

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42605
Docket No. MW-42150
17-3-NRAB-00003-130091**

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 utilized outside forces (Utilco Railroad Services, Inc.) to perform Maintenance of Way and Structures Department work (brush cutting) on the right of way between Mile Posts 21 and 30 and Mile Posts 35 and 38 on the Milwaukee Subdivision and at various locations on the Lake Subdivision starting on September 17, 2011 and continuing until October 7, 2011 (System File B-1101C-138/1561819 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 the December 11, 1981 National Letter of Understanding.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Klingseisen and J. Paulson shall now each be compensated for one hundred and twenty-eight (128) hours at their respective straight time rates of pay and for one hundred and thirty-one (131) hours at their respective time and one-half 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 perform brush cutting along the right-of-way. 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:

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 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”

Further, Rule 7(E) of the CBA specifically includes the category of Brush Cutter. A letter of September 14, 2007 from the Carrier to the Organization also spells out how a new brush cutting machine will be categorized within the CBA.

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 June 29, 2011. This Notice gave the type of work “. . . Brush cutting with Utilico brush cutter . . .,” the duration “. . . until December 31, 2011” and the location “the entire Chicago Service Unit CNW territory including the following . . . [subdivisions].” As a result, the Board finds this Notice sufficient to meet the criteria outlined in the CBA.

The next step of the analysis is whether the work falls into one or more of the five enumerated exceptions, such as to allow proper contracting out.

The Carrier argues that the equipment in question has specialized articulated cutting heads, allowing it to reach further out and around signal installations, under bridges and can get on and off the track more efficiently. No other arguments with respect to the exceptions were progressed at the hearing in this case.

The Organization points out that, while the brush cutter in question might have a number of special characteristics, there is no evidence before this Board that any of these uses were either required, or, in fact, used. Thus, they say, the Carrier

has failed to show that the brush cutting equipment in question falls within the contracting out exception. Further, they point out, it is unrefuted that the brush cutters owned by the Carrier were available. There are photographs and statements in the material before this Board to support this contention.

The Board is persuaded by the arguments of the Organization that the Carrier has failed to show that this particular equipment was necessary for the work to get done. This is not a case of requiring a massive crane to rebuild a bridge. It is a case of a brush cutter. While the Utilco equipment might have a few extra bells and whistles it still has one purpose – to cut brush. In this case, this Board finds that there are not sufficient equipment distinctions to justify the Carrier's actions in contracting out this work. As a result, the Organization has met its burden of proof with respect to these claims.

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 19th day of April 2017.

CARRIER MEMBERS' DISSENT

to

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(Referee Roger K. MacDougall)

The Majority's conclusions with respect to the Carrier's assertion the equipment utilized by the contractor was specialized failed to recognize and respect the precedent set by past arbitrators. We anticipate that the Majority's ill-advised action will create further turmoil and unwittingly add fuel to BMW's burning desire to alter the nature of the burden of proof historically required of the Carrier on the Union Pacific Railroad Company property. Consequently, we are compelled to register our vigorous dissent so that future readers of these Awards will recognize the injustice which the Majority sanctioned. It goes without saying that no future decision makers should be tempted to reach similar unwarranted conclusions.

In the matter at hand, the Organization filed a claim for the contracting out of brush cutting work. In response, the Carrier demonstrated proper notice was given and the work was contracted per Rule 1(b) as special equipment was utilized, specifically an Utilico Brushcutter. The Majority held that the Carrier failed to show that this particular equipment was necessary for the work to be done and thus sustained the claim. The Carrier points out imposition of such burden is in direct conflict with previous precedent on the property. Third Division Award 40374 held:

"We carefully reviewed all evidence regarding whether the Organization proved that the involved work belongs to BMW-represented forces. The Organization was unable to disprove the Carrier's evidence that the rented crawler crane was different from the Carrier's equipment and could perform the work in a more efficient and timely manner. It is within the Carrier's province 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 crawler crane and contracted operator did not violate the Agreement. The Agreement

specifically permits the Carrier to contract out work customarily performed by its own employees when specialized equipment not owned by Carrier is required.”

The Carrier does and should have the right to make decisions which affect the efficiency and productivity of its operations. Brush cutting could be performed with a wide range of tools and equipment from garden clippers, chain saws to the specialized Utilico. As the above precedent states, it is the Carrier’s discretion to determine the equipment that is the safest and most efficient to the operations.

Based on the above, the Majority’s determinations were palpably erroneous and cannot be considered as precedent in any future cases. Because they clearly create unwarranted chaos, we must render this vigorous dissent.

Katherine N. Novak
Katherine N. Novak

Matthew R. Holt
Matthew R. Holt

April 19, 2017