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

Award No. 43000
Docket No. MW-43538
18-3-NRAB-00003-160294

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 (Railworks) to perform Maintenance of Way work (movement, placement and assembly of track material in connection with welding rail for track construction) in the Kenwood North Yard Facility beginning on April 25, 2012 through April 28, 2012 (Carrier's File 8-01012 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 W. Kanton, T. Delamater, F. Vanderpool, J. Bruno and A. Jones shall now each be compensated for a total of thirty (30) hours at their respective straight time rates of pay and for ten (10) hours at their respective overtime rates of pay for the work performed by the outside forces April 25, 2012 through April 28, 2012."

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.

By letter dated May 7, 2012, the Organization filed a claim asserting that the Carrier assigned outside forces (Rail works) to perform Maintenance of Way track work, which included the movement, placement and assembly of track material in connection with welding rail for track construction in the Kenwood North Yard Facility in Albany, New York beginning on April 25, 2012 through April 28,2012, without notifying the General Chairman in advance of its intent to do so, or providing opportunity for conference.

The Carrier contended the claimed work was performed at a location which had been leased to a third party. I claimed to no longer have control over the work, and 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; it was for the benefit of Global and at Global's expense. Such work therefore fell outside of the scope of the BMWE Agreement and as such did not require a contracting notice to be issued. The Carrier insists it did not require the improvements in Kenwood Yard for its operations, and had Global not made such improvements under the lease terms, the Carrier would not have performed the work for enhancement of the Carrier's operation. It concludes 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 amended the lease agreement by way of an addendum which placed responsibility for improvements to the tracks and land on the lessee, Global. At the time Global sought to add four more 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. Rule l of the Agreement is the parties' designated Scope rule. Rule 1.1 recognizes that work, such as inspection, construction, repair and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences and roadbed, is reserved to Maintenance of Way employes. The type of work involved here is clearly encompassed within the language of Rule 1.1. In Award 45 of Public Law Board No. 6493 Referee D. Eischen interpreted Rule 1.1 to expressly reserve this work to Maintenance of Way employes: "The present claim involves Carrier's subcontracting, without notice or opportunity for conference, work expressly reserved to Agreement-covered employees by above-emphasized language in Rule 1, § 1.1, *viz,* 'inspection, construction, repair and maintenance of ... culverts'." The Organization argues Maintenance of Way forces were at one point assigned to and performing Maintenance of Way work at the same location and during the same time period that the Carrier contends the property was leased to a third party. In its view, this disproves the Carrier's assertions about dominion and control.

The Organization 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. It asserts the Carrier must provide evidence regarding dominion and control in support of its defense, and faults the Carrier for failing to provide the

Organization with the lease to Global. 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 the parameters of 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 was 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 exception due to transfer of dominion and control would therefore fall to the parties to resolve 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 which 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.

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.