Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40812
Docket No. MW-40760
10-3-NRAB-00003-080656

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former Chicago
(& North Western Transportation Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier utilized outside forces (Hulcher) to perform Maintenance of Way and Structures Department work (undercutting track) on the Boone Subdivision beginning at Mile Post 224 on July 16, 2007 and continuing (System File R-0701C-313/1482619 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1 and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Roberts, C. Rigby and L. Jackson shall now each be compensated at their respective and applicable rates of pay for eight (8) hours straight time and two (2) hours overtime for each day the outside forces performed the aforesaid work beginning July 16, 2007 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.

Despite the Organization's assertions to the contrary, the record establishes that the Carrier did serve a notice of its intent to contract out track undercutting work by letter dated May 1, 2007, and that a conference on the notice did take place. No understanding was reached. The notice reads, in pertinent part, as follows:

"Specific Work:	Provide equipment support, including but not limited to, backhoes, excavators, trucks, on an as-needed basis for Maintenance of Way forces in the performance of their duties.
Location:	Various location on the Council Bluffs Service Unit."

It is not necessary that a contracting-out notice specify every detail of a project. Flushing out the details is one of the objectives contemplated for the conference. See, for examples, Third Division Awards 30185, 30869 and 37103.

In light of the foregoing, our review of the record does not show that any notice violation was properly established. Accordingly, this portion of the claim is denied.

On the merits, the remaining issues in dispute are readily resolved by the straightforward application of well-settled analytical principals and long-standing precedent between these parties to the operative facts.

In the Organization's initial claim, it described how Hulcher operated a crawler backhoe with an undercutter bar attachment to undercut trackage at MP 224. The claim also made the following specific factual assertions:

> "The district employees perform similar work as part of their regularly assigned duties. As a matter of fact, the Carrier placed a similar machine into service on January 19, 2007 on this same area. This machine is a crawler backhoe with an undercutter bar attachment like Hulcher is using. Furthermore, Hulcher has rented this particular machine to perform this work. The Carrier allowed Hulcher to test this equipment in the Council Bluffs yard the week of July 9th and even asked an employee to show the Hulcher employee how to operate the machine. However, the employee refused to show a contractor how to take our work and job. If Hulcher could rent this equipment, so could the Carrier and have employees operate it, just like the assigned operator of the machine they put into service on January 19, 2007."

The Carrier's initial denial of the claim totally ignored the factual assertions contained in the foregoing excerpt. They were not addressed in any manner whatsoever. Moreover, the Carrier's subsequent correspondence also ignored the assertions. As a result, we must accept the assertions as facts that have been sufficiently proven for the purpose of our further analysis of the record. We turn, then, to the subject of scope coverage of the undercutting work.

Scope Rule 1(B) of the applicable Agreement reads, in relevant part, as follows:

> "Employes included within the scope of this Agreement in the Maintenance of Way and Structure Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the

operation of the Company in the performance of common Carrier service on the operating property. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.

By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employees describe herein, may be let to contractors and be performed by contractor's forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or, unless work is such that the Company is not adequately equipped to handle the work; or time requirements must be met which are beyond the capabilities of Company forces to meet."

In 1977, in its Award No. 16 between these same parties, Public Law Board No. 1844 recognized the foregoing Rule language to constitute a ". . . specifically worded work reservation clause." Contracting of reserved work is permitted if, and only if, one or more of the five stated exceptions apply, i.e., (1) the work requires special skills not possessed by Carrier forces (2) special equipment is not owned by the Carrier (3) special material is available only when applied or installed through a supplier (4) the Carrier is inadequately equipped to handle the work or (5) exigent time requirements exist.

Given the character of the disputed work, it is clearly seen to be maintenance work that falls squarely within the reservation of work established by Scope Rule 1(B). As such, it may only have been properly contracted out pursuant to one of more of the five exceptions. Because the five exceptions are in the nature of affirmative defenses, the Carrier has the burden of proof to establish their applicability. On the record before the Board, the Carrier failed to satisfy that burden.

In its notice of intention to contract the work, the Carrier did not contend that any of the five exceptions were applicable. In the claim handling correspondence exchanged on the property, the Carrier did not even attempt to establish any of the five exceptions. Instead, it relied on the fact that the Claimants were fully employed on the claim date.

Scope Rule 1(B) makes it clear that scope covered work may not be contracted out unless one or more of the five exceptions applies. The proper application of Scope Rule 1(B) had been known for some 30 years at the time the instant claim arose. On the record before the Board, therefore, we are compelled to find that the Carrier not only violated Scope Rule 1(B) but it did so blatantly. Full employment should not be a defense to this kind of violation. Accordingly, an appropriate remedy is required to put the Carrier on notice that it may not violate the Agreement with impunity while attempting to hide behind a full employment defense.

Although the claim alleges the contractor used a three-person crew, the record does not establish that anyone other than the Machine Operator performed work within the scope of the Agreement. Moreover, only two specific dates are identified in the on-property record. Therefore, our monetary award is limited to 20 hours of additional straight time compensation to be paid to Claimant Jackson at his rate then in effect.

AWARD

Claim sustained in accordance with the Findings.

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 15th day of December 2010.