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

Award No. 42521
Docket No. MW-42024
17-3-NRAB-00003-120394

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig 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 (Hulcher) to perform Maintenance of Way and Structures Department work (grading right of way and cleaning drainage ditches) between Mile Posts 200 and 233 on the Boone Subdivision beginning on April 5, 2011 and continuing through April 30, 2011 (System File G-ll01C-1556082 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 Appendix 15.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Newhouse and S. Roberts shall now each be compensated for one hundred and forty four (144) hours at their respective straight time rates of pay and for twelve (12) hours at their respective overtime hours."

The Carrier declined this 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.

On January 31, 2011, the Carrier sent notice to the General Chairman regarding the Carrier's intent to use outside forces to perform work on the Council Bluffs Service Unit. It is alleged that beginning on Tuesday, April 5, 2011 and continuing through Saturday, April 30, 2011, the Carrier hired a contractor, Hulcher, Inc., to operate a Cat D5 bulldozer to grade the right of way and clean out drainage ditches along the tracks between MP 200 and MP 233 on the Boone Subdivision. The contractor utilized two employees, each of whom worked eight or more hours a day. According to the Organization, the Claimants were available, willing and able to do this work.

The parties met on February 15, 2011. The Organization filed a claim on May 27, 2011, alleging that the Carrier violated Rule 1(B) when the contractor performed said work. The Organization requested that the Claimants be compensated for the contractor's forces' hours worked.

The Carrier's Engineering Supervisor denied the claim on July 25, 2011. He indicated that the Carrier had properly notified the Organization on January 31, 2011. The Supervisor explained that the Claimants were fully employed during the period in question and had worked alongside the contracted forces. The Carrier provided the Organization with a Manager's statement that indicated that the Carrier was not adequately equipped to perform the work in question. It was noted that the Organization's reliance upon the Berge-Hopkins Letter was not proper. The Carrier indicated that the Organization had not provided sufficient evidence to support its claim. It was the Carrier's view that Rule 1(B) of the Agreement had not been violated.

On September 16, 2011, the Organization appealed the Carrier's decision. The Organization argued that the Carrier had failed to make a good-faith effort to reduce subcontracting and that the Claimants lost work opportunities for which they should be compensated. The Carrier denied the Organization's appeal on October 20, 2011.

According to the Organization, the Carrier had customarily assigned work of this nature to BMWE-represented employees. It further argues that the relevant work is consistent with the Scope Rule and the Carrier's employees were fully qualified and capable of performing the designated work. The work performed by Hulcher is within the jurisdiction of the Organization and, therefore, the Claimants should have performed said work. Because the Claimants were denied the right to perform the work, the Organization argues that they should be compensated for the lost work opportunity. Further, the Organization contends that the Berge-Hopkins Letter supports its position.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that the work that was contracted out required the use of equipment that the Carrier did not have at that time. Under the specific language of the Scope Rule, the Carrier had the right to use outside forces under such circumstances and the relevant work does not belong to BMWE-represented employees under either the express language of the Scope Rule or any binding past practice. According to the Carrier, controlling precedent has upheld the Carrier's position. Further, the Carrier contends that it did provide proper advance notice to the Organization.

We note that Rule 1(B) provides 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. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.**
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> **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.

Nothing contained herein shall be construed as restricting the right of the Company to have work customarily performed by employees included within the scope of this Agreement performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible."

Further, the Berge-Hopkins Letter indicates as follows in relevant part:

"The carriers assure you that they will 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."

We carefully reviewed all evidence regarding whether the Organization has proven that the relevant work belongs to BMWE-represented employees. The Organization was unable to rebut the Carrier's evidence that the bulldozer procured from Hulcher was necessary at that time. It is within the Carrier's jurisdiction to make decisions concerning the efficiency of the operation, provided that it does not violate specific rights set forth in the Agreement. Based on the record before the Board, the Carrier's use of the equipment did not violate the Agreement. The Agreement specifically permits the Carrier to contract out work customarily performed by its own employees when the relevant equipment is required and not within the control of the Carrier.

Further, the Berge-Hopkins Letter does not change the result of this case. As indicated by Referee Gerald E. Wallin in Third Division Award 40802:

> **"Our careful review of the so-called Berge-Hopkins December 11, 1981 Letter of Understanding shows that it speaks in general terms. However, the second paragraph of Scope Rule 1(B) recognizes five specific situations in which the Carrier is permitted to contract out work otherwise reserved to scope-covered employees in non-emergency circumstances. One of those exceptions permits the contracting of work when the Carrier does not own specialized equipment. The equipment ownership exception does not require the Carrier to try to lease equipment for operation by its forces. It is undisputed that the Carrier did not own any off-track cranes. In addition, there is no proven contention that Carrier forces were qualified to operate such crane equipment.**
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> **The clash between the general language of the December 11, 1981 Letter of Understanding and the specific language of Scope Rule 1(B) requires an interpretation by the Board. Traditionally, such conflicts are resolved in favor of the specific terminology. Accordingly, we find that the specific language of Scope Rule 1 prevails over the general language of the Berge-Hopkins December 11, 1981 Letter of Understanding that may be in conflict."**

Based on the evidence, as well as the above-cited precedent, we cannot find that the use of the contracted equipment violated the Agreement. The burden was on the Organization to prove that a violation occurred, and it failed to do so. The Board concludes that the Notice was proper and that it was appropriate for the

Carrier to contract out the work. Further, we cannot find that the Berge-Hopkins Letter is determinative. Therefore, the instant claim is denied.

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 6th day of March 2017.