

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43723
Docket No. MW-42759
19-3-NRAB-00003-140448**

The Third Division consisted of the regular members and in addition Referee Jeanne M. Vonhof 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 (Snelton, Inc.) to perform Maintenance of Way and Structures Department work (make grade, remove old switches, unload and install switches, hauling and dumping ballast and related work) at the south end of the Proviso Rail Yard in Northlake, Illinois beginning on May 2, 2013 and continuing (System File B-1301C-130/1586633 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 and when it failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces 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 R. Perez, C. Rapier, S. Duda, T. Noakes, K. Gabriel, J. McCorkle and H. Fraction shall each ‘... be compensated for and (sic) equal share of ALL man/hours that the employees of the contractor worked and continue to work, 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.

As set forth above, this claim was initiated on behalf of the Claimants, employees in the Maintenance of Way and Structures Department. At the time of the dispute, the Claimants had established seniority within Seniority District T-9 of the Track Subdepartment and were assigned to Gang 3742.

This dispute arises over the Carrier's assignment of outside forces from Snelton, Inc. to make grade, remove old switches, unload and install switches, haul and dump ballast and other related work at the south end of the Proviso Rail Yard. The Carrier sent a notice dated December 28, 2012, to the General Chairman of the Organization regarding its intention to contract work at the location of Proviso Yard. The notice provided as follows:

"Specific Work: Providing fully fueled, operated, and maintained track excavators (track hoes) to assist the Railroad with removing, replacing, loading and unloading switches, and track panels, excavating ditches, drains and installing culverts commencing January 01, 2013 thru December 31, 2013."

The matter was conferenced on January 9, 2016, but the parties were unable to reach resolution.

The Organization argues that the work in issue is encompassed by the Scope Rule. Rule 1 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 disputed work falls under the coverage of Rule 1. Work on switches, and grading and maintaining the area around switches is work which falls within “all

work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities,” which Rule 1 states shall be performed by Maintenance of Way employees. In addition, the Organization argues that this work has historically and customarily been performed by Carrier forces.

The Carrier argues that the notice dated December 28, 2012 provided sufficient notice of intent to contract out the work in question. The disputed work in this claim -- removing and replacing old switches, and related work -- and the equipment used to perform the disputed work, a track excavator or trackhoe, fall within the work and equipment described in the notice. The location of the work, the Proviso Yard and dates of the work also fall within the description of location and dates set forth in the notice. The parties met in conference over the notice, and the Board concludes that the Carrier provided sufficient notice of its intent to contract out the work. See Third Division 40812.

The Carrier argues that the Agreement was not violated when the work was contracted because the work falls under an exception set forth in Rule 1: that the Company was not adequately equipped to perform the work with its equipment. The Carrier provided evidence that the Company did not own the excavators which it used to lift the switches. In response to the Organization’s suggestion that the Carrier could have used its own equipment, a locomotive crane, the Carrier provided a statement from a Manager saying that the Carrier’s equipment did not have the capacity to lift the switch in one piece.

The Organization has not refuted this evidence. In Third Division Award 40374 (Referee Margo R. Newman), this Board ruled,

“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 the Carrier is required."

The Agreement permits the Carrier to contract out work when it is not adequately equipped to perform the work. The Board concludes that the Carrier has proven that it was not adequately equipped to perform the disputed work with its equipment. The Organization has not been able to refute this evidence and therefore the Organization has not met its burden of proof to establish that the Agreement was violated when the Carrier contracted out the work at issue in this claim.

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.