Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42296
Docket No. MW-41140
16-3-NRAB-00003-090520

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 Employes**
(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 that:

(1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (unload rail) between Mile Posts CPC 56 and CPC 58 at Fort Edward, New York on May 19, 20, 21 and 22, 2007 (Carrier's File 8-00573 DHR).

(2) The Agreement was further violated when the Carrier failed to comply with the notice requirements regarding 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 P. Robinson, D. Jordan, K. Bigelow, J. Radzikowski, R. Albert, K. Dubanowitz and M. Keyes shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and for thirty-two (32) hours at their respective time and one-half 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.

In May 2007 Canadian Pacific Railway (CPR) leased two acres of its land at Fort Edwards, New York, to the General Electric Company (GE). The leased land - situated next to CPR's mainline track - adjoined 110 acres of land purchased by GE from private owners. GE entered into a contract with Railworks to build a 10,000-foot siding on the land leased from CPR. The leased and purchased land enabled GE to comply with a consent order requiring GE to dredge and remove PCBs from the Hudson River.

By letter dated March 14, 2007 the Carrier stated to the Organization:

> **"RE: <u>General Electric Track Contractors. Ft Edward NY</u>**
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> **As information, [GE] will have contractors grading and constructing 10,000 feet of GE-owned track on land leased from CPR at Fort Edwards NY. CPR forces will be installing the Mainline Turnouts. Work is scheduled to start on or about April 1, 2007. It should be noted that as part of the overall [GE] project, we are planning to have CPR forces construct a 1600-foot extension to a siding at Watervliet NY late 2007."**

The Organization labeled the Carrier's letter as a "contracting out notice" and requested a conference. BMWE also informed the Carrier that the track construction was scope-covered work (Rule 1 and Appendix H). It noted the absence of reasons in the Carrier's letter for contracting and the availability of qualified BMWE-represented forces to perform the work. The Organization requested a copy of the CPR-GE lease and other contracts involved with the claimed work.

A conference was convened on March 22, 2007 wherein the Organization renewed its request for a copy of the lease to assess, in the context of good-faith discussions, CPR's control of the leased land. The Organization noted the absence of reasons in the Carrier's letter for contracting scope-covered work. The Carrier stated that the claimed work was not subject to Rule 1 based on the contention it falls outside of the Agreement and the letter was an informational notice, not a contracting notice. A follow-up letter in April 2007 from the Carrier to the Organization memorialized that a conference had been held on March 22, 2007 with good-faith discussions.

On July 19, 2007 the Organization filed a claim "on behalf of all employees working on the Rail Distribution Train on the dates of Saturday, May 19, 2007 through Tuesday, May 22, 2007 when the Carrier hired and or allowed an outside contractor to perform work of distributing [continuous welded rail] at the . . . GE project" without advance notice of contracting out scope-covered work to outside forces in violation of Rules 1, 3, 4, 11, 18, 44, 57 and Appendices H, N and Q.

The Carrier issued a claim denial on August 14, 2007 stating that a 15-day notice issued on February 20, 2007 and good-faith discussions occurred during conference on March 22, 2007. "As stated in our 15-day letter, the property is leased to GE, the yard will belong to GE and GE hired contractors to unload the rail for their building of their yard. As this is GE's project, the work claimed is not covered under "the scope and terms of the . . . Agreement."

An appeal followed on October 17, and a denial of the claim appeal issued on December 10, 2007. A conference was convened on May 1, 2008 wherein each Party restated its positions without resolution of the claim.

At the outset, the Board must determine whether the claimed work falls within the scope of Rule 1. Employees' statements submitted by the Organization establish that unloading rail from the Carrier's rail train is work that has been historically and customarily performed by BMWE-represented forces. The Carrier does not dispute the statements. Consequently, the Board finds that unloading rail is covered by Rule 1 inasmuch as BMWE-represented employees have historically and customarily performed it.

The Carrier relies on Third Division Award 26103 to support its position that the claimed work falls outside the scope of the Agreement, because ". . . the

disputed work is not performed at the Carrier's instigation, not under its control, not performed at its expense and not exclusively for its benefit, the work may be contracted out without a violation of the Scope rule."

Award 26103 also states that other Awards ". . . extended the Carrier's liability to include circumstances where the Carrier involved itself as principal or agent in the securing of an Agreement with a third party under which the Carrier circumvented its known existing contractual arrangements in relinquishing control to the third party for contracting."

To assess the Carrier's position that the project was out of its control, thereby removing the work from Rule 1 coverage, the Organization requested a copy of the lease. The Carrier provided the first and last pages and asserted confidentiality as the basis for not releasing the entire lease. There are two leases -- one dated May 2, 2007 and the other dated May 3, 2007. The first page for each lease states:

> **"Lessee [GE] desires to enter upon certain real property of Lessor [CPR] in Fort Edward, New York, as defined herein ('Lease Property') for the purpose of conducting certain construction and rail yard operations as further specified herein . . . . Lessor desires to facilitate Lessee's construction and railroad operations on Lessor's property under the terms and conditions set forth in this lease."**

The terms and conditions are unknown because the Carrier did not disclose them although it was requested to do so. The terms and conditions would reveal the Carrier's control, or loss of control, and whether the terms and conditions enabled the Carrier to circumvent the Agreement. Although the Carrier leased its land to a private, outside company, the claimed work was performed on the Carrier's main line using Carrier equipment. The outside company's access to the Carrier's property and Carrier equipment is dependent upon the Carrier having authorized such access. As for confidentiality foreclosing release of the terms in the lease, the record does not establish whether that is based on law, court order or a mutually negotiated non-disclosure arrangement between GE and the Carrier.

Third Division Award 37047 presents a comparable situation to this claim where a carrier entered into a lease of its property with a private company involving work on the carrier's property and the private company entered into a

contract with another private company to perform the work. The carrier asserted loss of control and confidentiality as does CPR in this claim; this is an affirmative defense for CPR to prove. Award 37047 is illustrative for assessing this affirmative defense:

> **"It may be that the terms of the lease in dispute were sufficient for the Board to conclude that the Carrier did not retain enough control over the leased property for it to be responsible for contracting of work at the behest of the lessee. See Third Division Award 37048 and cases cited ('In these kinds of contracting out disputes, the issue is the extent of control retained by the Carrier over the leased property'). See also, Third Division Award 30947 ('The track upon which the contractor performed the work was under the control of the East Jersey Railroad pursuant to the terms of its lease with the Carrier. The lease made the East Jersey Railroad responsible for maintenance of the track. The Carrier did not hire the contractor to perform the work. The work in dispute was therefore outside the scope of the Agreement').**
>
> **But we cannot undertake an analysis of the terms of the lease in this case to determine the extent of control retained by the Carrier over the leased property. The above cited Awards concerning the failure of a carrier to produce a copy of a requested lease on the property make it clear that if the Carrier defends against a contracting out claim on the basis that a lease arrangement divested it of control over the leased property and the Organization requests a copy of the lease on the property, the Carrier is obligated to produce a copy of that lease to the Organization <u>on the property</u> and not to the Board in the first instance and failure to do so requires that the claim be sustained."**

Further illustration of the significance for disclosing the terms and conditions as they pertain to control is presented in Third Division Award 37677.

> **"It may be true that the terms of the Lease Agreement were sufficient for the Board to conclude that the Carrier's position would be ultimately sustained. However, as the lease was not produced, we cannot undertake an analysis of the terms of the lease in this case to determine the extent of control retained by the Carrier over the leased property. As noted above, when an organization makes a request on**

the property for a lease, the carrier is obligated to produce, on the property, a copy of the lease to the Organization. Failure to do so requires that the claim be sustained."

Precedent in Awards 37047 and 37677 will be followed in this claim. Because the Carrier did not disclose the terms and conditions of the lease to the Organization, and absent evidence establishing non-disclosure based on law or court order, the Carrier has not established its affirmative defense. This claim is sustained for lost work opportunities on leased property. The Claimants will be made whole at their respective rates of pay for the hours dedicated to unloading rail on the leased property.

Third Division Awards 26103 and 26481, submitted by the Carrier, are distinguishable. With respect to Award 26103, the claim was denied because the carrier was not the principal securing a contract with a third party and possessed no knowledge of the contract's contents, whereas the claim in this proceeding shows that the Carrier was the principal in its lease with GE and, as a result, would have knowledge of the lease but did not disclose such knowledge. In Award 26481, another claim denied, ". . . the site involved in the fencing job was property that was leased by [the] carrier to another company." Whether the carrier was (1) a principal securing the lease or (2) possessed knowledge of its contents cannot be determined from reviewing Award 26481.

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 15th day of June 2016.