

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43738  
Docket No. MW-42832  
19-3-NRAB-00003-150009**

**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 (Hulcher, Inc.) to perform Maintenance of Way and Structures Department work (operate vacuum truck to clean tracks and switches) at various locations on Tracks 1 through 5 in the East Minneapolis Yard on August 5, 6, 7, 8 and 9, 2013. (System File B-1301C-156/1591555 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 above-referenced work or make a good-faith attempt to reach an understanding concerning said contacting 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 T. Lane and A. Steffen shall now ‘\*\*\* each be compensated for an equal share of eighty (80) man/hours, that the contractor’s forces spent performing their Agreement covered 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, who have established and hold seniority within District T-7 of the Carrier's Track Subdepartment of Maintenance of Way and Structures Department. On the dates relevant to this dispute, they were assigned to work on the Twin City's Service Unit.

On five days in August 2013 the Carrier assigned outside forces to operate vacuum truck to remove debris from Tracks 1 through 5 in Carrier's East Minneapolis, Minnesota Yard. The Organization contends that the work performed by contractor employees in this claim is Maintenance of Way work, to be performed by Organization employees, unless one of the exceptions listed in Rule 1 applies.

The applicable language of the scope rule is as follows,

**“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 contraction 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."**

**Under the language of the Scope Rule, the work performed here, cleaning tracks and switches, is part of "all work in connection with the... maintenance of tracks" and the roadbed. Thus, the Organization has established that this work is generally to be performed by Maintenance of Way employees under the Scope Rule. In addition, the evidence shows that this work has traditionally and historically been performed by Maintenance of Way employees as part of their maintenance duties.**

**Work which falls under the Scope Rule may be contracted out under the exceptions set forth in the Rule. When the Carrier intends to contract out work it must provide notice at least 15 days in advance. In this case the Carrier issued a notice dated October 12, 2012 informing the Organization of its intent to use "fully fueled, operated, and maintained Vac truck(s) for cleanup of spills, debris and/or other materials commencing November 1, 2012 through December 31, 2013." A conference**

between the parties was held on October 23, 2012 to discuss the notice. The work in question falls within the terms of this notice and this Board has approved recent awards in which similar notices regarding specialized equipment were found to be sufficient. See Third Division Awards 42539, 42605. The parties had an opportunity to discuss in conference the Carrier's intent to use the specific equipment at issue in this claim, Vacuum trucks, for the type of work at issue here, the cleaning of debris from tracks and switches.

Having established that the work in dispute is encompassed by Rule 1, the Carrier bears the burden of proving that it may contract out the work under one of the exceptions enumerated in the Rule. In response to this claim the Carrier stated that the vacuum truck was specialized equipment which the Carrier did not own, and which its employees were not qualified or trained to operate. The Carrier presented product documentation showing the special features and capacities of the vacuum truck in relation to this type of work.

The Carrier argued that it was not adequately equipped because the Carrier did not possess this specialized equipment anywhere in the region. The Carrier relies upon the statement of Manager D. R. Knapp, who stated that the St. Paul Engineering team does not own or maintain this equipment. In response to this information, the Organization provided information that the Carrier owns two vacuum trucks in the Chicago area, as well as a super sucker vacuum machine in Colorado.

The Carrier has provided sufficient evidence to support its position that the equipment used in this work was specialized equipment for this type of work. The Organization has not provided evidence to refute the evidence regarding the specialized qualities of the equipment, as compared with equipment owned by the Carrier that could be used to perform this work. See, Third Division Award 40374. In that respect this case differs from Third Division Awards 42539, 42605.

In a similar case, the PLB 6205 ruled that the Organization failed to disprove the Carrier's evidence that the equipment used for that project was different from the equipment the Carrier owned -- and could perform the job in a more efficient and timely fashion. PLB 6205, Award 1, Referee Margo R. Newman. The Board continued,

**“It is within Carrier’s province to make decisions concerning the efficiency of the operation, so long as it does not violate specific rights set forth in the Agreement.”**

**The Organization has not proven that the Carrier was adequately equipped with the specialized equipment to perform the work of this claim because it may own vacuum trucks in other locations. The Organization has not proven that the equipment in Colorado or Illinois was reasonably available to perform this disputed work in Minnesota. The Carrier’s failure to move special equipment over long distances does not demonstrate that the Carrier has failed to prove that it was not adequately equipped at the site of the disputed work.**

**The Board concludes that the Carrier has established that the vacuum truck used in this claim was specialized equipment. The Organization has not been able to prove that the equipment used was not specialized or that this specialized equipment was reasonably available from another source. The parties had the opportunity in conference to discuss the merits of contracting vacuum trucks in this service unit rather than using other equipment. It is within Carrier’s province to make decisions concerning the efficiency of the operation, so long as it does not violate specific rights set forth in the Agreement.**

**The Carrier has established that the disputed work falls under exceptions that permit it to contract out work under Rule 1,B. The Organization has not been able to refute the Carrier’s evidence. Therefore, the Organization has not established the elements of its claim that the Carrier violated the Agreement when it contracted out this work. The burden of proof lies with the Organization to prove its claim and when it fails to sustain that burden, the claim must be denied. Third Division Awards 26033, 27851, 27895.**

**AWARD**

**Claim denied.**

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**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.**