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

Award No. 43010
Docket No. MW-44007
18-3-NRAB-00003-170045

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 (Carver Company) to perform Maintenance of Way work (site preparation work and grading) between CP01 and North Lawrence Street Crossing in Albany, New York beginning on April 13, 2015 and continuing (System File BMWED-MAY.2015-013/TM-008-07-18-15 DHR).

(2) The Agreement was further violated when the Carrier failed to comply with the advance notification and conference provisions in connection with its plans to contract out the aforesaid work and failed 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 D. Hupp and T. Warner shall now each be allowed one hundred thirty-six (136) hours at their straight time rates of pay and for twenty-eight (28) hours at their overtime rates of pay; Claimants T. Tiffany and J. Belmonte shall now be allowed twenty-four (24) hours at their straight time rates of pay and for three (3) hours at their overtime rates of pay for the work performed by the outside forces between April 13, 2015 and May 19, 2015. The Claimants must also be allowed all hours worked by the outside forces beginning on May 19, 2015 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.

On Sept. 15, 2014 the Carrier notified the Organization of its intent to contract out sub grade preparation work between CPOl and North Lawrence Street in order to build operations capacity to hold a Unit Oil Train between Green Street and North Lawrence Street. The Organization protested that this was in violation of the parties' collective bargaining Agreement.

The Carrier claims it submitted notice for this work on September 15, 2014 and the parties conferred regarding the matter September 16, 2014. It asserts the work had to be complete before winter of 2014 began in order to allow for subgrade settlement. The Carrier maintains it undertook to hire 35 new BMWED employees for 2014. However, even with the additional manpower, the Carrier asserts the work schedule was exhausted and subcontracting became necessary. It acknowledges that due to weather conditions and unexpected delays, the work could not be completed in 2014 and the contractor forces resumed work in spring of 2015.

The Carrier contends the Organization provided no information as to how the disputed work could have been timely and efficiently performed absent the use of contract employees. It denies that it is required to hire additional employees for a short-term project of this nature.

The Organization argues that discussions at the September 16, 2014 conference were about work that would be completed in 2014; the Carrier's notification was not applicable for the work that occurred in 2015. It notes the

Carrier failed to provide the Organization with any updated information in connection with this project following the conference on September 16, 2014.

As the Organization see it, the contractual requirement that the parties make a good-faith effort to reach an understanding is heavily dependent upon the Carrier fully complying with the advance notification and good-faith discussion provisions. In this connection, it asserts the General Chairman would never have a chance for genuine good-faith discussions if what is presented in the advance written notice and during the discussions is inaccurate, misleading or incomplete. It contends the Carrier utterly failed to show where it asserted any effort to reduce the incidence of subcontracting prior to contracting out the work.

In the Organization's view, site preparation and grading is scope covered work which has been customarily and historically performed by Maintenance of Way employes. It insists the Claimants were all qualified to perform the work in question. It argues that it is well-established that a Carrier cannot contract with outsiders for the performance of work which is of a kind and character covered by the effective collective bargaining agreement. The Organization points to Rule 3.13, which provides an avenue for the Carrier to assign employes to fill positions and temporary vacancies. It also maintains that the Carrier furloughed portions of its BMWED workforce between the end of 2014 and the start of the 2015 work season.

The Organization contends the record reflects no attempt by the Carrier to schedule the work in accordance with Rule 11 so that its own Maintenance of Way employes could perform this work. In its view, when the work was not completed in 2014, the reasons to contract out were no longer valid."

In the view of this Board, the crux of the parties' agreement regarding subcontracting is rooted in good faith. The notice and conference requirements envision transparency and mutual resolution, and cannot be harmonized with a combination of unilateral action and inadequate disclosure.

The Board finds that the Carrier violated the notice and conference requirements when it failed to put the Organization on notice of changed circumstances regarding the subcontracting in this case. It has been clearly demonstrated that the work involved was scope covered work; indeed the Carrier did quite a bit of hiring to try to cover it.

The particular circumstance of contracting it out was an articulated requirement that the work be completed by the end of 2014, something the Carrier was not able to do despite its hiring efforts. But when that critical aspect of the outsourcing dissolved, and the deadline ceased to have meaning, a fundamental aspect of the notice given to the Organization changed. In this situation, the contractual obligation to provide notice and an opportunity for conference revives, yet the Carrier left the Union in the dark and failed to meet its good faith requirement of notification. As a result, the Board finds the Carrier in breach of the parties' collectively bargaining agreement.

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.