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

Award No. 42999
Docket No. MW-43537
18-3-NRAB-00003-160293

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**
(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 (Carver Construction) to perform Maintenance of Way work (site clean up and site preparation for new track construction) in the Kenwood North Yard Facility in Albany, New York beginning on April 2, 2012 and continuing (Carrier's File 8-01013 DHR).

(2) The Agreement was further violated when the Carrier failed to notify the General Chairman in advance of its intent to contract out the aforesaid work or to make any good-faith efforts 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 N. Bloomingdale shall now be compensated for a total of eighty (80) hours at his respective straight time rate of pay and for twenty (20) hours at his respective overtime rate of pay, A. Gasper shall now be compensated for a total of fifty-six (56) hours at his respective straight time rate of pay and for fourteen (14) hours at his respective overtime rate of pay, J. Reightmyer shall now be compensated for a total of one hundred twenty (120) hours at his respective straight time rate of pay and for thirty (30) hours at his respective overtime rate of pay, F. Howatch shall now be compensated for a total of seventy-two (72) hours at his respective

straight time rate of pay and for eighteen (18) hours at his respective overtime rate of pay, W. Wade, Jr. shall now be compensated for a total of one hundred twenty (120) hours at his respective straight time rate of pay and for thirty (30) hours at his respective overtime rate of pay and T. Warner shall now be compensated for a total of eighty (80) hours at his respective straight time rate of pay and for twenty (20) hours at his respective overtime rate of pay for work performed by the outside forces April 2, 2012 through April 27, 2012 and each Claimant shall be compensated for an equal and proportionate share of all hours worked by the outside forces performing the claimed work after April 27, 2012 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.

Beginning April 2, 2012, the Carrier subcontracted work in the Kenwood North Yard Facility in Albany, New York. Though the Carrier alleges it gave notice of where the tracks were that the work was being done, the Organization claims there was no advance notification of an intent to contract out the work, nor was there a good faith opportunity for the parties to confer on the matter. The Organization contends that the work was covered and should have been assigned to Maintenance of Way forces.

The Carrier contended that the claimed work was performed at a location that was leased to a third party and that it no longer maintained control over the work, that the work was not for its benefit, and that it did not pay for the work to be performed. According to the Carrier, Lessee Global Companies bore responsibility for the work performed; it was for the benefit of Global and at Global's expense. The Carrier concludes that the work therefore fell outside of the scope of the BMWE Agreement and as such did not require a contracting notice to be issued. In the Carrier's view, if Global had not made such improvements under the lease terms, the Carrier would not have performed the work for enhancement of the Carrier's operation. Therefore, the argument that unit employees lost work must be discredited.

According to the Carrier, under the terms of the original lease signed in 2010, the Carrier made improvements to tracks 1 & 2 in conjunction with Global, as benefit and funds were shared by the parties. It asserts that as of February 15, 2012 the parties signed and amended the lease agreement by way of an addendum which placed responsibility for track and land improvement on the lessee, Global. At the time, the Carrier explains, Global wanted four additional tracks to accommodate its increase in bulk liquid transload. The details of this amended agreement are defined, in part, by

Paragraph 5 a. Clause E:

> **"E. The parties have agreed that Applicant may construct an expansion of the Private Siding to accommodate a Renewable Fuels and Petroleum Terminal on the Lease Property (as described in greater detail on Appendix D, the "Expanded Private Siding") The parties have agreed that the expense of constructing the Expanded Private Siding shall be the responsibility of Global"**

In the Carrier's view, this provision establishes that the Carrier did not have dominion and control over the tracks at issue, and is adequate support for its defense.

The Organization maintains the work of concern was site cleanup and site preparation which fell cleanly within the mandates of scope covered work. It notes that the contracting out was done without notifying the General Chairman in advance of the intent to do so, or providing opportunity for conference. The

Organization asserts that the Carrier must provide evidence regarding dominion and control in support of its defense, and rebukes the Carrier for failing to provide the Organization with the lease to Global. It concludes that the Carrier has failed to substantiate its dominion and control contentions. Instead of providing all relevant lease documents, the Organization argues the Carrier provided only the addendum to the initial lease without also offering the initial lease. Because this document could contain important provisions regarding dominion and control, the Organization concludes the Carrier's defense must fail.

The Board is persuaded that the nature of the work here concerned is historically and mutually recognized as scope covered. The Carrier deems lack of dominion and control to be adequate to exempt the matter from otherwise applicable notice and conference requirements. The Board is not so persuaded.

Under Rule 1.1 the work at issue is recognized as belonging to unit employees. The only exception to the notice and conference requirements is in Rule 1.3, in terms of emergencies. It follows that the work of concern in this case was scope covered and subject to the notice and conference requirements agreed to by the parties. Any alleged contention regarding transfer of dominion and control would therefore fall to the parties to explore together in conference.

At the crux of the parties' Agreement regarding subcontracting is good faith. This fundamental requisite translates into mandatory notice and an opportunity for conference. In this case, the Carrier unilaterally decided that the work was not covered when the issue of scope was not self-evident, but dependent upon documentation. Not only did the Carrier deny the Organization notice of the subcontracting, but it refused to supply the Organization with the documentation a reasonable person would require when determining whether dominion and control had been transferred.

The Board finds this withholding of notice and information to have been noncompliant with the requisites of the parties' Agreement. Carrier violated the Agreement by failing to provide mandatory notice and opportunity for conference. Accordingly, the claim is sustained in full.

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 29th day of March 2018.