

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43720
Docket No. MW-42745
19-3-NRAB-00003-140434**

The Third Division consisted of the regular members and in addition Referee Jeanne M. Vohnhof when award was rendered.

**(Brotherhood of Maintenance of Way Employes 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 (E-80 Plus Constructors) to perform Maintenance of Way and Structures Department work (concrete bridge backwall and pier repair work) at Mile Post 271.84 near Westside, Iowa on the Boone Subdivision on April 9, 10, 11, 12, 15, 16, 17 and 18, 2013 (System File J-1301C-511/1585682 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with 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 Appendix ‘15’.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Broich, J. Fagen, G. Koski and R. Romick shall now ‘*** each be compensated for an equal share of the man hours expended by the Contractor’s employees spent performing Maintenance of Way work on district B-4, 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.

The Claimants have established and retain seniority in the Bridge and Building (B&B) Subdepartment of the Maintenance of Way and Structures Department. On the dates in question, they were regularly assigned to their respective positions on B&B Gang 3471.

On the dates set forth in the claim the Carrier assigned outside forces (E-80 Plus Construction) to perform work of bridge construction, maintenance and repair on the Boone Subdivision in Westside, IA. The Organization describes the disputed work as the pinning, strengthening and refacing of bridge back walls and the pier at MP 271.84 near Westside, Iowa.

The Organization argues that this work is clearly covered by Rule 1, the scope rule. In addition, the Organization argues that the work has customarily, historically and traditionally been assigned to and performed by the Carrier's B&B Subdepartment employees. The Organization argues that the Carrier has failed to provide proper advance notice, and has failed to establish that any of the exceptions cited in Rule 1 have been met.

The Carrier argues that it has provided proper notice in this case. The Carrier argues further that the Carrier was not adequately equipped to handle such work due to insufficient manpower and/or equipment available and that the magnitude of the work was beyond the capabilities of the Carrier's forces. In addition, the Carrier contends that the Claimants were tasked with other high-priority bridge and safety issues and were therefore unavailable to perform this work.

Rule 1,B states in relevant part,

“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...**

By agreement between the Company and the General Chairman, work as described in the preceding paragraph, which is customarily performed by employees described here, 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 requirement must be met which are beyond the capabilities of Company forces to meet.

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.”

The Organization also cites the Berge-Hopkins letter, regarding the

contracting out of work. The letter remains in the Agreement at Appendix 15.

The disputed work falls under the coverage of Rule 1,B. The work involved the repair of a bridge and piers used by the Carrier in its operations. This work falls within "all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities" which Rule 1, B states shall be performed by Maintenance of Way employees.

The Carrier sent notice to the Organization of its intent to contract out concrete bridge repair work at this site. The notice, dated February 25, 2013 identified nine specific locations, including the location at issue here, in the Albert Lea Subdivision. Signed by Todd Martindale, Director of Bridge Maintenance, the notice stated,

"Specific Work: Provide labor, equipment, and material to perform specialized concrete repairs at the above referenced bridge locations."

The notice went on to state, "the Carrier does not have sufficient manpower to perform this work in a timely manner." The parties conferenced to discuss the notice. The disputed concrete bridge repair work here was performed at one of the bridge locations specified in the notice. The work in question falls within the terms of this notice and this Board has issued Awards in which similar notices were found to be sufficient. See Third Division Awards 40810, 40812.

The Carrier argues that the Company was not adequately equipped to handle the work, an exception under Rule 1 which, if established, permits the Carrier to contract out scope-covered work. In support of its position the Carrier relies upon the notice provided to the Organization regarding the contracting out of this work. Sent from the Director of Bridge Maintenance, it states that the Carrier does not have sufficient manpower to perform these projects in a timely manner.

The Organization argues that the Carrier cannot rely upon poor scheduling as a basis for contracting out scope-covered work. The Carrier presented evidence in the statement of the Director of Bridge Maintenance that it did not have sufficient manpower to complete this group of bridge projects at nine separate locations in a timely manner. The Organization has not refuted that evidence with probative evidence on this record.

The Board concludes that the Organization has not met its burden to show that

the Carrier violated the Agreement when it contracted out this work. The Carrier has provided evidence that it was not adequately equipped with manpower to perform this work in a timely fashion, and the Organization has not been able to refute that evidence. See Third Division Award 40816, involving the same parties and similar work. The burden of proof lies with the Organization to prove its claim and when it fails to sustain that burden, the claim must be denied. Third Division Awards 26033, 27851, 27895.

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 18th day of June 2019.