

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42325  
Docket No. MW-41301  
16-3-NRAB-00003-100179**

**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 that:**

- (1) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work (new siding track construction) between Mile Posts A56 and A58 at Fort Edward, New York on August 8, 2007 through August 31, 2007 (Carrier’s File 8-00588 DHR).**
- (2) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work (new siding track construction) between Mile Posts A56 and A58 at Fort Edward, New York on September 4, 2007 through October 15, 2007 (Carrier’s File 8-00593).**
- (3) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work (new siding track construction) between Mile Posts A56 and A58 at Fort Edward, New York on November 12, 2007 through December 10, 2007 (Carrier’s File 8-00604).**
- (4) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work (new siding track construction) between Mile Posts A56 and A58 at Fort Edward, New York on May 12, 2008 through May 31, 2008 (Carrier’s File 8-00616).**
- (5) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work (new siding track construction) between Mile Posts A56 and A58 at**

Fort Edward, New York on June 9, 2008 through June 30, 2008  
(Carrier's File 8-00634).

- (6) The Agreement was violated when the Carrier assigned outside forces (Railworks) to perform Maintenance of Way work (new siding track construction) between Mile Posts A56 and A58 at Fort Edward, New York on July 1, 2008 through July 28, 2008 (Carrier's File 8-00635).
- (7) 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'.
- (8) As a consequence of the violations referred to in Parts (1) and/or (7) above, Claimants R. Gordon, D. Jordan, J. Lavin and T. Aurilio shall now each be compensated for one hundred thirty-six (136) hours at their respective straight time rates of pay and for sixty-eight (68) hours at their respective time and one-half rates of pay, Claimant R. Wright shall now be compensated for one hundred twenty (120) hours at his respective straight time rate of pay and for sixty (60) hours at his respective time and one-half rate of pay, Claimant K. Herrington shall now be compensated for ninety-six (96) hours at his respective straight time rate of pay and for forty-eight (48) hours at his respective time and one-half rate of pay, Claimants N. Smith and R. Lindsay shall now each be compensated for eighty-eight (88) hours at their respective straight time rates of pay and for forty-four (44) hours at their respective time and one-half rates of pay, Claimants J. Rich and F. Lipka shall now be compensated for seventy-two (72) hours at their respective straight time rates of pay and for thirty-six (36) hours at their respective time and one-half rate of pay, Claimant J. Jackson shall now be compensated for sixty-four (64) hours at his respective straight time rate of pay and for thirty-two (32) hours at his respective time and one-half rate of pay, Claimant D. Therrien shall now be compensated for forty-eight (48) hours at his respective straight time rate of pay and for twenty-four (24) hours at his respective time and one-half rate of pay, Claimant V. Miner, III shall now be compensated for twenty-four (24) hours at his respective straight time rate of pay and for twelve (12) hours at his respective time and one-half rate of pay, Claimant E. Pratt shall now be compensated for sixteen (16) hours at his respective straight time rate of pay and for eight (8) hours at his respective time and one-half rate of pay and Claimant M. Berner shall now be compensated for eight (8)

hours at his respective straight time rate of pay and for four (4) hours at his respective time and one-half rate of pay.

- (9) As a consequence of the violations referred to in Parts (2) and/or (7) above, Claimant R. Gordon shall now be compensated for two hundred eight (208) hours at his respective straight time rate of pay and for one hundred sixteen (116) hours at his respective time and one-half rate of pay, Claimant D. Jordan shall now be compensated for one hundred seventy-six (176) hours at his respective straight time rate of pay and for one hundred (100) hours at his respective time and one-half rate of pay, Claimant F. Lipka shall now be compensated for one hundred forty-four (144) hours at his respective straight time rate of pay and for eighty-four (84) hours at his respective time and one-half rate of pay, Claimant D. Therrien shall now be compensated for one hundred twelve (112) hours at his respective straight time rate of pay and for sixty-eight (68) hours at his respective time and one-half rate of pay, Claimant J. Lavin shall now be compensated for one hundred four (104) hours at his respective straight time rate of pay and for sixty-four (64) hours at his respective time and one-half rate of pay, Claimant T. Aurilio shall now be compensated for eighty (80) hours at his respective straight time rate of pay and for fifty-two (52) hours at his respective time and one-half rate of pay, Claimant R. Wright shall now be compensated for fifty-six (56) hours at his respective straight time rate of pay and for forty (40) hours at his respective time and one-half rate of pay, Claimant K. Herrington shall now be compensated for forty-eight (48) hours at his respective straight time rate of pay and for thirty-six (36) hours at his respective time and one-half rate of pay, Claimant J. Rich shall now be compensated for forty (40) hours at his respective straight time rate of pay and for thirty-two (32) hours at his respective time and one-half rate of pay, Claimant J. Jackson shall now be compensated for thirty-two (32) hours at his respective straight time rate of pay and for twenty-eight (28) hours at his respective time and one-half rate of pay, Claimant M. Berner shall now be compensated for twenty-four (24) hours at his respective straight time rate of pay and for twenty-four (24) hours at his respective time and one-half rate of pay, Claimant R. Lindsay shall now be compensated for eight (8) hours at his respective straight time rate of pay and for four (4) hours at his respective time and one-half rate of pay and Claimant E. Pratt shall now be compensated for twelve (12) hours at his respective time and one-half rate of pay.
- (10) As a consequence of the violations referred to in Parts (3) and/or (7) above, Claimants R. Wright and D. Therrien shall now

each be compensated for forty-eight (48) hours at their respective straight time rates of pay and for twelve (12) hours at their respective time and one-half rates of pay, Claimants E. Pratt, D. Gaston, R. Bump, Jr. and B. Brown shall now each be compensated for forty (40) hours at their respective straight time rates of pay and for ten (10) hours at their respective time and one-half rates of pay, Claimants C. Laymon, W. Hoerning and S. Brooks shall now each be compensated for thirty-two (32) hours at their respective straight time rates of pay and for eight (8) hours at their respective time and one-half rates of pay, Claimant F. Howatch shall now be compensated for twenty-four (24) hours at his respective straight time rate of pay and for six (6) hours at his respective time and one-half rate of pay, Claimants D. LaChappelle and G. Foster shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and for four (4) hours at their respective time and one-half rates of pay and Claimants R. Gordon, G. Lawyer and W. Wade, Jr. shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for two (2) hours at their respective time and one-half rates of pay.

- (11) As a consequence of the violations referred to in Parts (4) and/or (7) above, Claimants R. Gordon, D. Jordan and N. Smith shall now each be compensated for one hundred twelve (112) hours at their respective straight time rates of pay and for thirty-eight (38) hours at their respective time and one-half rates of pay, Claimant J. Lavin shall now be compensated for one hundred four (104) hours at his respective straight time rate of pay and for thirty-six (36) hours at his respective time and one-half rate of pay, Claimants T. Aurilio and J. Christman shall now each be compensated for ninety-six (96) hours at their respective straight time rates of pay and for thirty-four (34) hours at their respective time and one-half rates of pay, Claimant F. Lipka shall now be compensated for eighty-eight (88) hours at his respective straight time rate of pay and for thirty-two (32) hours at his respective time and one-half rate of pay, Claimant K. Herrington shall now be compensated for seventy-two (72) hours at his respective straight time rate of pay and for twenty-eight (28) hours at his respective time and one-half rate of pay, Claimant J. Rich shall now be compensated for forty-eight (48) hours at his respective straight time rate of pay and for twenty-two (22) hours at his respective time and one-half rate of pay, Claimant R. Lindsay shall now be compensated for forty-eight (48) hours at his respective straight time rate of pay and for twelve (12) hours at his respective time and one-half rate of pay, Claimant W. Hoerning shall now be compensated for thirty-two (32) hours at his respective straight time rate of pay and for eight (8) hours at

his respective time and one-half rate of pay, Claimant S. Brooks shall now be compensated for twenty-four (24) hours at his respective straight time rate of pay and for six (6) hours at his respective time and one-half rate of pay, Claimant M. Berner shall now be compensated for sixteen (16) hours at his respective straight time rate of pay and for fourteen (14) hours at his respective time and one-half rate of pay, Claimant J. Jackson shall now each be compensated for sixteen (16) hours at his respective straight time rate of pay and for four (4) hours at his respective time and one-half rate of pay and Claimant V. Miner, III shall now be compensated for eight (8) hours at his respective straight time rate of pay and for two (2) hours at his respective time and one-half rate of pay.

- (12) As a consequence of the violations referred to in Parts (5) and/or (7) above, Claimant D. Jordan shall now be compensated for one hundred twenty-eight (128) hours at his respective straight time rate of pay and for fifty-two (52) hours at his respective time and one-half rate of pay, Claimants J. Lavin, F. Lipka and T. Aurilio shall now each be compensated for one hundred twelve (112) hours at their respective straight time rates of pay and for thirty-eight (38) hours at their respective time and one-half rates of pay, Claimant R. Lindsay shall now be compensated for eighty-eight (88) hours at his respective straight time rate of pay and for twenty-two (22) hours at his respective time and one-half rate of pay, Claimant R. Gordon shall now be compensated for eighty (80) hours at his respective straight time rate of pay and for twenty (20) hours at his respective time and one-half rate of pay, Claimant K. Herrington shall now be compensated for seventy-two (72) hours at his respective straight time rate of pay and for eighteen (18) hours at his respective time and one-half rate of pay, Claimants S. Brooks, J. Hoffman and W. Hoerning shall now each be compensated for sixty-four (64) hours at their respective straight time rates of pay and for twenty-six (26) hours at their respective time and one-half rates of pay, Claimant M. Brenner shall now be compensated for fifty-six (56) hours at his respective straight time rate of pay and for twenty-four (24) hours at his respective time and one-half rate of pay, Claimant J. Christman shall now be compensated for forty-eight (48) hours at his respective straight time rate of pay and for twenty-two (22) hours at his respective time and one-half rate of pay, Claimant C. Gordon shall now be compensated for forty (40) hours at his respective straight time rate of pay and for ten (10) hours at his respective time and one-half rate of pay, Claimant J. Rich shall now be compensated for thirty-two (32) hours at his respective straight time rate of pay and for eight (8) hours at his respective time and one-half rate of pay, Claimants

N. Smith and V. Miner, III shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and for four (4) hours at their respective time and one-half rates of pay, Claimants D. Gaston, J. Hurlburt, E. Pratt, J. Jackson and K. Wetsell shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for two (2) hours at their respective time and one-half rates of pay.

- (13) As a consequence of the violations referred to in Parts (6) and/or (7) above, Claimant F. Lipka shall now be compensated for ninety-six (96) hours at his respective straight time rate of pay and for twenty-four (24) hours at his respective time and one-half rate of pay, Claimant J. Lavin shall now be compensated for eighty (80) hours at his respective straight time rate of pay and for twenty (20) hours at his respective time and one-half rate of pay, Claimant T. Aurilio shall now be compensated for fifty-six (56) hours at his respective straight time rate of pay and for fourteen (14) hours at his respective time and one-half rate of pay, Claimant S. Brooks shall now be compensated for forty-eight (48) hours at his respective straight time rate of pay and for twenty-two (22) hours at his respective time and one-half rate of pay, Claimants R. Gordon and D. Therrien shall now each be compensated for thirty-two (32) hours at their respective straight time rates of pay and for eight (8) hours at their respective time and one-half rates of pay, Claimant J. Hoffman shall now be compensated for twenty-four (24) hours at his respective straight time rate of pay and for sixteen (16) hours at his respective time and one-half rate of pay, Claimants M. Berner, J. Christman and C. Gordon shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay and for six (6) hours at their respective time and one-half rates of pay, Claimants D. Jordan, G. Lawyer, J. Reightmyer, J. Rich and N. Smith shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and for four (4) hours at their respective time and one-half rates of pay and Claimants D. Gaston, K. Herrington, J. Jackson, E. Pratt and K. Wetsell shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for two (2) 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 2007 the Carrier entered into an agreement with the General Electric Company (GE) wherein the Carrier leased two acres of its land at Fort Edwards, New York, to GE. The leased land, adjacent to the Carrier's mainline, adjoined 110 acres of land that GE purchased from private owners. The GE-owned property was situated between the Carrier's mainline and the Champlain Canal.

By letter dated March 14, 2007, the Carrier notified the Organization of the lease agreement:

**"RE: General Electric Track Contractors. Ft Edward NY**

As information, General Electric 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 General Electric 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. The Organization also informed the Carrier that the track construction was scope-covered work pursuant to Rule 1 and Appendix H. It noted the absence of reasons in the Carrier's letter for contracting and the availability of qualified Carrier forces to perform the work. The Organization requested a copy of the CPR-GE lease and other contracts involved with the claimed work.

During the conference that was convened on March 22, 2007, the Organization renewed its request for a copy of the lease and noted the absence of

reasons in the Carrier's letter for contracting out scope-covered work. The Carrier responded that the letter of March 14 was an informational notice - not a contracting notice. Also, the Carrier stated that the claimed work was not subject to Rule 1 because as it falls outside the Agreement.

Following conference, the Organization filed six claims involving new track construction (10,000-foot siding) on the leased acreage. The construction commenced on August 8, 2007 and continued on various dates to July 28, 2008. Each claim was processed separately on the property; however, they have been mutually combined by the Parties for presentation to the Board and are referred to as the claim.

The Board finds that the claim was properly handled at all stages of processing on the property including up to the Carrier's highest designated officer.

Having reviewed the record, the Board finds that the work performed on the Carrier's acreage leased to GE is the kind of – track construction – customarily and historically performed by BMW-represented employees pursuant to Rule 1. The Organization asserts in the claim that the Carrier entered into a contract with Railworks to perform scope-covered work without notice in violation of Rule 1 and Appendix H, among other Rules.

The record shows, however, that GE (not the Carrier) entered into a contract with Railworks for the track construction (10,000-foot siding) on the land leased from the Carrier. In this regard, the first page of the CPR-GE lease states that GE's lease of CPR property facilitated GE's railroad operations associated with its Hudson River PCB dredging and removal project undertaken pursuant to a consent decree approved by a Federal court in United States of America vs. General Electric Co., Civil Action No. 1105-CV-1270 (November 2, 2006). GE would be loading the waste dredged from the Hudson River onto railcars. The Hudson River Dredging Project news shows that GE selected Railworks to build a rail yard with repair and inspection tracks.

According to the Carrier, the track construction is a GE project, controlled by GE and benefiting GE rather than a project initiated and controlled by the Carrier for the Carrier's benefit. Under that scenario, the work claimed by the Organization is not subject to Rule 1 of the Agreement.



The Carrier relies on Third Division Award 26103, among others, to support its position that the claimed work falls outside the scope of the Parties' Agreement.

**“This Board has ruled in Third Division Award 23433 and consistent with numerous past Awards (Third Division Awards 20644, 20280, 20156 and 19957) that:**

**‘where 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.’**

**More recent Awards (Third Division Awards 23034, 23036 and Public Law Board 2203, Award No. 21) have 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 the Agreement), the Organization requested a copy of the lease in its entirety. The Carrier’s claim denial stated that “lease agreements, land transfers, and/or internal documents are highly confidential and out of the scope of this process.” When the Carrier denied the claim appeal the Carrier noted that it provided “the front and rear signature page” of the lease during conference on August 22, 2008, but “due to confidential information in this document ... could not submit the entire agreement.”

There are two copies of the front and rear pages – one copy is dated May 2, 2007 and the other copy is dated May 3, 2007. The first page for each lease states:

**“Lessee General Electric 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 [CPR] desires**

to facilitate Lessee's construction and railroad operations on Lessor's property under the terms and conditions set forth in this lease."

The Carrier agreed to "facilitate Lessee's construction and railroad operations on Lessor's [CPR] property under the terms and conditions set forth in this lease," but the terms and conditions are unknown in the record of this proceeding. The terms and conditions would be dispositive of the Carrier's control, or loss of control, over its property leased to GE. As demonstrated in Third Division Awards 20895, 28229, 32335, 32858 and 37047, lease disclosure enables the Board to determine whether the terms and conditions of the lease were the result of an arm's length negotiation wherein GE presented to CPR a fait accompli arrangement with Railworks or whether the lease facilitates a circumvention of the terms and conditions of the BMW/CPR Agreement.

The Carrier describes the acreage as "insignificant" in relation to the 110 acres owned by GE; however, the Carrier's property represents the avenue for transporting waste from GE's property. The significance of the Carrier's property (land) was apparent in June 2005 when the EPA announced that the waste processing facility would be located at Fort Edwards, New York on property adjacent to the Carrier's mainline. The Carrier's land is dimensionally small but significantly large in the context of facilitating the lease sought by GE.

When a lease has been requested but not disclosed, the claim has been sustained and monetary relief granted as occurred in Third Division Awards 20895, 28229, 32335, 32858 and 37047. Unclear in precedent relied on by the Carrier involving claim denials – Third Division Awards 26816, 30824, 40207 – is whether a copy of the lease was even requested by a party or whether its terms and conditions were disputed and other precedent submitted by the Carrier – Third Division Awards 30965, 31234, 37143, 37144 – show that when the entire lease was disclosed or its terms and conditions discussed and explained during on-property exchanges, claims were denied because the carrier established loss of control. As for confidentiality foreclosing release of the terms in the lease, the Carrier does not state or explain whether that affirmative defense 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 a project initiated by that private company; however, the private company entered

into a contract with another private company to perform the work on the carrier's property. The carrier asserted loss of control and confidentiality.

**“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 the 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 on the property 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 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 Third Division 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, court order or some other superintending document, 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 new track construction on the leased property.

**AWARD**

Claim sustained in accordance with the Findings.

**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 28th day of July 2016.