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

Award No. 43768
Docket No. MW-42565
19-3-NRAB-00003-140231

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 (Jerry Weise Trucking) to perform Maintenance of Way and Structures Department work (operate a truck to haul rail) from Carrier stock piles located in the Mankato Yard, Mankato, Minnesota to the rail yard in Altoona, Wisconsin on March 8, 2013 (System File B-1301C-125/1584027 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 1 and Appendix '15.'

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant D. Brooks shall be compensated '* for an equal share of all hours of the lost work, reportedly six (6) hours overtime, at the applicable rates of pay.' (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.

According to the Organization, the Carrier violated the Agreement on March 8, 2013, when one employee from contractor Jerry Weise Trucking operated a lo-boy (flatbed) truck to transport approximately thirty 40' sticks of Carrier-owned 115# rail from the Mankato Yard in Mankato, Minnesota, to the Carrier's Altoona, Wisconsin Yard facility. Operating trucks to move material associated with track construction, repair and maintenance is routine Maintenance of Way Track Subdepartment work. The contractor employee worked six hours. The Carrier did not provide 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. Transporting Carrier-owned materials from one Carrier-owned and -operated facility to another is work that has historically, customarily and traditionally been performed by MoW forces, which brings it within the Scope Rule. The October 10, 2012, "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 equipment like that used by the contractor. The Claimant was available, willing and qualified to perform the work if it had been assigned to him.

The Carrier contends that the Organization has failed to meet its burden of proof. The Carrier is permitted to contract out work when "the Company is not adequately equipped to handle the work." The statement from Director Layne Hable established that the Twin Cities service unit does not have a lowboy semi-truck. The work was then contracted out under the "not adequately equipped" exception. 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 statement from Director Hable establishes that the Carrier did contract out the hauling work that is in dispute here.

The Board recognizes that the work of hauling Carrier-owned materials from one Carrier facility to another 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 Carrier contends that the scope set forth in Rule 1B—"all work in connection with the construction, maintenance, repair, and dismantling of tracks, structures and other facilities"—does not mention transportation of materials and therefore such work is not covered. That position ignores the language "all work *in connection with*" (emphasis added). Given the geographic scope of the Carrier's operations, transporting materials to various locations would necessarily be required "*in connection with* the construction, maintenance, repair and dismantling of tracks, structures and other facilities."

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 October 10, 2012:

> **"This is to advise you of the Carrier's intent to contract the following work:**
>
> **PLACE: At various locations on the Twin Cities Service Unit.**
>
> **SPECIFIC WORK: Providing fully fueled, operated and maintained truck(s) and lowboy trailer(s) to assist in hauling and or moving misc.**

equipment and material commencing November 1, 2012 thru December 31, 2013."

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 not sufficient for purposes of Rule 1B. It is specific as to the location of the proposed contracting out: the Twin Cities Service Unit, and it specified the equipment and the nature of the work to be contracted out: "truck(s) and lowboy trailer(s) to assist in hauling and or moving misc. equipment and material." What is missing is any indication of why it is necessary to contract out the work. Notices that indicate the need for specialized equipment that the Carrier does not own implicitly reference the "specialized equipment" exception in Rule 1B. But here, the Carrier owns trucks and lowboy trailers, and the mere mention of them does not give the Organization any indication, explicit or implied, why the Carrier believes that there is a need to contract out the work. Nor is the work to be contracted narrow in scope, such as "performing asphalt repairs," which gives the Organization a sense of the magnitude of the proposed contracting out. The notice states that the trucks and lowboy trailers will be used "to assist in hauling and or moving misc. equipment and material." That is a wide range of proposed contracting out of ordinary scope-covered work. The Board recognizes that the Carrier needs flexibility to contract out work where it is appropriate, but Rule 1B nonetheless requires adequate notice in

advance to the Organization. The notice here did not meet the minimum standards for adequacy under Rule 1B. As Board precedent has held, as a result the Claim must be sustained.

The Carrier contends that the Claimant should not be entitled to any monetary compensation, because he was fully employed, he was not qualified to drive a lowboy truck, and he could not have been assigned to the work because of federal hours-of-service regulations that limit the number of hours someone driving a commercial vehicle can work. Its arguments are not persuasive. This Board has previously held that monetary compensation *is* appropriate even where Claimants have been fully employed; if the Carrier were permitted to violate the Agreement without any consequences, it would be encouraged to do so again in the future. The Carrier's declination letter of May 22, 2013, acknowledges that the Claimant was qualified to operate the vehicle in question. Finally, had the Claimant been assigned the work, he undoubtedly would have been assigned consistent with federal regulations. The remedy shall be allowed as claimed.[1]

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 16th day of July 2019.

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[1] **The Carrier contends that the remedy is excessive, because the driving distance between Mankato, Minnesota, and Altoona, Wisconsin, is three hours. The Board assumes that the claim is for six hours because the Claimant would have had to drive back.**