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

Award No. 42436
Docket No. MW-41976
16-3-NRAB-00003-120336

The Third Division consisted of the regular members and in addition Referee George E. Larney 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 utilized outside forces (Utilco) to perform Maintenance of Way and Structures Department work (brush cutting) between Mile Posts 314 and 278 on the Adams Subdivision and between Mile Posts 139.97 and 112 on the Clyman Subdivision beginning on March 17, 2011 and continuing through April 16, 2011 (System File B-1101C-111/1552861 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) and Appendix '15'.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants L. Heitman and H. Mathe shall now each '* * * be compensated at their respective rate of pay for an equal share of the of (sic) eighty and one half (80.5) man/hours at the straight time rate and thirty one (31) man/hours at the overtime rate worked by Contractor forces performing the brush cutting on the dates under claim.'"

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.

As the Board has stated in prior cases pertaining to the issue, as here, where Carrier utilizes the services of outside forces to perform work the Organization asserts is scope covered work, that is, work falling under the provisions of Rule 1 of the Agreement, it befalls to the Organization the burden to prove the work in dispute belongs to the Maintenance of Way craft. In this instant case, the Organization has shown to the satisfaction of the Board by a multitude of prior decisions that reference to the language in the Scope Rule to "maintenance of tracks" covers the removal of brush and other vegetation from on and along the track and right of way, work the Organization avers is some of the most basic and fundamental work customarily and historically performed by maintenance of way employees.

Having established that the work in question is scope covered work, the Organization must show that, as alleged, Carrier failed to comply with contractual obligations in furnishing it proper and timely written notice of its intention to contract out the work in question and that the utilization of outside forces failed to meet one or more of the contractual exceptions advanced by Carrier as set forth by Rule 1 to permit the performance of the work by other than Carrier's own Maintenance of Way forces.

Carrier issued the following 15-day written notice dated August 10, 2010, seven months in advance of the actual performance of the work in question on the Adams and Clyman subdivision. The notice directed to the Organization's General Chairman, W. E. Morrow reads in pertinent part as follows:

> **"This is a 15-day notice of our intent to contract the following work pursuant to the provision of the collective bargaining agreement.**
>
> **Locations: the entire Chicago Service Unit CNW territory including the following subdivision: Adams, Belvidere, Clinton, Clyman, Geneva, Harvard, Kenosha, Lake, Milwaukee, Peoria, Rockwell, Shoreline, Troy Grove, and Wyeville.**
>
> **Specific work: Brush cutting with the Utilico brush cutter continuing until December 31, 2010.**
>
> **The Company does not own the equipment and is not adequately equipped to handle the work. Serving of this 'notice' is not to be construed as an indication that the work described above necessarily falls within the "scope" of your agreement, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMWED."**

Contrary to the argument asserted by the Organization alleging the 15-day Notice not to constitute a proper notice due to deficiency of information, we find otherwise noting there are three contractual requirements to be met by Carrier to deem a 15-day Notice of Intent to subcontract work to constitute a proper notice. The first requirement is set forth in Rule 1(b) which states the notice must be issued not less than fifteen (15) days in advance of the date of the intended contracting transaction. A second and third requirement is specified in Appendix 15 which states 1) the advance notice shall identify the work to be contracted and 2) the reasons given for contracting out the work. A straight-forward reading of the August 10, 2010 Notice issued by Carrier and reproduced in pertinent part above clearly complies with all three contractual requirements and therefore is found by the Board to constitute a proper 15-day notice. The additional information the Organization asserts should also be included in the notice such as, the number of contractor employees to perform the work and the start and end date of the work to be performed, among other inquiries, is information the Board holds should be discussed by the Parties in conference as a means of making a good-faith attempt to reach an understanding concerning the intended subcontracting transaction as so provided by Rule 1(b).

The Board further notes that Rule 1(b) also provides that if no understanding of the intended subcontracting transaction is reached by the Parties in conference, the Carrier nevertheless may proceed with utilizing outside forces to perform the work in

question and the Organization may, in response, file and progress claims in connection with the disputed work. This is, of course, what occurred here when Carrier proceeded to contract out the disputed brush cutting work and the Organization responded by filing the instant claim. In so proceeding, Carrier assumes the burden of showing the Board its use of outside forces to perform scope covered work falls within one or more of the exceptions provided for in Rule 1(b) that permits such subcontracting transaction.

Carrier referenced the exception it relied upon at the very outset in its 15-Day Notice of Intent wherein Carrier noted it did not own the equipment to perform the brush cutting work and, as a result, was not adequately equipped to handle the work. Subsequently, Carrier elaborated on this exception asserting that the brush cutters it owns are limited in their ability to reach brush and/or trees both horizontally and vertically whereas, the contractor's brush cutter possesses the capacity to articulate its arms thereby moving horizontally and laterally in a number of different directions, providing the ability to reach areas not otherwise accessible by the brush cutter equipment it owns. As an additional exception, Carrier cites, as fact, that the ability to properly operate the contractor's brush cutter requires specialized skill sets due to the machine's articulating arms and its capability of working on the track as well as off the track which makes the machine unique.

Subsequent to receipt of the 15-day Notice of Intent, the Organization exercised its contractual right under the provisions of Rule 1 and requested a conference be convened to attempt to reach a good-faith understanding of the subtracting transaction in question. Said conference was held on August 27, 2010. Among other points of discussion, the Organization asserted Carrier was unable to identify the special skills it maintained were necessary to operate the contractor's brush cutter nor did the Carrier address the suggestion to lease the type of contractor brush cutter it maintained was necessary to accomplish the work, said suggestion of a leasing arrangement supported by the written sentiments expressed in the December 11, 1982 Berge-Hopkins letter incorporated in the controlling agreement as Appendix 15. As we have noted in prior awards, contrary to Carrier's position the letter is devoid of any current meaning or application, it continues to be incorporated in successor collective bargaining agreements as Appendix 15 and therefore signals an intention by the Parties to still have significant bearing to some degree on contracting out issues such as here set forth in the instant claim. In the letter, the Carrier assured the Organization it would assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by

carrier employees. Such assurance however does not rise to a contractual obligation on the part of Carrier to procure rental equipment in response to every instance it subcontracts scope covered work based on the asserted exception of requiring specialized equipment to perform the work in question. We find nothing in the record evidence to even intimate that Carrier somehow skirted the Organization's suggestion that it rent the "specialized" brush cutter as an alternative to subcontracting the disputed work or by so doing, it failed to honor a pledge to reduce the incidence of subcontracting and increase the use of their maintenance of way forces.

Notwithstanding the Organization's argument Carrier at conference was unable to identify the special skills it maintained were necessary to operate the contractor's brush cutter, Carrier has successfully described the unique attributes of the contractor's brush cutter as compared to the brush cutter equipment owned by it, to persuade the Board that special skills are needed to operate the contractor's brush cutter. Furthermore, the Organization was unable to prove to the satisfaction of the Board that Carrier could have leased a comparable brush cutter to that used by the contractor to perform the disputed work.

In accordance with the foregoing findings, we rule to deny the subject claim in its entirety.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of October 2016.