

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 43728  
Docket No. MW-42779  
19-3-NRAB-00003-140472

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 (clean out a frame and backfill) near “Mile Post 88.92 on the Peoria Subdivision near Pekin, Illinois on July 25 and 26, 2013 (System File J-1301C-516/1590932 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, Claimants R. Law shall ‘... for nineteen (19) hours of time that the contractor’s forces spent performing B&B 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.

This claim was initiated on behalf of Claimant R. 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.

On the dates set forth in the claim the Carrier assigned outside forces to clean out a frame and backfill it. The Organization contends that a contractor employee used an excavator to perform this work, expending 19 man/hours to do so.

The Organization argues that this work is clearly covered by Rule 1, B the scope rule. In addition, the Organization argues that Carrier forces have regularly used excavators, back hoes and other equipment to clean out frames and backfill them. 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 provided proper advance notice in this case. The Carrier argues further that the Carrier was not adequately equipped to handle the work. In addition, the Carrier argues that the Claimant was not qualified to operate an excavator at the time the work was contracted out.

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. The work of cleaning out a frame and backfilling it 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 is customarily performed by Carrier forces.

The Carrier sent a notice dated March 8, 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:

**“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 27, 2013. There was no agreement. The work was performed in relation to bridge repair, and falls under the geographic and time limitations set forth in the notice. The work falls within the parameters of the notice that was sent, and this Board has issued Awards in which similar notices have been found to be sufficient. See Third Division Awards 40810, 40812.

The Carrier claims that the work in dispute was contracted out as work that the Company is not adequately equipped to handle. The Carrier provided a statement from Manager Justin Perry that the Bridge Department does not have the equipment used in this job, a 315 excavator, or a tractor-trailer to haul the excavator to and from the jobsite. The Organization asserted that the Carrier has an inventory of equipment which could have been used to perform this work.

The record is devoid of any probative evidence to refute the Manager’s statement or to support the Organization’s general assertion that other equipment was available to perform this work. In Third Division Award 26257, Referee Suntrup stated,

**“As moving party in the instant dispute the burden of proof lies with the Organization to provide substantial evidence that the claim be sustained... Assertions by the Organization are no substitute for proof according to substantial evidence criteria. (Third Division Award**

25575). Substantial evidence has been defined as such ‘relevant evidence as a reasonable mind might accept as supporting a conclusion.’”

In Third Division Award 41168, Referee Sherwood Malamud ruled, “The Organization bears the burden of proof to establish each element of its claim. (Third Division Award 31930).” The Carrier has established on this record that it was not adequately equipped to perform the work in issue. The Organization has failed to meet its burden to establish that this excavator or comparable equipment was reasonably available. Therefore the Organization has failed to rebut the Carrier’s evidence that it was not adequately equipped to perform this work. Therefore, the claim must be denied.

**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.