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

Award No. 43727
Docket No. MW-42778
19-3-NRAB-00003-140469

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) to perform Maintenance of Way and Structures Department work (dig out and reset concrete pipe) near Mile Post 111.25 on the Peoria Subdivision near Mason City, Illinois on August 20, 2013 (System File J-1301C-517/1590933 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 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, Claimant R. Law shall '…be compensated proportionally for at least ten (10) hours of time that the contractor's forces spent performing their 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 Claimant L. Law, an employee in the Maintenance of Way and Structures Department, Track Subdepartment. At the time of the dispute, the Claimant had established seniority in Seniority District T-3 and was assigned to Gang 3078.

The Carrier assigned contractor forces to perform the work of digging out a concrete pipe with a crawler hoe and resetting the pipe near Mason City, Iowa on the Peoria Subdivision on August 20, 2013.

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 employees. The Organization argues that Maintenance of Way forces have regularly used excavators, backhoes and other machinery to dig and reset pipe located on Carrier property. The Organization argues further 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 this work, because the Carrier did not have available an excavator, or the equipment to haul it.

The Carrier contends that the Claimant was not qualified to operate an excavator, and would not have been available to perform the work because he was employed elsewhere.

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 fair 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 in question falls under the coverage of Rule 1. This work 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 the work has historically and customarily been performed by Carrier forces.

The Carrier sent a notice dated March 3, 2013, to the General Chairman of the Organization that it intended to contract work at the location of the Chicago Service Unit. The notice provided the following information about the work to be contracted:

> **"Specific work: Provide fully fueled operated and maintained equipment to assist our forces in bridge and facility repairs through 12/31/13."**

The parties conferenced over the notice on March 23, 2013. No agreement was reached over the notice.

The Organization argues that the notice to contract the work was procedurally defective and failed to mention or adequately describe the work or contracting transaction that took place in this case. The Organization argues that the disputed work bore no relation to the generic description of the work in the notice that was provided by the Carrier.

The Organization raised this argument on the property and the Carrier failed to explain how the disputed work is related to the work described in the notice. In addition, there is no evidence from the records presented here that the work at issue was discussed in the conference over the notice. The Board concludes that the Organization had no reasonable way to know that the Carrier intended to contract out the work under this claim, based upon the notice provided five months earlier. The purpose of the advance notice is to provide the parties with an opportunity to discuss work the Carrier wishes

to contract out and for the Organization to raise alternative ways to use Carrier forces instead of contracting out the work. Because the Organization could not know that the work here was included under the notice relied upon by the Carrier, the Organization was not provided with a reasonable opportunity to have a dialogue about this work before it was contracted out. The Board concludes that the Carrier has not met the advance notice requirements of Rule 1, B.

The Organization established a prima facie case that the disputed work is scope-covered, and the Carrier had an obligation to provide proper notice before contracting out the work. Third Division Award 37575. Having concluded that the Carrier did not provide adequate notice, there is no need to address the arguments regarding whether the Carrier was adequately equipped to perform the work in issue. These are matters which the parties might have discussed had the informed dialogue and consultation envisioned under Rule 1, B resulted from proper advance notice of the contracting out of this work. See, PLB No. 1844, Aw. 16., Third Division Award 37575.

The Board further finds that the proper remedy for the failure to provide advance notice in a contracting out case is to grant the claim on its merits. In Third Division Award 40080, (Referee Edwin H. Benn), this Board ruled,

> **"Rule 1 specifies that advance notice of the contracting transaction 'except in "emergency time requirements" cases' must be given by the Carrier for scope covered work. That was not done. The claim therefore has merit."**

Similarly, there was no proper advance notice of the contracting out of this work, and therefore the claim must be sustained. The Carrier's argument that the Claimant was fully-employed elsewhere has been rejected by this Board as a reason to deny a monetary remedy. In Third Division Award 40819, (Referee Gerald E. Wallin), this Board ruled,

> **"If full-employment was allowed to serve as a defense to a monetary remedy, the defense would effectively allow the Carrier to violate the Agreement with impunity."**

The Claimant shall therefore be compensated for the hours worked by the contractor on August 20, 2013.

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 18th day of June 2019.