

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40819
Docket No. MW-40825
10-3-NRAB-00003-090085**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin 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 utilized outside forces (DeAngelo Brothers) to perform Maintenance of Way and Structures Department work (cut brush and trees on the right of way and crossing clearing) at grade crossing on the Adams Subdivision beginning on June 26, 2007 and continuing (System File B-0701C-106/1485502 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance written 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(B).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Jewson, R. Otto, R. Kuhl and R. Schuett shall now each be compensated at their respective straight time rates of pay for an equal and proportionate share of the total time man-hours expended by the outside forces in the performance of the aforesaid work on the Adams Subdivision beginning June 26, 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.

Although the Carrier questioned the number of hours expended by the contractor and whether the disputed work was covered by the Scope Rule, it did not effectively refute any of the allegations of the claim. Therefore, all of the assertions in the claim that were not refuted are accepted as proven fact for purposes of resolving the dispute.

Turning to the merits, it is clear that Scope Rule 1(B) forms the core of the dispute. It reads, in pertinent part, as follows:

“Employes included 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. 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 employes 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 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 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 requirements' 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)

We note that Scope Rule 1(B) uses the word "shall" in connection with the performance of all maintenance work. As traditionally interpreted, the word "shall" imposes a mandatory obligation. Moreover, Scope Rule 1(B) as written, has been construed to be a reservation of work Rule. See Award 16 of Public Law Board No. 1844 between these same parties.

It is clear that the work in question was routine maintenance work within the meaning of Scope Rule 1(B). Therefore, the Carrier was required to provide notice of its intention to contract out the work. The Carrier did not provide any notice whatsoever. Thus, the Carrier's action constituted a double violation of the Agreement, i.e., it impermissibly contracted out reserved work and it did not provide the required advance notice of its intentions.

We turn, then, to consideration of the remedy question. Although the Carrier asserted a full-employment defense, it did so on the basis of three prior Awards that involve a different Rule and a different Agreement. If full-employment was allowed

to serve as a defense to a monetary remedy, the defense would effectively allow the Carrier to violate the Agreement with impunity. Thus, the asserted defense is not persuasive here.

On the record before the Board, we find the Carrier's violations did create a loss of work opportunity. Accordingly, the Claimants are entitled to the remedy requested for all hours worked by the contractor for the two specific dates identified in the record, i.e., June 26 and 27, 2007.

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.