Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41102
Docket No. MW-40911
11-3-NRAB-00003-090141

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(
(Union Pacific Railroad Company (former Chicago and 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 to perform Maintenance of Way and Structures Department work (clean right of way ditches) on the Boone Subdivision beginning on July 10, 2007 and continuing (System File R-0701C-312/1481905 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, R. Van Cannon, R. Pohlner and G. Hudson shall now each be compensated at their respective and applicable rates of pay for all of the hours worked by the outside forces in the performance of the aforesaid work beginning July 10, 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.

The Organization objects to the Carrier's contracting out the work of cleaning ditches and the performance of grading and sloping to improve drainage near track structures on the Boone Subdivision. The Carrier provided a notice dated March 2, 2007 under Service Order No. 36327 which reads, in pertinent part, as follows:

> "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 Carrier provided this notice well before the contractor began the work at issue on July 10, 2007. The notice covers all locations on the Carrier's system, including locations on the former Chicago and North Western Transportation Company property.

The Carrier contends that the above notice meets its contractual notice requirement. In support of its position it cited Third Division Award 40810 (Referee Wallin). The Carrier contracted for the use of specialized equipment – a Loram ditcher. The contractor used its employee to operate the equipment to perform the work described in the notice. It is undisputed that the Carrier does not

own this piece of equipment. Accordingly, its employees are not qualified to operate it.

The Organization maintains that the notice does not provide sufficient information for it to be considered a valid notice. It argues that the Carrier owns other equipment that the Claimants are qualified to operate that will get the job done.

Rule 1 – SCOPE governs the determination of this dispute. It reads, in relevant part, as follows:

> "B. Employees 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. . .
>
> 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 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."

APPENDIX 15 (Berge/Hopkins letter of December 11, 1981) is also germane and reads, in pertinent part, as follows:

> "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 any 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." (Emphasis added)

The work in question – cleaning drainage ditches, as well as grading and sloping drainage areas around track structures – is reserved work (Public Law Board No. 1844, Awards 16 and 17). Under Rule 1 B, the Carrier must provide notice to the Organization of its intent to contract out work. Further, Appendix 15 to the Agreement in effect on this property mandates that the Carrier's "advance notices shall identify the work to be contracted and the reasons therefor."

The Carrier elected to issue and rely on a notice applicable to the former C&NW property and other system locations. The notice describes the work to be performed by the contractor. Because it is applicable to different instances of contracting, it does not specify the reason for the contracting. In this case, the Organization wrote the Carrier on March 6, 2007, only four days after it issued the notice. The Organization provided the Carrier with an opportunity to state the reason(s) for the contracting. None was forthcoming until the filing of the claim. The Carrier asserted in response to the claim that it contracted out this work because the Carrier does not own a Loram ditcher. The contractor owns and operates a Loram ditcher. The Carrier could have stated that reason in its notice or in response to the Organization's March 6 letter. Instead, the Carrier failed to set out the reason for the contracting in violation of the specific contractual mandate set forth in Appendix 15. The Appendix language provides for strict adherence to

notice requirements. Accordingly, the Board concludes that the Carrier did not comply with the notice requirements.

Once it is established that the Carrier violated the notice requirement, any further analysis concerning the nature of the violation becomes dicta. See, Third Division Award 35736 (Referee Eischen). Nonetheless, the Board carefully considered Awards which were adopted subsequent to the November 17, 2010 Referee Hearing. In Third Division Award 40802 (Referee Wallin) a case arising on C&NW property, the language of the notice is not quoted. However, from the recitation of the facts underlying Award 40802, the Carrier employed the crane it owned on one of two mainline tracks to drive 14-inch by 60 foot H-pilings; the contractor brought to this job an off-track crane, a piece of equipment not owned by the Carrier. The contractor operated its crane on the other mainline track. In this manner, the Carrier was able to accommodate the train traffic of approximately 70 trains per day. The Board found in that case, that the Carrier's lack of ownership of the off-track crane met the Rule's exception. The contracting thus conformed to the Rule.

In Third Division Award 40800 (Referee Wallin) which also arose on former C&NW property, the Carrier stated its intent to contract out the work, because its personnel lacked the skills and the Carrier lacked the equipment to repair concrete/stone bridges through the use of epoxy injection technology. The notice appears to be quite specific and focused on that job. The Board concluded that the Carrier had established that the work was contracted under two of the Rule's exceptions: (1) the Carrier did not own the equipment and (2) the employees lacked the skills to use equipment not owned by the Carrier.

Third Division Award 40810 (Referee Wallin) likewise arose on former C&NW property and under the same notice relied on by the Carrier in this case, i.e., Service Order No. 36327 issued on March 2 and conferenced on March 14, 2007. The Board concluded that the notice complied with the Rule. However, the Board did not discuss the impact of the specific language of Appendix 15 as it does in the instant case. The Board need not address the Board's finding of a violation of the Rule in Award 40810, because the Board does not address the question whether the Carrier violated the substantive portion of Rule 1 B. It violated the notice requirement.

What remains to be determined is the matter of remedy. On this property, it is well established that for the Claimants to receive monetary payment, the Organization must demonstrate that the Claimant(s) suffered a monetary loss, Public Law Board No. 1844, Award 13 (Referee Eischen) as well as Third Division Awards 31284 and 31036 (Referee Benn) and Award 32352 (Referee Zusman) – monetary awards are limited to those on furlough. In this case, the Claimants were fully employed. Accordingly, no monetary award is warranted.

## 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 18th day of October 2011.