

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42536
Docket No. MW-42053
17-3-NRAB-00003-120419**

The Third Division consisted of the regular members and in addition Referee Roger K. MacDougall when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 (Brandt Construction Company/Rittmer Incorporated Construction) to perform Maintenance of Way and Structures Department work (dismantle bridges and related work) at Mile Posts 88.59 and 88.79 on the Clinton Subdivision beginning on May 2, 2011 and continuing (System File J-1101C-358/1556323 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper 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 and Appendix ‘15’.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Johnson, G. Mathies, D. Kalfas, W. Harrington and T. Malcore shall now each be compensated at their respective and applicable rates of pay for an appropriate share of all straight time hours and overtime hours expended by the outside forces in the performance of the aforesaid work.”**

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.

This is a case involving contracting out of work. The Organization says the contracting out was improperly done.

The Rules in question are as follows:

“RULE 1 - SCOPE

* * *

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

RULE 2- SUBDEPARTMENTS

The following Subdepartments are within the Maintenance of Way and Structures Department.

- A. Bridge and Building Subdepartment**
- B. Track Subdepartment**
- C. Roadway Equipment Repair Subdepartment**

A. B&B Subdepartment

- 1. B&B & Painter Foreman**
- 2. B&B & Painter Assistant Foreman**
- 3. Scale Inspectors**
- 4. Truck Drivers**
- 5. B&B Carpenters**
- 6. Masons**
- 7. B&B Helpers**
- 8. Bridge Tenders**
- 9. Bridge Flagmen**
- 10. Cooks**
- 11. Machine Operators**
- 12. Assistant Machine Operators**

* * *

RULE 3 - CLASSIFICATION OF WORK

* * *

A. An employee directing the work of employees and reporting to officials of the Company shall be classified as a Foreman.

* * *

E. An employee assigned to construction, repair, maintenance or dismantling of buildings, bridges or other structures including the building of concrete forms, etc., shall be classified as a B&B Carpenter.

* * *

I. An employee qualified and assigned to the operation and servicing of machines used in the performance of Maintenance of Way and Structures Department work shall be classified as a Machine Operator

* * *

K. An employee assigned to operate a truck used in the performance of Maintenance of Way and Structures Department work shall be classified as a Truck Driver.

* * *

D. Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Company.

* * *

RULE 5 - SENIORITY DISTRICTS

Seniority Districts are identified as follows: B&B Track

**B-2 T-2
B-3 T-3
B-4 T-4
B-7 T-7
B-8 T-8
B-9 T-9**

* * *

RULE 7 - SENIORITY LIMITS

A. Separate seniority in the B&B and Track Subdepartments shall be established in the following classes:

B&B Subdepartment

- 1. B&B Foreman (including Classes 2&3)**
- 2. Assistant B&B Foremen (including Assistant Foremen - Truck Drivers)**
- 3. Truck Drivers***
- 4. B&B Carpenters (including Masons and Lead Carpenters)***
- 5. B&B Helpers, Bridge Tenders and Cooks**

* * *

TRACK - B&B MACHINES

H. The following machines, not listed as Class A, B, or C machines, are used in common in the B&B and Track Subdepartments, i.e., at times on Track work, at other times on B&B work. In order to permit the assigned operator to stay with the machine, regardless of the Subdepartment in which working, a separate seniority roster shall be established for operators of such machines. Where there are no qualified bidders holding seniority on such roster for such machine operator positions, vacancies shall be bulletined to both B&B and Track Subdepartment employees who shall be eligible to bid for such positions. Assignment to the vacancy will be based upon the oldest retained seniority date.

**Cranes of less than 20-ton maximum lifting capacity Pettibone
Speed Swing
Earth Drill Blacktop Roller Car Top Unloader Crawler Crane
Crawler Loaders and Dozers Boom Truck
Motor Grader Tie Cranes
Rubber Tired Tractor
Trencher
Portable Air Compressor (Rail-Mounted) W-64 Derrick Car
Lo-Boy Backhoe
Idaho Norland Snow Blower Articulated Front End Loader
Hydro-Scopic Excavator Unimog
Fuel Service Truck
Truck With Plows and Salt Spreaders Skid Loaders with
Attachments Sheep's Foot"**

In addition, the Organization says that the "Berge" letter continues to apply to this day. The Carrier disagrees.

The Organization says that when the Carrier plans to contract out work contained within the Scope of the Agreement, i.e., work which is customarily performed by Carrier forces, it is required to give the General Chairman written notice of its plans to contract out the work as far in advance of the date of the

contracting transaction as practicable and in any event not less than 15 days prior thereto and if the General Chairman or his representative requests a meeting to discuss matters relating to the intended contracting transaction, a representative of the Carrier shall promptly meet with him for that purpose, as required by Rule 1(b), Paragraph 3 and the interpretation and amendments thereto embodied in the December 11, 1981 Letter of Agreement. Rule 1(b), Paragraph 3 and the December 11, 1981 Letter of Agreement, in pertinent part, read:

“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.”

* * *

“Dear Mr. Berge:

December 11, 1981

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.

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”

The Organization says that, commencing on May 2, 2011, the Carrier allowed a third party contractor to dismantle bridges on the Clinton Subdivision. They say that ordinary tools, trucks and equipment were used to perform this work.

The Organization first says that the Carrier failed to provide proper notice of its intent to contract out this work in their letter of August 12, 2010. They then say that the Claimants were properly trained and available to perform this work. Further, they say that a conference held on August 27, 2010, relative to the August 12, 2010 letter, failed to address the contracting out of this work. In addition, they say that the Carrier failed to provide an adequate reason for contracting out and failed to assert good-faith efforts to reduce the incidence of contracting out and to increase the use of Maintenance of Way forces to the extent practicable, as required by the Burge letter.

The Carrier says that Rule 1(b) allows the use of outside contractors. They say the Carrier was not adequately equipped to perform the work with its own forces. They say that the Claimants (and other covered forces) were fully occupied and that they are not required to “piecemeal” work when part of a larger project (as was the case here).

The Carrier says that proper notice was given on August 12, 2010. They say that these bridges were part of a three-year project, covering many bridges. They say that the key portion of Rule 1 is that work:

“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.”

The Notice in question provided in the materials references “. . . grading . . . drainage including culverts and bridge construction . . .” between MP 87.30 and 88.14 on the Clinton subdivision.

After the Notice, there was a conference held on August 27, 2010, with the Organization following up with a letter of September 27, 2010. Claims and appeals followed.

It is clear to this Board that the position of the Carrier is not that special skills were required, nor that special material was needed, nor, indeed, that special equipment was required which was not available. Instead, this case turns on the Carrier’s allegations that it was not adequately equipped to handle the work and/or that time requirements must be met that were beyond the capabilities of Company forces to meet.

It is clear that the Carrier has the right to contract out work, but that they must follow the procedures and meet the criteria contained within Rule 1, in order to do so. After a full review of the material before this Board, we find that the Carrier did issue proper notice and did follow the requisite steps required in Rule 1. Further, despite allegations to the contrary, the evidence before this Board does not refute the Carrier’s position that it lacked the necessary forces to meet this required work. The Organization bears the burden of proving the contrary in any contracting-out case. In this particular circumstance, this Board finds that it has failed to meet this hurdle.

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.