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

Award No. 43763
Docket No. MW-42527
19-3-NRAB-00003-140165

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 to perform Maintenance of Way and Structures Department work (clear brush and trees on right of way and related work) at various locations in the vicinity of Mile Posts 48 to 66 and from Mile Posts 92 to 199.1 on the Altoona Subdivision commencing on November 29, 2012 and continuing (System File B-1301C-102/1578420 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 such contracting 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 J. Hulke, M. Kuberra, R. Pichler, P. Wilson, A. Klinger and M. Dobson shall now: "'* be compensated at their respective rates of pay for an equal share of all man/ hours, worked by Contractor forces performing the brush cutting on the dates under claim.'"**

*** * ***

This claim is being filed as a continuous claim pursuant to Rule 21 of the November 1, 2001, CBA.' (Emphasis in original.)"

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.

On January 8, 2013, the Organization filed a claim alleging:

"… [T]he Carrier did violate the Agreement when assigning forces of an outside contractor to perform the work of brush and tree cutting along with removal of other obstructions along the Carrier right of way and associated property. Contractor forces consisted of six (6) employees, performing the tree and brush cutting duties. The contractor forces did perform tree and brush cutting on the Carrier's Altoona Subdivision about milepost 48 to 66 and 92 to 100.1. This work commenced on or about November 29th, 2012."

The Organization contended that the work was Scope-covered under the Agreement, the Carrier had not provided notice of the proposed contracting, and that there was no basis under Rule 1(B) of the CNW/BMWE Agreement for the work to be contracted instead of performed by BMWE employees. The Carrier responded that it had provided notice, dated October 31, 2012, and that the parties had met in conference on November 6, 2012.

The October 31, 2012, notice stated, in relevant part:

"This is a 15-day notice of our intent to contract the following work:

Location: Altoona Subdivision on the Twin Cities Service Unit MP 48-66 and MP 92-130 Approx 57 miles.

Specific Work: provide all labor, supervision, equipment, materials, supplies and transportation necessary for brushcutting, tree trimming, remove dead communication wire from poles includes vegetation debris, wire, and scrap material removed from Union Pacific property and disposal."

According to the Carrier, the work involved "much more than just brush and tree cutting." The contracting out was permissible under Rule 1(B) of the Agreement because it required special skills not possessed by the Carrier's forces in order to remove live communications lines that were intertwined with the brush being cleared. Because brush around the right of way had not been maintained for many years, the vegetation was quite thick and removal required special equipment not owned by the Carrier. The density and scale of the project was such that the Carrier was not adequately equipped to handle it. In addition, mature trees needed to be removed, and under GCOR rules, trees with a diameter of more than 6" must be removed using an outside contractor. Nor is the Carrier required to piecemeal the project.

This dispute is governed by Rule 1(B) of the parties' Agreement, which states:

"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. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.

By agreement between the Company and the General Chairman, work as described in the preceding paragraph, which is customarily performed by employees described herein, 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 requirements must be met which are beyond the capabilities of Company forces to meet.**
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> **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 far 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.**
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> **Nothing contained herein shall be construed as restricting the right of the Company to have work customarily performed by employees included within the scope of this Agreement performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible."**

In contracting claims, the Organization must first establish that the work occurred as alleged and that it is Scope-covered work under the Agreement. The next issue is whether the notice was sufficient under Rule 1(B). If it was, the Carrier must establish that the proposed contracting falls under one of the exceptions established in Rule 1(B): special skills, equipment, or materials; the Carrier is not adequately equipped to handle the work; special time requirements "beyond the capabilities of the Company"; or emergency conditions.

There is no serious dispute here that the work occurred. Clearing brush and maintaining the right of way is work traditionally, customarily and historically assigned to Maintenance of Way forces and is covered under the Scope rule.

The Organization contends that the Carrier failed to provide adequate notice. While the October 31, 2012, notice failed to indicate the approximate time frame for when the contracting would occur and did not specify the basis for the Carrier's belief that the work was permitted under Rule 1(B), it identified the specific location of the project and the type of work that the contractor would be performing. From the Board's perspective, the notice was sufficient to satisfy the purpose underlying the notice requirement: to give the Organization enough information for it to determine if it wanted to protest the proposed contracting out and to be able to engage in good faith discussions with the purpose of reaching an understanding. Notice need not be perfect; one purpose of conferencing is for the Organization to be able to ask questions in order to flesh out any aspects of the proposed contracting that may be ambiguous.

The record includes evidence from the Carrier about why the project required an outside contractor. A statement from the Manager of Signal Maintenance explained:

> **"The brush cutting contractors are completing all inclusive work in which they are removing old communications lines and brush at the same time. Since the brush and communications lines are intertwined with live pole line, special skills not possessed by the employee is [sic] required. In addition, there is a special technique used in removing old communications lines in which the line must be taken down, wound and disposed of in a proper manner. The brush removal is not a small job. Its density resembles a rain forest in which old ties are left buried under dead fallen trees and weeds. Much of the material cannot be easily seen and poses a tripping hazard. Additionally, no on-track brush cutting equipment will reach many of the areas in question. Often these areas are more than 25 feet off the track and 5-10 feet above track level. The contractors are using special equipment to lift brush cutters to the necessary locations. The contractors are using six individuals to complete the daunting task of removing mature trees, not just brush, from the pole line. Maintenance of Way is not equipped to handle the work in the terms of manpower or equipment. Finally, I would like to point out that the condition of the pole line and brush did not get this way overnight. The trees are so mature, that they have begun to grow into and around the actual pole line itself. We have been forced to comply with FRA CFR 213**

> **under the following comment left by the FRA inspector "vegetation prevents proper operation of signaling and/or communications lines." Usually CFR is a Maintenance of Way violation, but many years of not maintaining the brush has led to the brush growing into trees and now interfering with the signal system."**

The statement was accompanied by a photograph showing the extremely dense nature of the brush on the right of way. In particular, the photograph clearly shows some sort of pole that is nearly buried by the overgrowth to the point where it is barely visible. The Signal Manager's comparison to the dense vegetation of a rain forest is apt. The record also includes two detailed statements from employees who observed the contractors at work, alleging that Carrier forces could have performed the same tasks, using rental equipment as needed.

The Carrier has established procedures for the removal of brush and the safe operation of tools used to clear it from the right of way. The General Code of Operating Rules (GCOR), Rule 76.36, Chain Saw, states, in relevant part:

> **"Standing Trees**
> **Employees must not fell standing trees that are greater than 6 inches in diameter at mid-chest height. If the tree is leaning, extreme care should be used when cutting and consideration should be given to having the tree cut by an outside service provider. *Standing trees that are greater than 6 inches in diameter that need to be felled must be removed by an outside service provider."* (Emphasis added.)**

The record establishes that the brush had been allowed to become overgrown, dense and mature over the course of some years. There were large trees with diameters in excess of 6 inches at mid-chest height. Pursuant to Rule 76.36, the Carrier engaged an "outside service provider" to safely clear the right of way. The contractor used equipment that the Carrier did not own, and the Carrier was clearly not equipped to handle a project of such scope using its own forces and equipment. While it raises some legitimate concerns about how the work was done by the contractor, the evidence submitted by the Organization is not sufficient to rebut the Board's conclusion that the contracting was permitted by Rule 1(B).

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 16th day of July 2019.

LABOR MEMBER'S DISSENT
TO
AWARD 43763, DOCKET MW-42527
(Referee Andria S. Knapp)

The Majority erred in its findings in this case. Specifically, the Majority erred in accepting the Carrier's notices and in its findings related to the exceptions under Rule 1B.

Under Rule 1B and Appendix 15, any contracting notice must include, amongst other things, the work to be contracted and the "reasons therefor". These requirements have been enforced by recent arbitrations under this Agreement. See Third Division Awards 41044, 42419, 42423, 42435, 42438 from Arbitrators Malamud and Larney. Also, see Third Division Awards 43577, 43578, 43582, 43589 and 43592, which were adopted on March 27, 2019. The Majority failed to distinguish this precedent or even acknowledge it existed. Accordingly, for this reason, this awards should be given no precedential value.

In addition, prior to contracting out reserved work, the Carrier has an obligation to establish a Rule 1B exception. See Third Division Award 40409. The Carrier also has an obligation to attempt to procure rental equipment and schedule the work to utilize its own forces to perform scope covered work. See Third Division Awards 42423, 42427, 42429 and Award 153 of Public Law Board No. 2960. Notwithstanding, in this case, the Majority found the Carrier was able to establish a Rule 1B exception based on its unilaterally enacted General Code of Operating Rules. Such a rule would clearly not be sufficient to justify removing work from a bargaining unit. To accept such logic, would be to allow the Carrier to undermine the entirety of work reservation simply by creating unilateral policies. Such a unilateral change is impermissible under the Railway Labor Act. Moreover, the Carrier never even identified what alleged special equipment was required to perform the claimed work. The Carrier cannot possibly establish that the claimed work required equipment that it does not own, when it does not even advise the Board what the alleged special equipment was. Accordingly, this award should be given no precedential value.

Respectfully submitted,

Zachary C. Voegel

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Labor Member