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

Award No. 42551
Docket No. MW-42203
17-3-NRAB-00003-130156

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 allowed and assigned outside forces (Hulcher, Inc. and Progress Rail Services) to perform Maintenance of Way and Structures Department work (remove/dismantle and install new switches and track panels and related work) in and around the Short Line Yard in Des Moines, Iowa beginning on October 22, 2011 and continuing through October 25, 2011 (System File G-1101C-69/1563506 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 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 J. Anderson, M. Hopkins, T. Tracy, C. Gildea, F. Goodall, T. Vinson, R. Dolan, S. Ginder, J. Payne, E. Lorenzen, D. Juhl, N. Harrison, J. Weber, A. Jass, E. Banks, D. Wiklander, L. Cameron, J. Everett, K. Iverson, C. Hayes, T. Henn, J. Horstmann, C. Peterson, J. Coolican, L. Nordman, J. Clausen, J. Kockler, F. Pearson and S. Seible 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 T-2, 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 of the Carrier utilizing a contractor to remove/dismantle and install new switches and track panels and related work. The Organization says this is work exclusive to them and that the contracting out provisions of the Collective Bargaining Agreement (CBA) were not complied with.

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

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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 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"

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 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 . . . ."**

This Board is persuaded by the Organization that the work involved is that which is traditionally performed by the employees they represent. As a result, we turn to the

Notice provided by the Carrier, and whether the Carrier's arguments fall within the exceptions such as to allow the contracting out in question.

The Carrier provided a Notice dated January 17, 2011. The Notice provided that it covered "various locations on the Railroad's Twin Cities Service Unit" and that it planned to have a contractor provide ". . . fully operated, fueled and maintained equipment to assist Railroad forces in performing work on an as-needed basis." No time frame for the work to be done is provided in the Notice.

This Notice is problematic. If this Board were to accept it, it would be tantamount to allowing contracting out of any of the Organization's work, for all times into the future. By simply sending out a few of these letters, the location could include the whole railroad system. There could be no meaningful dialogue at a subsequent conference. This cannot be what the parties agreed to in the contracting out provision of the CBA. This form of Notice simply attempts to reach too far. It fails.

As a result, the Organization has met its burden of proof with respect to these claims and they must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 6th day of March 2017.