

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43731
Docket No. MW-42786
19-3-NRAB-00003-140481**

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 (Rybak and Hulcher, Inc.) to perform Maintenance of Way and Structures Department work (grade right of way roads, hauling and spreading rock and related work) at the Valley Park, Minnesota Yard and surrounding area on June 6, 2013 (System File B-1301C-144/1589283 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 A. Stenen and M. Ganzer shall each ‘*** be compensated for an equal share of thirty two (32) hours of straight time and eight (8) hours of overtime, that the contractor’s forces spent performing their 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.

As set forth above, this claim was initiated on behalf of the Claimants, employees in the Carrier's Track Subdepartment of Maintenance of Way and Structures Department. At the time of the dispute, the Claimants had established seniority in Seniority District T-7.

The Organization claims that on June 6, 2013, the Carrier assigned outside forces to grade right of way roads, haul and spread rock and perform other related work at the Valley Park, Minnesota Yard. The Organization contends that four contractor employees were used in this work. The Organization presented statements and photos from Claimant Stenen to demonstrate that contractor employees performed the disputed work.

The Organization contends that the work at issue is exclusively reserved to the Carrier's Maintenance of Way employees by the clear language of Rule 1, B.

"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.

Under the language of the Scope Rule, the work performed here, grading roads and hauling rock for road repair is encompassed under "all work in connection with the construction, maintenance, repair ... of tracks, structures and other facilities used in the operation of the Company in the performance of common Carrier service on the operating property." The Organization has established that this is work to be performed by Maintenance of Way employees under the Scope Rule.

The Carrier contends that the work also has been performed by outside forces in the past, and therefore the Organization has not established an exclusive claim to the work. However, if the work comes within the scope of Rule 1, the Organization need not establish that it has performed the work exclusively in the past. Exclusivity is not a necessary element to be demonstrated by the Organization in contracting cases. Third Division Award Nos. 32862, 40078; PLB 7096, Award No. 1.

The Carrier sent a notice dated October 12, 2012 to then-General Chairman of the Organization of its intention to contract out work at various locations on the Twin Cities Service Unit.

“SPECIFIC WORK: Providing fully fueled, operated and maintained equipment necessary for grading railroad railroad [sic] property including but not limited to right of way roads commencing November 1, 2012 thru December 31, 2013.”

The Organization argues that the notice to contract the work was procedurally defective, failing to mention or adequately describe the work or contracting transaction that took place in this case. The parties met in conference over the notice on October 23, 2012. The work in question falls within the terms of this notice, and in earlier awards this Board has found similar notices to be sufficient. See Third Division Awards 40810, 40812.

The Carrier argues that it was not “adequately equipped to handle the work” In support of its position the Carrier relies upon a statement from Manager D. Knapp stating that the Twin Cities Service Unit “does not own, maintain or operate any of the road grading equipment that is required to maintain the roadways.”

In response to this argument the Organization produced a May 2, 2013 photograph of a motor grader purportedly owned by the Carrier, sitting unused at another location in Butler Yard in Milwaukee, Wisconsin on the date of the claim. It also produced a 2013 bulletin regarding an open position for a motor grader in Seniority District T-9. The Organization also argues that the Carrier did at one time have more equipment available in the region, and argues that the Carrier must provide equipment necessary to permit its forces to perform scope-covered work.

The evidence shows that the Carrier did not have the equipment in the Twin Cities Service Unit to perform this road grading work. The Organization's evidence supports the Carrier's position that it does not have the equipment now, even if it had it in the region in the past. The evidence does not establish that equipment located hundreds of miles away was reasonably available for use for this work in Minnesota. The Carrier's failure to move equipment from that distance does not sufficiently disprove its position that it was not adequately equipped at the site of the disputed work.

The Carrier has established that it was not adequately equipped to perform this work at the location where it was performed. The Organization has not been able to rebut that evidence. 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.