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

Award No. 42993
Docket No. MW-43066
18-3-NRAB-00003-150303

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 Employes Division - IBT Rail Conference**
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(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 July 15, 2013 and continuing through August 16, 2013 (Carrier's File 8-00943 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 J. MacDougall, D. Wydeen, K. Sweatt and J. Ambrose shall now each be compensated for two hundred fifty-five (255) hours at their respective straight time rates of pay and seventy-five (75) 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 15, 2013 and continuing through August 16, 2013, the Carrier assigned outside forces (Loram Corporation) to perform the duties of spot rail grinding at various location on the Carrier's property. The Organization protested that this was in violation of the parties' agreement.

The Carrier argues it has historically contracted out "Rail Grinding" operations to Loram Corporation because the equipment is specialized and is not owned by the Company. It explains that the equipment is capable of grinding numerous miles of track per day, far beyond what the Company can accomplish with its own work force. The Carrier notes the Organization has provided no proof of any kind that BMWE represented forces have ever been trained and or qualified on such equipment, or have ever operated it. In the Carrier's assessment, these considerations mean a fifteen day notice would not be required. It concludes the Company is not obligated to meet and conference with the General Chairman.

In the Organization's view, rail grinding is repair and maintenance of tracks. It points out that Rule 1 expressly grants repair and maintenance of tracks to Maintenance of Way employes. It notes the Carrier has consistently provided the General Chairman with advance notification when it intended to contract out rail grinding in the past. As the Organization sees it, 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. It argues that past understandings were reached after the Carrier provided

advance notification and an opportunity for discussion prior to the work being contracted out as envisioned by the parties' Agreement.

In the opinion of the Board, rail grinding is scope covered work, though the equipment is sufficiently specialized to allow for subcontracting. This finding is consistent with Award 45 of Public Law Board ("PLB") No. 6493 which held that: "... 'inspection, construction, repair and maintenance of ... culverts' is in fact clearly recognized by Rule 1.1 and therefore scope covered." Likewise, Third Division Award 40454 stated: "Rule 1.1 specifically reserves to BMWE-represented employees the work of maintenance of track. The installation of mainline ties falls squarely within the parameters of that reservation of work, and there can be no dispute that it is scope-covered. See Public Law Board No. 6493, Award 45." Moreover, Third Division Award 40455 also shared this perspective: "Rule 1.1 specifically reserves to BMWE-represented employees the work of track construction. Thus, there can be no dispute that the work involved herein was scope-covered. Public Law Board No. 6493, Award 45."

The Organization has indeed historically recognized the specialized nature of the equipment used by Loram Corporation and allowed the subcontracting. The Board does not interpret this history as a concession that rail grinding is no longer scope covered work. To the contrary, the historical, mutual conferencing by the parties on the issue of rail grinding indicates mutual acceptance of the work as scope covered. To hold otherwise would negate the parties' express intent in Rule 1 to retain maintenance work for maintenance employes and to allow the parties to confer regarding changing equipment and circumstances.

It follows that the Carrier was in violation of the parties' Agreement when it failed to provide the Organization with notice and an opportunity to confer. The Board is persuaded that the Carrier's failure in this regard occurred in the context of a repeated pattern of contracting out the work in question. Given this context, there was no discernible basis for expecting a different result in this case. As a result, the Carrier was not outsourcing work that would have been performed by unit employes, and therefore cannot be said to have acted in bad faith. On this basis, the Board finds that a full remedy is not warranted.

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 notices 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.