

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42537
Docket No. MW-42101
17-3-NRAB-00003-130032**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees 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 (Dietz and O.C.C.I.) to perform Maintenance of Way and Structures Department work (remove culverts and replace them with a bridge) at Mile Post 18.03 on the Peoria Subdivision beginning on August 18, 2011 and continuing (System File J-1101C-367/1560460 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out the above-referenced work or make a good-faith effort 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 W. Harrington, J. Santos, D. Kalfas, S. Osborn, G. Mathies, D. Jaegers, J. Vossen and B. Helgeson shall now ‘*** each be compensated for an appropriate share of all hours of straight time and overtime that the Contractor’s employees spent performing Maintenance of Way work on district B-3, at the applicable rates of pay.’”**

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

* * *

B. 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**

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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 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 first says that the Carrier failed to provide proper notice of its intent to contract out this work in their letter of July 29, 2011. The Organization responded on August 3, 2011 and requested a conference. They then say that the Claimants were properly trained and available to perform this work. Further, they say that a conference held on August 16, 2011 failed to adequately 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 MoW forces to the extent practicable, as required by the Burgeletter.

They say that a mere two days after the conference, the Carrier had outside contractors on the property to do the work under dispute. The contractors removed culverts and replaced them with a bridge at Mile Post 18.03 on the Peoria Subdivision.

There is no dispute that this work would normally fall under the Scope rule in the CBA in question. The issue is whether the Carrier properly complied with the provisions which allow, under certain circumstances, contracting out.

The Carrier says that proper notice was given on July 29, 2011. The notice states in relevant part:

“Location: mile post 18.03 on the Railroad’s Peoria Subdivision near Normandy, Illinois.

Specific Work: furnishing all labor, supervision, equipment, supplies, and material to fully design and build a 3-span steel ballast deck bridge supported by driven steel pile abutments and two intermediate bents. The scope includes sitework/temporary construction, bridge construction, and levee repairs per contractor proposal dated July 27, 2011.”

The Carrier submits that this bridge was wiped out as part of a derailment on May 6, 2011. The Carrier replaced the bridge with culverts to get traffic moving again. The culverts washed out a few weeks later. In order to build a new bridge,

with three foot diameter pilings, the Carrier had to lease a 250 ton crane, which it did not have in its inventory.

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. Instead, this case turns on the Carrier's allegations that special equipment was required and, further, 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. This particular notice was extremely clear and detailed.

Further, despite allegations to the contrary, the evidence before this Board does not refute the Carrier's position that it lacked the necessary equipment and forces to meet this required work. It is unrefuted that the crane was not in inventory. The Carrier says that all Organization forces were fully occupied. This is not refuted in the material before this Board. The Organization says that the Carrier should carry further employees on its payroll to allow work, such as this, to be performed by covered employees. However, this is not what the CBA provides. 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.