

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43722
Docket No. MW-42758
19-3-NRAB-00003-140447**

The Third Division consisted of the regular members and in addition Referee Jeanne M. Vohnhof 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 assigned outside forces (Hulcher, Inc.) to perform Maintenance of Way and Structures Department work (operate vacuum truck to clean tracks and switches) at various locations in and around Mankato Minnesota on the Mankato Subdivision on June 24, 25, 26 and 28, 2013 (System File B-1301C-138/1590079 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with 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 Appendix ‘15’.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Clough and D. Brooks shall now ‘ ... each be compensated for an equal share of eighty four (84) man/hours, that the contractor’s forces spent performing their Agreement covered work, at the applicable rate 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 claims here are made on behalf of D. Clough and D. Brooks, who have established and hold seniority in their respective classes within Seniority District T - 7 of the Carrier's Track Subdepartment of Maintenance of Way and Structures Department. On the dates relevant to this dispute, they were headquartered on the Mankato Subdivision.

The Organization claims that on June 24, 25, 26 and 28, 2013, the Carrier used a contractor to operate a vacuum truck to clean tracks and switches at various locations in and around Mankato, Minnesota, on the Mankato Subdivision. The Organization has provided sufficient evidence that work of cleaning track and switches was performed by contractors at this location during this period.

The Organization contends that the work performed by contractor employees in this claim is Maintenance of Way work, to be performed by Organization employees, unless one of the exceptions listed in Rule 1 applies.

Rule 1, the Scope Rule, states in relevant part,

“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 herein, 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 requirements 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."

Under the language of the Scope Rule, the work performed here, cleaning tracks and switches, is part of "all work in connection with the...maintenance of tracks" and the roadbed. The Organization has established that this work is to be performed by Maintenance of Way employees under the Scope Rule. In addition, this work has traditionally and historically been performed by Maintenance of Way employees as part of their maintenance duties, as demonstrated by the statements presented by the Organization in the record.

Work which falls under the Scope Rule may be contracted out under one of the exceptions set forth in the Rule. When the Carrier intends to contract out work it must provide notice at least 15 days in advance. In this case the Carrier issued a notice dated October 12, 2012 informing the Organization of its intent to use "fully fueled, operated, and maintained Vac truck(s) for cleanup of spills, debris and/or other materials" in the Twin Cities Service Unit from November 1, 2012 through December 31, 2013." A conference between the parties was held on October 23, 2012 to discuss the notice. The work in question falls within the terms of this notice and this Board has approved recent awards in which similar notices were found to be sufficient. The

parties had an opportunity to discuss in conference the Carrier's intent to use the special equipment at issue in this claim, Vacuum trucks, for the type of work at issue here, the cleaning of debris from tracks and switches. The work in question falls within the terms of this notice and the Board has issued Awards in which similar notices involving specialized equipment were found to be sufficient. See Third Division Awards 42539, 42605.

Having established that the work in dispute is encompassed by Rule 1, the Carrier bears the burden of proving that it may contract out the work under one of the exceptions enumerated in the Rule. In response to this claim the Carrier argued on the property that the vacuum truck was specialized equipment which the Carrier did not own, and which its employees were not qualified to operate. The Carrier presented product documentation showing the special features and capacities of the vacuum truck in relation to this type of work. The Carrier also presented a statement from a Manager E. Gehringer stating that the railroad did not own its own vacuum truck.

The Organization provided evidence in response to this statement demonstrating that the Carrier owns a vacuum truck located in Colorado. The Organization further presented evidence establishing that the Company and Organization have agreed in a different seniority unit to place vacuum trucks on a list of equipment which Carrier Maintenance of Way employees operate.

The Carrier argues that the Carrier was not adequately equipped to perform this work because the service unit does not own a vacuum truck, specialized equipment that its employees locally are not trained to operate. The Carrier notes that the location of the vacuum truck identified by the Organization is nearly 1000 miles from the location of the disputed work.

The Carrier has provided sufficient evidence to support its position that the equipment used in this work was specialized equipment for this type of work. The Organization has not provided evidence to refute the Carrier's evidence regarding the specialized qualities of the equipment, as compared with equipment owned by the Carrier that could be used to perform this work. See, Third Division Award 40374. In that respect this case differs from Third Division Awards 42539, 42605.

In a similar case, the PLB 6205 ruled that the Organization failed to disprove the Carrier's evidence that the equipment used for that project was different from

the equipment the Carrier owned and could perform the job in a more efficient and timely fashion. PLB 6205, Award 1, Referee Margo R. Newman. The Board continued,

“It is within Carrier’s province to make decisions concerning the efficiency of the operation, so long as it does not violate specific rights set forth in the Agreement.”

The Organization has not proven that the Carrier was adequately equipped with the specialized equipment to perform the work of this claim because it owns a vacuum truck in Colorado. The Organization has not proven that the equipment in Colorado was reasonably available to perform this disputed work in Minnesota. The Carrier’s failure to move special equipment – and the crew to operate it – over such a long distance does not demonstrate that the Carrier has failed to prove that it was not adequately equipped at the site of the disputed work.

The Board concludes that the Carrier has established that the vacuum truck used in this claim was specialized equipment. The Organization has not been able to prove that the equipment used was not specialized or that this specialized equipment was reasonably available from another source. The parties had the opportunity in conference to discuss the merits of contracting vacuum trucks in this service unit rather than using other equipment. It is within Carrier’s province to make decisions concerning the efficiency of the operation, so long as it does not violate specific rights set forth in the Agreement.

The Carrier has established that the disputed work falls under exceptions that permit it to contract out work under Rule 1,B. The Organization has not been able to refute the Carrier’s evidence. Therefore, the Organization has not established the elements of its claim that the Carrier violated the Agreement when it contracted out this 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.

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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.