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

Award No. 42549
Docket No. MW-42199
17-3-NRAB-00003-130152

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 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 (Razorback Rail Service and R. J. Corman) to perform Maintenance of Way and Structures Department work (repair slide areas) between Mile Posts 40.6 and 47.5 on the Trenton Subdivision beginning on September 29, 2011 and continuing through November 16, 2011 (System File G-1101C-68/1563252 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 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. McGinness and G. Chaney shall now each be compensated for two hundred and sixteen (216) hours at their respective straight time 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 slide repair work. The Organization says the contracting out was improperly done.

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

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

*** * ***

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 employes 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"

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 l (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."**
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> *** * ***
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> **"Dear Mr. Berge:**
>
> **December 11, 1981**
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> **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. The Notice in question was dated February 20, 2011, and specifies that the Carrier plans to use a contractor for “. . . assistance on subgrade stabilization, drainage improvement, a culvert installation on the Trenton Subdivision between Moseby Junction and Carlisle.” It goes on to describe the type of equipment (dozers, rubber-tired loaders, crawler hoes, dump trucks and backhoes). It goes on to specify the Carrier Project number involved. In accordance with the Collective Bargaining Agreement (CBA), a conference was held on the matter on March 17, 2011. The work was done from the end of September through mid-November of that year.

The Board finds that the Notice had sufficient detail and was thus in compliance with the CBA.

This case turns on the type of equipment required to perform the work. The Carrier says that it needed, and used, track hoes to do the job. This is not something they have readily available, they say. The Organization highlights the term “backhoe” in the CBA to point out that this is something contained within their contract. They also provided statements from employees who said that they have operated track hoes to repair slide areas in the past. Further, they say, such equipment could have been rented for this project.

While the Organization may be correct in what has been done in the past, and what could have been done with rental equipment, that is not what the CBA deals with. The Carrier has the right to determine what equipment it should buy or lease. There was no argument made in this case, as has been argued in other cases, that the Carrier actually had track hoes available in inventory. Had that been proven, this case may well have had a different outcome. However, the buy/lease decision is one for management to make. For better or worse, they decided it was more economical to contract out this work than to buy or lease a track hoe and have the work done by their own forces. This falls squarely within the contracting out exceptions contemplated in the CBA. As a result, the Organization has failed to meet its burden of proof.

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.

LABOR MEMBER'S DISSENT
TO
AWARD 42541, DOCKET MW-42155,
AWARD 42549, DOCKET MW-42199
(Referee Roger K. MacDougall)

In these cases, the Majority erred when it determined that the Carrier established an exception under Rule 1B allowing it to contract out the reserved Maintenance of Way work. The Majority's decision clearly misapplied the language of the Agreement.

First, it should be noted that economy is not one of the listed exceptions within Rule 1B under which the Carrier can contract out Maintenance of Way work. This Board has frequently and consistently held that economy is not a valid justification for contracting out reserved work. See Third Division Awards 14591, 21609, 24810, 29394 and 31622 which are representative of this Board's consistent findings on this issue.

Assuming, arguendo, that the Carrier's position that it needed track hoes to perform the claimed work and that said track hoes were not readily available was true, it would not alleviate the Carrier's obligations pursuant to Appendix 15 (December 11, 1981 National Letter of Agreement). Specifically, Appendix 15 requires the Carrier to attempt to procure rental equipment and make a good-faith effort to reduce the incidence of subcontracting. These principles have consistently been recognized and applied by this Board and were recently reaffirmed by on-property Third Division Awards 41102, 42419, 42423, 42427, 42429, 42435, 42437 and 42438. In said Awards, the Board held that Appendix 15 creates obligations for the Carrier to follow prior to contracting out work reserved by Rule 1B of the Agreement. Said awards specifically held that the Carrier's failure to make its own equipment available and/or failure to procure rental equipment violated the Appendix 15 obligation to make a good-faith effort to reduce the incidence of subcontracting. Moreover, a failure to schedule work when men and equipment were available violated the Appendix 15 obligation to make a good-faith effort to reduce the incidence of subcontracting. Specifically, Awards 42423 and 42429 held:

AWARD 42423:

> "*** The Board further notes that Carrier asserted at conference the exception for contracting out the work was due to time requirements which are beyond the capabilities of the Carrier's forces to meet yet, as observed by the Organization, the Notice was issued in January but the work in question did not occur until the following October and November. ***
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> It is evident from the foregoing findings that the initial exception cited by Carrier permitting it to utilize outside forces to perform the scope covered work in question was a circumstance of Carrier's own making as the work in question could have been scheduled at a time when maintenance of way forces were available to

> "perform the work. It is further evident that not scheduling the work in question at a more propitious time, Carrier failed to adhere to the pledge set forth in Appendix 15, to assert a good faith effort to reduce the incidence of subcontracting and increase the use of its maintenance of way forces."
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> AWARD 42429:
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> > "*** The record evidence before us clearly proves that Carrier's inability to utilize its own maintenance of way employees was due directly to decisions of its own making to wit: poor planning exemplified by transferring its own snow removal equipment to other of its property locations; and its failure to comply with the pledge specified in Appendix 15 that in the absence of owning the proper equipment to perform the work as indicated/described in the 15-day advance Notice, that it would rent the necessary equipment."

For the above reasons and in connection with the above-cited precedent, it is clear that the Majority in this instance erred when it determined that the Carrier complied with Rule 1B and Appendix 15 and when it determined the Carrier established an exception listed in Rule 1B allowing it to contract out work. The Majority's decision that the Carrier was justified in contracting out this basic Maintenance of Way work is therefore palpably erroneous and must be considered to be without precedential value. Therefore, I respectfully dissent.

Respectfully submitted,

Zachary C. Voegel
Labor Member