its opposition “to contracting out any work that accrues to the Bridge and Building (B&B) and the (M/W) Maintenance of Way Departments.” Under Rule 1, “there is no condition that would allow the Carrier to contract out work within the scope of this Agreement” as assertions of unavailable employees and unskilled force are excuses and show the Carrier’s failure to maintain an adequate level of manpower for common carrier service and failure to train the force as required by the Agreement. The Carrier also fails to identify the specialized construction methods and equipment.

Since the Carrier states the work is scheduled to being on August 8 and the contracting-out notice is dated July 21, the Organization states that the Carrier exerted no effort to schedule the force to perform the work. In accordance with Third Division Award 4765, the Carrier’s prerogative is to control the size and abilities of its force but when the Carrier assert its force is unqualified, it is required to provide the training or hire skilled personnel and not unilaterally set aside the Agreement by using an outside 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 are the estimated man hours that would be needed to do this work?
4. A copy of the proposal that was put out for bid to contractors.
5. A list of the contractors contacted to perform this work.
6. A list of contractors who made a response.
7. Will the Carrier advertise a B&B Maintenance Gang to work with this contractor?

8. How many positions and what positions will be advertised in this gang?
9. When this contractor is working on the Main Line they will need to have On Track Protection provided for them as outlined in the Roadway Workers Protection.

This will be performed by a B&B Foremen from the B&B Department correct?

The Organization concludes: "Basic maintenance work is clearly reserved to BMWED members who are fully qualified, ready and willing to perform this work." Contracting out scope-covered work represents a loss of work opportunity.

On August 3, 2011 conference convened; however, there was no understanding reached on the Carrier's notice to contract.

On August 18, 2011, the Carrier issued a post-conference letter to the Organization stating as follows:

"Nicholson Bridge Concrete Remediation Project"

The scope of the work involves the rehabilitation of the structure over the public highway that includes the milling of outside edge of the arch ribs and columns. This requires testing of concrete areas to determine the degree of deterioration. This take a level of experience that our work force and supervisors don't have, and the contractor possess.

[Division Engineer] Higgins advised that the contractor was required to design and build a system to protect from debris removed from the sections of bridge directly over the public highway, design a fall protection system for employees, along with a work platform, a process to mill the outside edge of the arch ribs and columns, and a system to deliver concrete to the areas being renewed.

The Carrier does not have the capacity to train its employees in the rehabilitation of this complicated structure.

The contractor's work is warranty, the contractor assumes all liability for required daily inspection of the work platforms, any damages to private property, state highway and the General Public.

To reiterate from our meeting on August 3rd, this project required knowledge in a full range of construction skills by workmen who have a great proficiency and experience in each of the areas where the knowledge and ability are required.

The Organization provided nothing at conference as to show how the D&H/BMWE work force could perform all aspects of the work in addition to all necessary work which is part of their regular assignment and meeting the time frame required."

On August 23, 2011, the Organization issued its post-conference letter to the Carrier stating that "concrete remediation of bridges is in connection with bridge maintenance operations and reserved to BMWED members by Rule 1 - Preamble." Since the force customarily and traditionally performs bridge maintenance, the force is qualified and available to perform this work "if only the Carrier will assign them thereto." The last time concrete remediation was performed on this bridge the force handled it.

The Carrier did not identify "specialized construction methods" during conference; this shows the Carrier's lack of a good-faith attempt to reach an understanding when they cannot identify the equipment or methods which it relies as the basis for outsourcing. It also denies the General Chairman an opportunity to engage in good-faith discussions. Furthermore, supervisors or managers labeled by the Carrier as unqualified to oversee this project is not a basis for outsourcing.

Contracted-out work on the Nicholson Bridge has been ongoing in phases since 2009; the Carrier refuses to train employees, obtain equipment by rent or lease or use its own equipment for the force to perform bridge maintenance. In this regard, there are many bridges in the Carrier's territory that require rehabilitation due to their age. Bridges require periodic, ongoing maintenance. The Carrier fails to schedule the force when planning this work thereby demonstrating a lack of managerial foresight.

The Carrier refused to consider the Organization's suggestion of an outside consultant with the force performing the work "during daily or weekend overtime

hours. This can be accomplished by rearranging the schedule of their other work . . . rescheduling the work the Carrier proposes to assign to the outside contractor, or by a combination of these options.” The Agreement between the Parties is for work and not equipment which can be obtained by purchase or rent and training employees to use.

Outsourcing without exhausting a good-faith attempt to reach an understanding violates Rule 1. The Organization is not required by Appendix H or Rule 1 to convince the Carrier not to outsource. Rather, the Carrier is “to demonstrate to the Organization that ‘good faith’ efforts were made to secure the work for [the force] in what is supposed to be ‘good faith’ attempts to reduce the incidence of sub-contracting” under Appendix H.

On September 13, 2011, the Carrier responded to the Organization’s “misleading statements” in the Organization’s post-conference letter. Although the force performs “normal maintenance masonry work” the force has not “performed this type of work, to the extent and magnitude” (e.g., complete remediation) such that the “the scope work outlined in this project is work not customarily and traditionally performed” by the force. “This work requires the testing of deterioration in, around and under the arches areas and the removal of outer edges of the arch rings to determine the proper method of repairs, along with solutions to any unforeseen complications.” This is the first major remediation of the bridge since its construction by contractors in the early 1900s.

“The design of the scaffolding system, (which is approximately 140 feet in height and 180 feet wide) must withstand inclement, high winds and protect the public highway system, private property and the general public below this massive structure. The contractor would provide scaffolding system along with a fall protection, concrete removal and delivery system, which would be far safer than anything the Carrier owns or could rent. The project is work well beyond the capabilities of the Carrier’s work force and Supervisors.”

The force performed emergent work on parapets in the past to stabilize the deterioration. Working out of a bucket truck (the Organization’s suggestion) is impracticable as this project is not the usual scaling and patching of concrete. The Carrier’s supervisors are not design engineers or bridge builders and this project requires the full range of construction skills by workers, foremen and supervisors.

A consultant “cannot ascertain a solution to any unforeseen complications” and “use of the Carrier’s unqualified workforce along with the hiring of an outside consultant would not be economically feasible.” As for training, the Carrier is not required to train employees on specialized equipment or tasks which are in demand for a one-time performance. The Organization’s assertion for training requires the Carrier to train the entire force knowing that employees can move to any position by seniority thereby being unavailable for a project. Unlike a steel bridge where defects are recognized by normal inspection, the initial inspection of a small deteriorated area may lead to significantly larger problems. Finally, the Organization refuses to recognize the phrase “to the extent practicable” when quoting Appendix H for reducing the incidence of contracting and increasing the use of the force.

On October 21, 2011, 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 beginning September 26, 2011 and resulting in a loss of work opportunity for the force. The claim restates the Organization’s position and arguments set forth in letters and conferences following the notice issued on July 21, 2011. In short, the Carrier did not engage in a good-faith effort to integrate or use the force in any manner for this project.

“The Organization has been more than willing and has done everything in its power to work with the Carrier . . . but has not been reciprocated with the same effort from the Carrier. While this Organization recognizes that the Carrier stated that they did take some of the Organization’s ideas into consideration (that they later denied); the Carrier never specified, identified or supported why utilizing the Carrier’s forces in some capacity on such a long term project could not be feasible or practicable.”

On December 7, 2011, the Carrier denied the claim stating it complied with Rules 1.3, 1.4 and 1.5 and engaged in good-faith discussions during two conferences (July 24 and August 3, 2011). “During conferences a number of ideas were exchanged” and “certain standard suggestions that may have been offered in previous conferences would have already been considered and in some cases may not be feasible.” The Carrier states that “fragmenting work to include the Carrier’s forces can complicate the process and lead to unsafe conditions for the Contractor as well as the Carrier’s forces.” The Organization makes misleading statements about exchanges during conference and presents issues not relevant to the claim.

On January 30, 2012, the Organization filed an appeal. The Organization disagrees with statements and positions advanced by the Carrier. The Organization submits an employee statement indicating no special equipment has been used on this project and an email providing the age of individuals used by the contractor on this project; these individuals are in their 20s which means the Carrier's statement as to needing experienced (ten to 15 years) personnel for this work is not established. The Organization states the Carrier refuses to divulge the estimated hours needed for this project and continues to fail to identify specialized equipment. Given the length of the project (ten to 12 years) at Nicholson Viaduct, failure to integrate or use the force on any of the work is not a good faith attempt to reduce outsourcing.

Following mutually-agreed upon extensions of time, the Carrier denied the appeal on April 4, 2013. The Carrier states it complied with Rule 1 (notice, conference) and engaged in good-faith discussions. For example, the Carrier informed the Organization that the scaffolding and fall protection systems would be designed by the contractor, "clearly one of a kind and specialized."

The force does not customarily and traditionally perform the kind of mason work involved with this project: "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 had never performed in the past." This is not routine, normal maintenance work. The Carrier states it "could not accurately supply the man hours as unforeseen deterioration would have extended the project. Case in point were the side wall/parapets which were completely deteriorated and needed to be replaced, an unforeseen delay." According to the Carrier, the Organization would possess a general estimate of the hours for this project if (as the Organization asserts) the force typically performs this kind of work.

CPR states - -

"The contractor, who performs this type of work, is more up to date on technology, construction methods and has the new materials that are introduced on the market to perform this work more efficient than the Carrier The combination of contractors and [the force] working at extreme heights at an unknown task at hand (condition of concrete and the method of repairs) would be a high risk situation, we are not talking about contractors and [the force]

working a solid level ground pouring concrete. The Carrier is not required to fragment this project out.”

Notwithstanding the asserted “youthful” ages of the contractor personnel performing this work, that personal information is in an anonymous e-mail. Data and information provided by the contractor during the contracting process met the Carrier’s requirements. The contractor is responsible and liable for the work.

As for training, it is impracticable to train employees on specialized equipment designed and built by a contractor and not available for rent or lease. Employees’ statements do not confirm they have performed the type of concrete remediation work involved with this project.

On April 17, 2013, the Organization responded to the Carrier’s denial of the appeal because the Organization “does not agree with the Carrier’s letter and the premise it is written on due to the Carrier’s importation of misguided references, innuendos and opinions in the absence facts that has compelled the Organization to respond.”

On October 17 and 18, 2013 conference convened on the claim but a resolution or understanding was not attained. The claim is now before the Board for a final decision.

The Board reviewed the voluminous on-property exchanges as well as the submission of each party presenting its arguments and precedent in support of its position. Since the claim involves an allegation of a rules violation, the well-settled precedent in the Third Division is that the burden of proof resides with the Organization to establish the violations.

The Carrier issued a timely notice of its intent to contract including the reasons for doing so and the anticipated date the work would commence. The Organization asserts this is scope covered work. The Board finds the work is, arguably, maintenance of bridges and structures and, as such, is within Rule 1, the general scope rule. There is no dispute that the force has customarily and traditionally performed the work of routine concrete patching on bridges; however, the evidence shows that the rehabilitation of the Nicholson Bridge is a significant project and not routine remediation. The contractor fabricated equipment for use to perform the work and, as the extent of deterioration would be determined during the process of remediation, would determine the appropriate equipment for use to

rehabilitate the project. Since this is the first effort at remediation of the concrete viaduct since its construction in the early 1900s there would be no history of the force performing work of this magnitude. Furthermore, the Board is persuaded that specialized skills and equipment were needed for the project and not available to the Carrier in its own inventory of equipment or available for rent. The Carrier contracted for a range of skills with the contractor that the Carrier determined was not available within its force.

The record shows that Carrier issued a timely notice of its intent to contract. The notice contained reasons for outsourcing and an anticipated date the work would commence. The parties met in conference to reach an understanding on the Nicholson Bridge rehabilitation. Rule 1 is a mutual obligation to engage in a good-faith attempt to reach an understanding; it does not compel an understanding. The parties did not enter conference with tabula rosa mindsets over the scope of this project as it has been ongoing in phases since 1990 with prior claims and conferences. There was no understanding reached. When that occurs, Rule 1 states the Carrier may proceed to contract. As for Appendix H, it states the incidence of subcontracting is to be reduced with an increase in the use of the force provided contracting is preceded by notice and conference which occurred in this situation.

As noted in Third Division Award 32251, the burden of proof resides with the Organization in this proceeding to establish the alleged rules violations. Given the totality of the record, the Board finds 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 6th day of March 2017.