

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43001
Docket No. MW-43539
18-3-NRAB-00003-160295**

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 (R.J. Corman) to perform Maintenance of Way work (welding rail) in the Kenwood North Yard in Albany, New York beginning on April 25, 2012 through April 28, 2012 (Carrier’s File 8-01011 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 J. MacDougall, M. Stone and J. Smith shall now 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 (R.J. Corman) to perform Maintenance of Way work welding rail 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 Organization protested that this was in contravention of contractual mandates.

The Carrier contended the claimed work was performed at a location which had been leased to a third party. It asserted a lack of 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 bore responsibility for the work at issue; it was for the benefit of Global and at Global's expense. Such work therefore fell outside of the scope of the BMW Agreement, it reasons, and as such did not require a contracting notice to be issued. The Carrier insists that had Global not made such improvements under the lease terms, work would never have been done. It concludes that the argument regarding unit employees losing 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 and placed responsibility for track and improvement on to the lessee, Global. It notes that at that time, Global sought add four tracks to accommodate Global's 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 welding rail, 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 acknowledged receiving documents in support of the Carrier’s dominion and control contentions. However, it maintained those documents failed to show that the subject location was leased or that the Carrier no longer maintained control of the work being performed at that location. It concludes that the Carrier has failed to substantiate its dominion and control contentions.

The Organization notes that instead of providing all relevant lease documents, the Carrier provided only the addendum to the initial lease without also offering the original lease agreement with Global. Because this document could contain important provisions regarding the parameters of dominion and control, the Organization insists the Carrier’s defense must fail.

The Board is persuaded that the welding 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.