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

Award No. 43005
Docket No. MW-43572
18-3-NRAB-00003-160322

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 (Railworks) to perform Maintenance of Way work (welding and replacement of rail and other track material) in the Kenwood North Yard Facility beginning on April 10, 2012 and continuing through April 14, 2012 (Carrier's File 8-01009 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, C. Valentine, F. Vanderpool and S. Hanyon shall be allowed:

'Thirty (30.0) hours Straight Time and Thirty Four (34.0) hours Overtime (time and one half rates) for Each Claimant covering period of April 10 to April 14, 2012.' (Emphasis in original)."

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 beginning on April 10, 2012 and continuing through April 14, 2012, asserting that the Carrier OUTSOURCED welding and replacement of rail and other track material in connection with new construction of Tracks 1, 2, 4 and 7 in the Kenwood North Yard Facility in Albany, New York without notifying the General Chairman in advance of its intent to do so, or providing opportunity for conference.

The Carrier contended that the claimed work was performed at a location that was leased to a third party and that it no longer maintained control over the work, that the work was not for its benefit, and that it did not pay for the work to be performed.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; it was for the benefit of Global and at Global's expense. IThe Carrier reasons this exempted the work from the scope of the BMWE Agreement and no contracting notice was needed. 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 work would not have been done. It concludes any 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 and placed responsibility for improvements to the tracks and land on the lessee, Global. At the time, Global

wanted to add four 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 asserted without challenge that the claimed work, welding and replacement of rail and other track material, is of the type historically performed by Maintenance of Way employes. It points out that Rule 1.1 recognizes that as inspection, construction, repair and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences and roadbed is work reserved to Maintenance of Way employes. The Organization references Award 45 of Public Law Board No. 6493 where Referee D. Eischen recognized this work as work for 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 that the contracting out was done without notifying the General Chairman in advance of the intent to do so, or providing opportunity for conference. In its view, this alone warrants granting the claim. It further asserts that 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 its alleged 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 original lease. Because the original lease could contain important provisions regarding dominion and control, and cause the addendum 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, 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. The importance of good faith in the parties' relationship simply cannot be overemphasized. 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 document interpretation. 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.