

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42992  
Docket No. MW-43065  
18-3-NRAB-00003-150302**

**The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.**

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
(  
(Delaware 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 (Loram Corporation) to perform Maintenance of Way work (rail grinding) beginning June 12, 2013 and continuing through July 8, 2013 (Carrier’s File 8-00942 DHR).**
- (2) The Agreement was further violated when the Carrier failed to provide an 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 W. Scott, M. MacDougall, D. Wydeen, R. Foote, K. Sweatt, J. Ambrose and W. Beers shall now each be compensated for one hundred forty-four (144) hours at their respective straight time rates of pay and one hundred thirty-two (132) 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.

Beginning on June 12, 2013 and continuing through July 8, 2013, the Carrier assigned outside forces (Loram Corporation) to perform rail grinding duties at various locations on the Carrier's property. The Carrier did not notify the General Chairman in advance of its intent to contract out this work and the Organization asserts that the Carrier's failure to comply with the advance notice and conference provisions constituted a violation of the Agreement, requiring a fully sustained claim herein.

The Carrier argued that it has historically contracted out "Rail Grinding Train" operations to Loram Corporation, as this equipment is specialized and is not owned by the Company. It argues the Organization has provided no proof of any kind that BMW representative forces have ever operated such equipment, or been trained or qualified on it.

It explains that the equipment is capable of grinding numerous miles of track per day, far beyond what the Company could accomplish with its own work force. It notes there was no tradition, custom or practice of BMW representative employees operating such equipment. It does not deny a lack of notice, but notes that the fact that the Company in the past may have sent out a notice informing the Organization that this equipment was on the property does not make this work scope covered.

The Organization contends that rail grinding is maintenance of tracks under Rule 1. In its view, it is a well-established principle that the Carrier cannot contract with outsiders for the performance of work which is of a kind and character covered

by the effective collective bargaining agreement. There is no dispute in this case that the work was scope covered, argues the Organization, concluding it was specifically reserved to Maintenance of Way employees and should have been assigned accordingly.

The Organization contends the Carrier unilaterally determined it would no longer provide advance notification for rail grinding. It maintains the Carrier is attempting to unilaterally remove rail grinding work from the scope of the agreement based on the Organization's good faith in reaching an understanding with the Carrier in the past. While the Organization has reached an understanding in the past with the Carrier to allow this work to be contracted out, the Organization points out that those understandings were after the Carrier provided an advance notification and opportunity for discussion prior to the work being contracted out. There is no practice of the Carrier contracting out this work without advance notification or opportunity for discussion, it contends.

In the opinion of the Board, rail grinding is generally scope covered work because it directly involves rail maintenance. However, the equipment used to perform this task has been jointly recognized as sufficiently specialized to allow for subcontracting. The problem in this case is that there was no advance notice or opportunity for conferencing in this case as envisioned by the Agreement.

Because the work falls squarely within the language of Rule 1, the lack of notice and opportunity for conference constituted a violation of the parties' Agreement. However, the parties' history of allowing the subcontracting in question constitutes a mitigating circumstance. There was no evidence of any basis for an expectation by either party that the work would actually be given to unit employees this time. As a result, a fully sustained award is not indicated. The fact remains, however, that the work is properly designated as scope covered, and the notice and conference requirement negotiated between the parties applies and is fully enforceable.

The claim is granted in part. The Carrier will cease and desist from contracting out rail grinding to Loram Corporation without providing the Organization with advance notice and an opportunity for conferencing.

**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 29th day of March 2018.**