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

Award No. 43773
Docket No. MW-42670
19-3-NRAB-00003-140373

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 (Heartland Asphalt) to perform Maintenance of Way Track Department work (grading roadways, pack gravel, move, stockpile and spread gravel) in the Mason City West Yard and surrounding area in Mason City, Iowa on May 1 and 2, 2013 (System File B-1301C-129/1586632 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance notice of its intent to assign outside forces to perform the aforesaid work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces 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. Clausen, M. Attig and S. Seible shall each be compensated for '*an equal share of *forty-eight (48) man/hours* of straight time, that the contractor's forces spent performing their work, at the applicable rate 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 when on May 1 and 2, 2013, it assigned Heartland Asphalt to perform routine Maintenance of Way and Structures Department work. Specifically, one employee operated a dump truck to move and spread Carrier-owned gravel (rough grading); another employee operated a motor grader to level the roadway (surfacing); and a third employee operated a blacktop roller to compact the surface. The employees worked eight hours a day for the two days. 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. Repair and maintenance of the Carrier's roadways and yard facilities is work that has historically, customarily and traditionally been performed by MoW forces, which brings it within the Scope Rule. 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 equipment like that used by the contractor. Claimants 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 local service units did not have the equipment to perform the work and efforts to perform it using equipment on hand were not satisfactory. The work was then contracted out under the

special equipment and "not adequately equipped" exceptions.[1] Moreover, the Carrier gave the Organization 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 Manager of Track Maintenance Jack establishes that the Carrier did contract out the grading work that is in dispute here—the specific dates and hours or number of contractor employees may not have been acknowledged by Mr. Jack, but there can be no dispute that some form of contracting out did take place.

The Board recognizes that the work of maintaining the Carrier's roadways, including those located within yard facilities, 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 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.

---

[1] **The record includes a statement from Manager of Track Maintenance David Jack:**

> **Local and service unit equipment fleets do not include any road graders or rollers, we had been attempting to perform this work with a loader dragging a rail, which was not performing the job to expectations. The roadway was becoming a safety concern, so to do the best job possible, we brought in the contractors with specialized equipment.**

SPECIFIC WORK: Providing fully fueled, operated and maintained equipment necessary for grading railroad property including but not limited to right of way roads 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 sufficient for purposes of Rule 1B. It is specific as to the location of the proposed contracting out: the Twin Cities Service Unit. It is also specific as to the equipment and the nature of the work to be contracted out: "equipment necessary for grading railroad property." 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 13-month duration set forth in the October 10, 2012, 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 for "equipment necessary for grading railroad property" 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 motor grader that the Organization provided a photograph of was apparently located over three hundred miles away in Milwaukee, Wisconsin. One must be pragmatic. The Manager of Track Maintenance's statement indicated that the problem was a lack of equipment *at the local level*. The Board is not in a position to require the Carrier to move equipment hundreds of miles interstate. The Carrier's response to the local problem was a reasonable one under the circumstances and met the requirements of the "specialized equipment" and "not adequately equipped" exceptions to Rule 1B.

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 43773, DOCKET MW-42670
AWARD 43778, DOCKET MW-42728
AWARD 43779, DOCKET MW-42729
AWARD 43780, DOCKET MW-42730
(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. In this case, the Organization established that the Carrier owned a grader. Notwithstanding, the Majority determined that the equipment was 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 a location provision to the exception. The Majority found that because the equipment was over three hundred (300) miles away, the Carrier could still contract out the work. This was not a requirement that was negotiated between the parties and if the parties intended on location 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.

The Majority also found the Carrier was able to establish a Rule 1B exception based on lack of local available equipment. However, the notification relied on by the Carrier was dated October 10, 2012, but the claimed work did not occur until the middle of 2013. Accordingly, the Carrier had over six (6) months 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."

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. 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

Zachary C. Voegel
Labor Member