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

Award No. 43766
Docket No. MW-42539
19-3-NRAB-00003-140179

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 (Hulcher, Inc.) to perform Maintenance of Way and Structures Department work (operate vacuum truck to clean tracks) at the Bowl tracks, East Diamond 5 in Proviso Yard near North Lake, Illinois on December 11, 12, and 13, 2012 (System File J-1301C-502/1580017 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, Claimant A. De La Fuente shall now ' … be compensated proportionally for at least twenty seven (27) 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.

The Organization contends that the Carrier violated the Agreement when it assigned an outside contractor, Hulcher, to operate a vacuum truck to clean tracks at the Bowl Tracks, East Diamond 5 in the Proviso Yard near North Lake, Illinois December 11 through 13, 2013. One contractor employee worked a total of 27 man-hours. Track maintenance, including cleaning tracks, 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 "notice" that the Carrier asserts it provided was not proper advance notification, because it was generic in nature and failed to identify any specific contracting out transactions. The Carrier owns vacuum trucks, which MoW forces have operated to clean tracks. MoW Forces were available, willing and qualified to perform the work if it had been assigned to them.

The Carrier contends that the Organization has failed to meet its burden of proof. The Carrier is permitted to contract out work that requires "special equipment not owned by the Carrier" or "that the Company is not adequately equipped to handle." The statement from the Manager of Track Maintenance established that the Carrier

does not have a vacuum truck on the seniority district. The work was contracted out under the special equipment and "not adequately equipped" exceptions. Moreover, the Carrier gave the Organization adequate notice of its possible intent to utilize contractors to perform the work, and the parties met in conference on it.

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 maintaining the Carrier's tracks, including cleaning them, is work that has historically, traditionally and customarily been performed by its 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 you 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 Vac truck(s) for cleanup of spills, debris and or other materials 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: "Vac truck(s) for cleanup of spills, debris and or other materials." 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 for "Vac truck(s)" is strongly indicative that specialized equipment is required or 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 "specialized equipment" or "not adequately equipped" did not apply. However, the record includes a statement from Manager of Track Maintenance Chase Nichols that contradicts that assertion:

> **"… We do not have a vacuum truck anywhere on this seniority district owned by Union Pacific. (One on Commuter Ops is owned by Metra.) This is a specialized equipment and differs from our yard cleaner as the yard cleaner cannot pick up the fine sand particles as it was originally built for picking up grain which is much larger. When trying to pick up sand the yard cleaner just blows it around and creates a bigger mess."**

The record also includes information from Hulcher that describes in detail the "Hi-Rail Air Spade®/Vacuum Truck" and how it differs from a standard vacuum truck. It is not clear that any vacuum trucks the Carrier may own are of the newer "air-mover" variety, and even if they are, none were located in the seniority district where the work needed to be done. The Board concludes on the basis of the record that the equipment used by Hulcher met the requirements of the "specialized equipment" and "not adequately equipped" exceptions to Rule 1B, and that the Carrier did not violate the Agreement when it contracted out the work at issue here.

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 43766, DOCKET MW-42539
(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 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, 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 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. In this case, the Organization established that in May 2019, the Carrier purchased a Vac Truck and bulletined it as a common machine. This fact is important because it establishes that the Carrier owns Vac Trucks and that they are readily available for purchase and/or rent. Notwithstanding, the Majority determined Vac Trucks to be special equipment under Rule 1B. However, in doing so, the Majority amended the parties' Agreement. Rule 1B has an exception surrounding "*** **special equipment not owned by the Company**....", but the Majority added the provision located in the seniority district where the work needed to be done. This was not a requirement that was negotiated between the parties and if the parties intended on that phrase being a condition of the exception, they would have written it into the Agreement. This Board certainly does not have the authority or jurisdiction to add provisions to the Agreement. Moreover, this Board failed to address the Appendix "15" requirements of attempting to procure the equipment prior to contracting out scope covered work even if the Carrier can meet an exception. The Organization established that this equipment was readily available to the Carrier and the Carrier made no showing that it complied with Appendix "15". Accordingly, this award should be given no precedential value.

Respectfully submitted,

Zachary C. Voegel

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Labor Member