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

Award No. 43765
Docket No. MW-42538
19-3-NRAB-00003-140175

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - (IBT Rail Conference
(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 (remove/replace switches and related work) at 508 Rip track switch in Proviso Yard on December 12, 2012 (System File J-1301C-503/1580016 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with 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 1B and Appendix '15.'

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Alexander, H. Fraction, R. Perez, D. Johnson and A. Martinez shall now ' … each be compensated for twelve (12) hours of time 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.

This is a companion case to the claims addressed in Award 43764, in that this claim presents the same issues raised in those claims regarding the same contractor performing the same work in roughly the same location and in the same time frame. The Board adopts the same reasoning here.

The Organization alleges that the Carrier violated Rule 1B of the parties' Agreement when it assigned an outside contractor, Snelton, to assist its Maintenance of Way forces in replacing and/or repairing switches at the 508 Rip Track in the Proviso Yard, near Northlake, Illinois, on December 12, 2012. Track maintenance, including repairing and replacing switches, is work that has historically, customarily and traditionally been performed by MoW forces, which brings it within the Scope Rule. Contracting may occur pursuant to the terms agreed in Rule 1B of the Agreement, which requires notice in advance and an opportunity to meet to discuss ways to reduce the amount of contracting before Scope-covered work may be assigned to outside forces. Rule 1B also establishes the circumstances under which work may be contracted: special skills, special equipment, or special material; work such that the Carrier is not adequately equipped to handle it; time requirements that are "beyond the capabilities of Company forces to meet"; and emergencies. The Carrier did not provide adequate notice or an opportunity to conference as required by Rule 1B of the Agreement, nor did it offer a basis for contracting out scope-covered work. The December 27, 2011, "notice" that the Carrier provided was not proper advance notification, because it was generic in nature and failed to identify any specific contracting out transactions. Finally, the Carrier failed to establish that the work contracted fell within any of the exceptions set forth in Rule 1B that would permit contracting of scope-covered work. The Carrier owns the same equipment that was

used by the contractor, and its own MoW forces have repaired and replaced switches throughout the Carrier's system for years. MoW Forces were available, willing and qualified to perform the work if it had been assigned to them.

According to the Carrier, the Organization has failed to meet its burden of proof. The Carrier gave the Organization adequate notice on December 27, 2011, of its possible intent to utilize contractors to assist its own forces in "removing, replacing, loading and unloading switches and track panels…," and when the parties met in conference on the notice, they discussed the reasons why the Carrier needed to contract out the work. The Carrier is permitted to contract out work "that the Company is not adequately equipped to handle." The statement from Manager Nudera established that the Carrier did not have adequate personnel or equipment in the area to complete the work in a timely fashion without the use of supplemental forces. The work was properly contracted out under the "not adequately equipped" exception.

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.

The Board recognizes that the work of removing, repairing and replacing switches has historically, traditionally and customarily been performed by the Carrier's Maintenance of Way forces and that it accordingly is covered by the Scope Rule in the Agreement.

The next step in the analysis is whether the notice was sufficient under Rule 1B. The Carrier sent the Organization a 15-Day Notice of Intent to Contract Work dated December 27, 2011:

> **"THIS IS TO ADVISE OF THE CARRIER'S INTENT TO CONTRACT THE FOLLOWING WORK:**
>
> **PLACE: Proviso Yard on the Chicago Service Unit.**
>
> **SPECIFIC WORK: Providing fully fueled, operated and maintained track excavators (track hoes) to assist Railroad with removing, replacing,**

loading and unloading switches, and track panels, excavating ditches, drains and installing culvers commencing January 1, 2012 thru December 31, 2012."

Whether a notice is sufficient under Rule 1B is a perennial topic for the Board, and there are innumerable Awards on the subject. One problem is that the complexity of the Carrier's operational requirements is such that there is no single template or checklist to use when it comes to what a notice must contain. Ultimately, the measure of adequacy for a notice under Rule 1B is whether it provides sufficient information for the Organization: (1) to be able to determine whether it wants to meet in conference with the Carrier to discuss the proposed contracting out and (2) to be able to engage in meaningful discussion in conference if it does. This does not mean that the Carrier must specify every detail of the who, what, when, where, how and why of a proposed contracting transaction; one purpose of meeting in conference is for the Organization and Carrier to be able to discuss the proposal more fully and for the Organization to be able to ask any questions it might have about the proposal. Conversely, the Board has found notices that are overbroad to be inadequate. Frequently, the Board is tasked with balancing the Organization's need for sufficient information with the Carrier's interest in maintaining as much flexibility as possible with respect to contracting out by issuing a notice that is as general as it can be while providing the information that the Organization is entitled to.

Considering the notice at issue here, the Board concludes that it was sufficient for purposes of Rule 1B. It is specific as to the location of the proposed contracting out: the Proviso Yard in the Chicago Service Unit. It is also specific as to the equipment and the nature of the work to be contracted out: "track excavators (track hoes) to assist Railroad with removing, replacing, loading and unloading switches and track panels…." The Board has been critical in the past of notices that cover too much time, but given the specificity of the location and the nature of the work, the one-year duration set forth in the December 27, 2011, notice is acceptable. The Organization contends that the notice fails to set forth the basis for the proposed contracting. The notice does not contain the specific language "the basis for the contracting out is [fill in the blank]," but the Carrier's statement that it is proposing to contract specifically "*to assist* Railroad [forces]" (emphasis added) with removing and replacing switches is strongly indicative that the Carrier is not adequately equipped to handle the work with the equipment and forces that it has. The basis for the contracting is another topic that the parties can discuss in conference. The notice could have been more specific, but it met minimum standards for adequacy under Rule 1B.

The Organization next contends that the Carrier failed to establish a legitimate basis under Rule 1B for contracting the work. Specifically, it stated that the Carrier owns the same equipment that was used by the contractor, which Carrier forces could have operated, so that "not adequately equipped" did not apply. However, the record includes a statement from Manager James Nudera that contradicts that assertion:

> **"All claimants where [sic] working at this time, also we used *sneltons crawler back hoes which the carrier does not have*. Also all other equipment was being utilized installing other turn outs at the same time frame. We have sent notices out to the union about using contractors." (Emphasis added.)**

The employee statement in the record alleges that the contractor used the same equipment that the Carrier owned and that was already on site. Regrettably, the Board is not in a position to be able to resolve an irreconcilable dispute in the facts: the Carrier alleges that it did not have the necessary equipment (crawler back hoes) to perform the work, while the Organization contends that the Carrier's MoW forces could have performed the work with the equipment it already had. In cases of irreconcilable disputes regarding material facts, the Board is required to dismiss or deny the claim.

Ultimately the result is the same whether the claim decided on the basis of a dispute in facts or on the basis of the "not adequately equipped" exception to Rule 1B—the claim is 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 16th day of July 2019.

LABOR MEMBER'S DISSENT
TO
AWARD 43764, DOCKET MW-42529,
AWARD 43765, DOCKET MW-42538
(Referee Andria S. Knapp)

The Majority erred in its findings in these cases. 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 and 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, these 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 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 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 a manager's statement that equipment and men were all being utilized elsewhere. However, the notification relied on by the Carrier was dated December 27, 2011, but the claimed work did not occur until December 2012. Accordingly, the Carrier had nearly a year to plan to make its men and equipment available for performing the claimed work. This Board has previously addressed a similar fact pattern. See on-property Third Division Awards 42423, 42435, 42437 and 42438. Specifically, the Majority in Award 42435 held:

> "*** Certainly the most implausible exception asserted by Carrier is that it was not adequately equipped to handle the work, that is, maintenance of way employees were unavailable as they were assigned to work on other projects. The Board concurs in the Organization's position that the lead time of five and a half months that elapsed from the time Carrier issued the subject 15-day Notice of Intent to subcontract the re-roofing work, was more than sufficient for Carrier to find a total of four days within that span of time that would not conflict with other projects, thereby freeing seven maintenance of way employees to perform the disputed scope covered work. In not finding such a period to utilize its own forces to perform the disputed work strongly indicates to us that poor scheduling of work on the part of Carrier was responsible for Carrier having to subcontract the work. We hold this same reasoning applicable to Carrier's asserted exception that time requirements were such that it was beyond the capabilities of its own forces to complete the work.

> "All that was required of Carrier was to find four consecutive days within the five and a half month time period that would permit assigning seven maintenance of way employees to perform the scope covered work thereby assuring its completion consonant with the time requirements."

Accordingly, the Majority erred when it failed to follow or even distinguish the recent on-property precedent and these awards should be given no precedential value.

Respectfully submitted,

Zachary C. Voegel

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Labor Member