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

Award No. 43737
Docket No. MW-42816
19-3-NRAB-00003-140540

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 utilized outside forces (Utilco) to perform Maintenance of Way and Structures Department work (brush cutting) in the vicinity of Mile Posts 108 and 112 on the Geneva Subdivision and around Mile Posts 2 and 8 on the Clinton Subdivision August 2, 3, 4, 6, 19 and 24, 2013 (System File J-1301C-519/1591561 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the work referenced in Part (1) above or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b) and Appendix '15'.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants T. Beveroth and K. Funk shall each '* be compensated for all hours of straight time and overtime 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 Claimants, employees in the Maintenance of Way and Structures Department, Track Subdepartment. At the time of the dispute, the Claimants established and held seniority within various classifications.

This case involves the Carrier's use of contractor forces to perform brush cutting. The Organization contends that this is work reserved to Maintenance of Way employees under Rule 1,B and other rules cited in the claim letter.

Rule 1, the Scope Rule 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."**

Brush cutting work falls within "all work" performed in connection with the "construction, maintenance and repair of tracks and structures used in the Carrier's operations." In addition, Carrier employees have customarily and historically performed the work of clearing brush and vegetation from tracks and areas around the tracks as part of their work of maintaining tracks and structures. Other Third Division Awards have concluded that brush cutting falls under the scope of Rule 1,B as Maintenance of Way work, including Third Division Awards 42605 and 42539 and PLB 7096, Aw. Nos. 1, 3.

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, Aw. No. 1.

The Carrier provided a notice dated December 28, 2012 notifying the Organization of its intent to contract out the work of "tractors, mowers and other equipment necessary to control vegetation, commencing January 01, 2013 thru December 31, 2013," at "various locations on the Chicago Service Unit." The parties conferenced over this notice. The work in question falls within the terms of this notice and this Board has approved awards in which very similar notices were found to be sufficient. See Third Division Awards 42539, 42605.

Once the Organization demonstrates that the disputed work falls under the Scope Rule, the Carrier has the burden to establish that one of the exceptions in the Rule applies, permitting the contracting out of work. The Carrier asserts that the equipment used to perform this contracted work was special equipment that the Carrier did not own that was necessary to perform the work.

Rule 1,B specifically permits the Carrier to contract out work which is customarily performed by its own employees when special equipment not owned by the Company is required. The Carrier provided a statement that the trees were too large to be cut by saw, in support of its decision. The Carrier also provided information in relation to a different claim to argue that the brush cutter used by the contractor to perform the disputed work under this claim has specialized articulated cutting heads and other features not possessed by the Carrier's brush cutters.

The Organization argued that the Carrier did not provide evidence about the features of the specific brush cutter used in this claim, and did not demonstrate that any of these features, if they were part of the contractor's equipment, were used or required for the disputed work. The parties agree that the Carrier has its own brush cutters, and the Organization presented unrefuted evidence regarding the significant capabilities of these brush cutters, including their ability to cut trees, and to cut brush 30 feet out from the center of the track.

This Board has recently considered several nearly identical cases involving the same parties and ruled that the Carrier had not established that the contractor's

brush cutter constituted specialized equipment that was sufficiently superior to the Carrier's equipment to constitute specialized equipment -- or that it was necessary to perform the work.

This Board ruled in Third Division Award 42605,

> **"the Carrier has failed to show that this particular equipment was necessary for the work to get done. This is not a case of requiring a massive crane to rebuild a bridge. It is a case of a brush cutter. While the Utilco equipment might have a few extra bells and whistles it still has one purpose – to cut brush. In this case, this Board finds that there are not sufficient equipment distinctions to justify the Carrier's actions in contracting out this work. As a result the Organization has met its burden of proof with respect to these claims."**

See also, Third Division Award 40810, (Referee Gerald E. Wallin).

We have considered Third Division Award 40374 (Referee Margo R. Newman), in which this Board concluded that "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." In that Award, the Board concluded that Carrier had established that the rental equipment was different and superior to the Carrier's equipment. In Third Division Awards 42605 and 42539 this Board concluded that the Carrier did not prove that the contractor's brush cutter equipment was sufficiently different or superior to the brush cutters owned by the Carrier. Because this claim demonstrates no significant difference from the claims in Third Division Award Nos. 42605 and 42539, involving the same parties, the same or similar equipment, and the same type of work, there is no basis for this Board to reach a different result on this claim.

In regard to remedy, the Board concludes that the violation of the Agreement created a loss of work opportunity. The Carrier's argument that the Claimants were 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."

Therefore, the Claimants are entitled to a monetary remedy. The Claimants are to be compensated for all hours spent by the contractors on the disputed work on the dates in question.

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.