Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40996
Docket No. MW-40881
11-3-NRAB-00003-090157

The Third Division consisted of the regular members and in addition Referee Sherwood Malamud when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 assigned outside forces (Herzog) to perform Maintenance of Way and Structures Department work (clean right of way ditches) at Marshalltown, Iowa on the Clinton Subdivision beginning on October 15, 16, 17, 18, 19, 22 and 23, 2007 (System File R-0701C-319/1489231 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, Claimant G. Mathies shall now be compensated at his respective and applicable rate of pay for all of the hours worked by the outside force in the performance of the aforesaid work on October 15, 16, 17, 18, 19, 22 and 23, 2007."

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.

The Organization objects to the Carrier's contracting out the work of cleaning right-of-way ditches on the Clinton Subdivision at Marshalltown Iowa for a period of seven-days between October 15 and 23, 2007. The Carrier provided the following notice dated March 2, 2007, to the Organization. It states as follows:

> "This is a 15-day notice of our intent to contract the following work:
>
> Location various locations on the Railroad's system
>
> Specific Work: providing all supervision, labor, and equipment necessary for the operation of a ditch cleaner to perform grading and sloping of drainage area near track structures on an 'as needed' basis."

The Organization requested and a conference was held on March 14, 2007. The Carrier stated that the work is not reserved. In any event, the contractor would use specialized equipment that the Carrier did not own.

The Organization argues the work is scope-covered work reserved to BMWE-represented employees under Rule 1 of the UP-CNW Agreement. The Claimant is well qualified to operate a long list of Carrier equipment. He was able to perform the work using any one of several pieces of Carrier equipment. The Carrier failed to demonstrate that special equipment was required to perform the work. The above notice is insufficient; it should be treated by the Board as if no notice had been

provided. The Carrier refused to provide the information requested by letter dated March 6, 2007. The Organization asks that the Board sustain the claim.

The notice sets out the work to be contracted, i.e., cleaning right- of- way ditches on an "as needed" basis. The notice predates the work performed by approximately seven months. The Organization objects to the Carrier's use of a blanket notice. It does not refer to a specific project, identified by the time and place of the work to be performed. The Organization maintains and the Carrier rejects the argument that each time the contractor performs work under the blanket notice, the Carrier must issue another notice.

In the on-property handling of the claim, the Carrier added the defense that the Carrier's forces could not have completed the work in the required time, an exception in the Scope Rule that if established, would allow for the contracting.

Rule 1-Scope of the UP-CNW Agreement controls the outcome of this case. In pertinent part, Rule 1 provides:

> "B. Employees includes within the scope of this Agreement in the Maintenance of Way and Structures 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. . . .
>
> By agreement between the Company and the General Chairman, work as described in the preceding paragraph, which is customarily performed by employees described 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 employees, special equipment not owned by the Company, or special material available only when applied or installed through the supplier, are required; or unless, work is such that the Company is not adequately equipped to handle the work, or the time requirements must be met which are beyond the capabilities of Company forces to meet.

> In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirement cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith." (Emphasis added)

APPENDIX 15 (Berge/Hopkins letter of December 11, 1981)

> "The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor."

The Carrier's assertion that it could not accomplish the work within the time restraints extant in October 2007, a contractual exception to Rule 1 Scope Rule, ironically supports the Organization's argument over the sufficiency of the notice. First, the Carrier produced no evidence to support this time crunch defense. However, assuming that there was insufficient time for the Carrier's forces to complete this project, the Carrier's assertion of this defense spotlights the Organization's argument, the disconnect between the notice, the work performed and the contracting.

Rule 1 obligates the Carrier to issue notice in advance of contracting transactions. Here, the Carrier properly gave notice of its intent to contract. What is the contracting transaction in this context? During the on-property handling of this claim, the Carrier asserted that the Organization's objection to the use of a blanket

notice would require the Carrier to issue a notice each time the contractor did any work under the blanket notice.

The record contains references to two independent facts: 1) a March 2, 2007 notice and 2) the undisputed fact that a contractor, Herzog, cleaned ditches in the Marshalltown, Iowa, area during the period of October 15–23 2007. What contracting transaction connects these two events?

The dictionary definition of the term "transaction" is "an exchange or transfer of goods, services, or funds." (Online Merriam-Webster Dictionary). The date the Carrier entered into the contract for which it provided notice is not in the record. The contracting transaction may indeed reference many projects. Under the Carrier's position, the notice provides that contracting will occur system-wide on an "as needed" basis. The Carrier provided notice of its intent to perform ditch cleaning. Where is the reference in the notice to a transaction? It is unclear how the contracting transaction relates to the October ditch cleaning. The language of the Rule makes two further references to "said transaction;" these references indicate the drafters had in mind that the notice would refer to an anticipated contractual event that would generate contractor activity. See Public Law Board No. 7099, Award 14.

The Board notes that the UP-CNW Agreement includes Appendix 15, i.e., the Berge/Hopkins letter. Appendix 15 requires that ". . . advance notice requirements be strictly adhered to. . . ." The Board finds the Carrier's notice (1) describes the work to be contracted (cleaning ditches on the Carrier's right- of- way) and (2) sets out the purpose of the contracting ("perform grading and sloping of drainage area near track structures.") However, the Board does not know whether the notice relates to the contractual transaction with Herzog pursuant to which it cleaned the ditches on the seven days between October 15 and 23, 2007. The Board concludes, in this regard, that the notice does not comply with the requirements of Rule 1 and Appendix 15.

Ordinarily, the failure to provide notice would bring a halt to the Board's analysis. See on-property Third Division Award 35736. Whether the work at issue may be contracted out will impact the remedy. Although the Carrier argues that this work is subject to a mixed practice, neither party presented any evidence on who performs this work during their processing of the claim onthe property. The CNW Scope Rule is the subject of careful analysis in Public Law Board No. 1844, Award 16. In that case, the Carrier argued that Rule 1 is a general Scope Rule. The Carrier asserted that the Organization bore the burden of proof to establish that it customarily

performed the work in question. Referee Eischen wrote on behalf of the Board in answer to this Carrier argument that:

> "Examination of Paragraph 2 shows that the subject matter thereof is a qualified right to subcontract Scope Rule work under certain specified conditions. Paragraph 3 also deals with subcontracting and imposes upon Carrier the obligation of prior notice and consultation before entering into contracting transactions, even if subsequently the transaction is found to have come within one of the specific exceptions listed in paragraph 2. Construing these contract provisions in context we cannot agree with Carrier that the first sentence of the contracting provision is intended by the parties to limit and qualify the coverage of the specifically worded work reservation set out in paragraph 1 of Section (b). To do so would have the effect of transforming the specifically worded work reservation clause into a 'general' scope rule in which custom, practice, and tradition become the sole governing indicator of coverage. If the parties had intended such a result they would not have agreed to a specifically worded work reservation clause...
>
> Based upon the foregoing it is clear that the work of snow removal on station platforms is covered by Rule 1. Accordingly the evidence of custom, practice, and tradition becomes largely irrelevant in the face of the express contract language."

The Carrier argued that in Public Law Board No. 1844, Award 39, the PLB concluded that the CNW Scope Rule, Rule 1, was general in nature. Upon review of Award 39, the Board in that case characterized the work in question as salvaging and re-cycling taconite pellets, work not covered by the Scope Rule. The removal of the pellets was not maintenance work. Award 39 contains no language that modifies the analysis of Award 16.

Ditch cleaning to promote better drainage along the Carrier's right-of-way structures, on the other hand, is maintenance work. The Carrier may contract out this work, if one of the specified exceptions apply. The Carrier argues that Herzog's forces used specialized equipment, and it required that the operator be familiar with the machine's tolerances. Herzog uses its employee to operate this equipment. There is no dispute that the equipment used is specialized, and that the Carrier does not own

such equipment. The Carrier argues the use of this specialized ditching equipment meets the stated exception in the Rule. Its action, therefore, does not violate the Rule.

The Organization argues that the Carrier failed to meet its burden of proof and present any evidence in support of its affirmative defense by showing a need to use specialized equipment rather than equipment owned by the Carrier. The Organization points to the Rule's use of the phrase "are required" as a modifier of the specialized equipment subcontracting exception.

In Public Law Board No. 6205, Award 1, Referee Newman addressed the specialized equipment exception, where the Carrier asserts it does not own such equipment and the Organization maintains that the Carrier owns equipment that employees operate that would get the job done, as follows:

> "While the Organization did identify equipment in Carrier's inventory that could do the job of tie removal, it was unable to disprove Carrier's evidence that the cartopper was different from this equipment, could perform the job safely in a more efficient and timely fashion, and its own equipment was being fully utilized elsewhere during the relevant time period. It is within Carrier's province to make decisions concerning the efficiency of the operation, so long as it does not violate specific rights set forth in the Agreement." (Emphasis added)

As in Award 1, the Organization points to several pieces of equipment on which the Claimant in this case, is well qualified to operate and perform the job of cleaning ditches.

The phrase "are required" indicates that the Carrier, at least, should state why it elected to have the work done through the use of specialized equipment. The Carrier presented no evidence as to why it used specialized equipment. There is nothing in the record on point. The Board would have to assume a reason for the Carrier's action. The Board cannot make assumptions.

The Carrier does bear the burden of proof to establish that the contracting conforms to the exception and does not violate the Rule. In Public Law Board No. 6205, Award 1, the Board concluded that the Organization failed to refute the Carrier's evidence that the cartopper was more efficient equipment.

The Carrier in the instant case failed to meet that burden. The Rule allows for the Carrier's subcontracting with a contractor that employs specialized equipment that the Carrier does not own, when it has a reason to use specialized equipment. There is no statement in the record as to why the Carrier elected to contract with Herzog to deploy specialized equipment to clean the ditches. The Carrier failed to establish the exception, which is its affirmative defense. The Board concludes that the involved contracting violated the Scope Rule.

The only issue that remains is the matter of remedy. The Claimant was not on furlough. He was fully employed. On this property there is a substantial number of Awards that hold that in the absence of a proof of loss, no monetary award is appropriate. See on- property Public Law Board No. 1844, Award 13; Third Division Awards 31284 and 31036; monetary award limited to those on furlough, Award 32352.

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 20th day of July 2011.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 40996 - DOCKET MW-40881

and

THIRD DIVISION AWARD 40997 – DOCKET MW-40915

(Referee Sherwood Malamud)

The Majority's conclusions with respect to the involved contracting notices failed to recognize and respect the precedent set by past arbitrators. We anticipate that the Majority's ill-advised action will create further turmoil and unwittingly add fuel to BMWE's burning desire to alter the nature of the contracting notices that have been historically provided on Union Pacific Railroad Company property. Consequently, we are compelled to register our vigorous dissent so that future readers of these Awards will recognize the injustice which the Majority sanctioned. It goes without saying that no future decision makers should be tempted to reach similar unwarranted conclusions with regard to the adequacy of such a notice.

The basis for the Majority's decision to declare the contracting notices in these cases improper came about as a result of the Majority reviewing the definition of the term "transaction" in the "Online Merriam-Webster Dictionary." This publication does not and has never interpreted the Carrier's rights and practices under the parties' Collective Bargaining Agreement. Given the Majority's apparent confusion, a far better place to have searched for enlightenment would have been prior arbitral precedent and on-property practices. Had the Board undertaken such a review it would have concluded that its ill-advised interpretation was in direct conflict with the prior arbitral precedent and the practice on this Carrier's property.

Not only have such general notices been historically used by the Carrier, they have previously been found to satisfy the requirements set forth in the parties' Agreement. Recently rendered Third Division Awards 40756, 40758, 40761, 40810 and 40812 are but a few examples. These Awards addressed the same issues under facts similar to those before the Board in the instant cases. For the Majority to ignore them creates further unrest which goes against the purpose of the Railway Labor Act. Award 40810 (Wallin) outlined the principle as follows:

> "Although the Organization alleged the Carrier failed to serve notice and refused to respond to the General Chairman's request for a conference, later correspondence from the Organization nullifies these contentions. The record establishes that the Carrier did service (sic) notice by Service Order No. 36327 dated March 2, 2007. The parties did engage in a conference on the notice on March 14, 2007. Accordingly, on the record before the Board, we must reject the portion of the Organization's claim that alleges a violation of the applicable notice requirements.
>
> Turning to the merits of the claim, we do not find the record to establish that the ditching work in question was unusually difficult or peculiar in any manner whatsoever. The notice merely describes the work as follows:
>
> > 'Specific Work: providing all supervision, labor and equipment necessary for the operation of a ditch cleaner to perform grading and sloping of drainage area near track structures on an "as needed" basis.'
>
> The remainder of the record does not amplify the character of the ditching work beyond the description set forth in the notice."

Thus, it is clear that prior precedent has established the legitimacy of the Carrier's general notices. Because that prior precedent was not palpably erroneous, it should have been followed by the Board in adjudicating the instant claims. Nothing in the present records gives any rationale to deviate from the previous Awards which should have been respected as authoritative on the practice, if not stare decisis. The parties have never used "Merriam-Webster" as a tool to interpret the Agreement in the past and there is no Agreement support for its use.

One of the oft-stated purposes of arbitration is to provide consistency in the workplace so as to promote harmonious labor/management relations. To ignore and/or cast aside arbitral precedent which has clearly and unmistakably recognized the long-standing practice of providing general notices on this property does a dis-service to the process and the parties to these disputes. Without a doubt, the Majority's determinations that the notices were not proper are palpably erroneous

and cannot be considered as precedent in any future cases. Because they clearly create unwarranted chaos, we must render this vigorous dissent.

Brant Hanquist
Brant Hanquist

Michael C. Lesnik
Michael C. Lesnik

July 20, 2011