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

Award No. 44993
Docket No. MW-42969
Old NRAB-00003-150158
New 23-3-NRAB-00003-220922

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Holland Welders) to perform Maintenance of Way Department work (rail welding and related prep work) between Mile Posts 129.25 and 173.4 on the Altoona Subdivision beginning on November 25, 2013 through December 17, 2013 (System File B-1401C-111/1598674 CNW).

(2) The Agreement was further violated when the Carrier failed to notify the General Chairman 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 regarding the aforesaid work and when it 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 the December 11, 1981 National Letter of Agreement (Appendix '15').

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants C. Seig and D. Balow shall now each '… be compensated for an equal share of ninety (90) hours straight time and ten (10) hours overtime, worked by contractor Holland on all dates cited earlier in the claim, at the applicable rate 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.

Factual Background:

The claim in this case contests the Carrier's decision to contract out work and asserts the subcontracting constituted a violation of the parties' collective bargaining Agreement. That Agreement addresses the subject of contracting out, stating as follows in pertinent part:

RULE l - SCOPE

A. The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employees in any and all subdepartments of the Maintenance of Way and Structures Department, (formerly covered by separate agreements with the C&NW, CStPM&O, CGW, Ft.DDM&S, DM&CI, and Ml) represented by the Brotherhood of Maintenance of Way Employes.

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 contractors. 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.

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. (See Appendix '15')

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. * * *

Appendix 15 (the December 11, 1981 Letter of Agreement) states as follows in pertinent part:

> **Dear Mr. Berge: * * ***
>
> **The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.**
>
> **The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor. * * ***
>
> **Please indicate your concurrence by affixing your signature in the space provided below.**
>
> **Very truly yours,**
>
> **/s/ Charles I. Hopkins, Jr.**
> **Charles I. Hopkins, Jr.**
>
> **I concur:**
> **/s/ 0. M. Berge**

The following Notice was given to the Organization in this case:

> **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 any and all fully operated, fueled and maintained and or non operated [sic] equipment necessary to assist with program work, emergency work, and routine maintenance commencing November 1, 2012 thru December 31, 2013.

The contested work was contracted out to Holland Welders on November 25, 2013 through December 17, 2013 between Mile Posts 129.25 and 173.4. The welding at issue was precision welding known as flash-butt welding. The flash-butt welder used to perform the work was owned by Holland, and Holland only uses its own technicians to perform calibrations and repairs to the machine. Carrier forces did the prep work prior to the weld, as well as the finish work after the weld.

Position of Organization:

In the view of the Organization, the work at issue in this case was scope-covered and therefore expressly reserved to the unit. In support of this argument, it refers to a list of maintenance of way employes classified as "welders" and "welder helpers," and claims this classification is definitive proof that welding work belongs to the unit.

It maintains the Notice issued by the Carrier was vague and did not even state the type of work to be contracted out or reasons for the outsourcing. Further the contracting period stretched over an entire year. It concludes the notice was actually no notice at all.

The Organization argues that there is no need for the Holland precision welder and that BMWE employes could perform the same work with a thermite welder. Alternatively, the Carrier could have rented the equipment and trained its employes to use it.

Position of Carrier:

The Carrier contends the work was not scope covered because it was performed using a specialized piece of equipment that could not be rented or leased without contracting Holland. It argues there is no work reservation because there are negotiated exceptions. It further contends the Union must show its employes regularly performed the work before that work can be deemed to fall within the Scope Rule. It

notes the contractor's technicians were needed to calibrate the machinery, a function that unit employes have neither performed nor been trained to perform.

Because the work was not scope covered, the Carrier maintains there was no requirement of notice at all. Even if there were a requirement of notice, it maintains Award 43769 was identical to this case, and the notice there was found adequate. In its view, that Award should be followed here.

In the Carrier's view, the remedy sought by the Organization is improper and excessive, as the Claimants were fully employed during the period in question and therefore suffered no harm.

Analysis:

The Organization maintains that Rule 1(B) establishes a strong presumption that work reserved to Maintenance of Way forces will be performed by them. In its view, only when the Carrier can establish an exception will the Carrier be permitted to contract out reserved work. By contrast, the Carrier cites Third Division Award 37480 for the proposition that the Scope Rule is general in nature, and the BMWE must establish that it has traditionally performed the work as a matter of customary and historical performance before it can establish a contract violation. It references Rule 52 which only requires notice when employes have customarily performed the work in question.

On this point we find the Organization's position to be more persuasive. Section B of Rule 1 unequivocally assigns to the BMWE "all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities…." This is mandatory language. It sets forth a clear intent that such work be assigned to the BMWE. As such, we find it establishes a presumption that the described work in Rule 1 will be assigned to the BMWE.

The second paragraph of Section B states that the work described in the first paragraph "is customarily performed by employes described herein." This constitutes an agreement between the parties that the work described in the first paragraph of Section B is jointly considered to have customarily been performed by the BMWE. The language starts with the words "By agreement between the Company

and the General Chairman," meaning that what follows has been the subject of joint assent. As such, it cannot serve as imposition of a burden upon the Organization to establish that the work in question has customarily been performed by affected employes. To the contrary, it expresses a stipulation between the parties that it has.

Section B goes on to clearly articulate situations where an exception is recognized. These exceptions in no way negate the general intent that identified work be assigned to BMWE, but instead identify circumstances where the general proposition will be narrowed to allow for negotiated exceptions. In those cases, the Carrier is permitted to contract out work that would otherwise be considered BMWE work.

We are not persuaded by the Carrier's argument that this specialized welding work is not scope-covered. Rule 1(B) states: "The 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." Mandatory language ("shall") is used to express this obligation. It applies to "all work" within the general description of the applicable sentence. This expression of the parties' intent is broad and intended to be inclusive unless one of the specified exceptions applies. As a result, we find non-emergency work which broadly falls within this inclusive and mandatory obligation to be subject to the notice requirements. Welding certainly falls within the rubric of construction, maintenance and repair of structures and facilities, and the existence of welders and welder helpers in the Carrier's workforce establishes a presumption that welding work is scope-covered.

There have been a substantial number of cases between the parties where the Board has addressed the issue of Notice, and unfortunately the decisions are not consistent. We will undertake a comprehensive review of the awards on the subject in order to better understand the arguments of both parties.

In its General Contracting Hearing Memo, the Carrier notes that its blanket notices have been deemed sufficient. It cites Award 3 of PLB 7096, Awards 42491-42496, 42521-42530, 43763-43780 and 43719-43738. Some of these cases did not

address the issue of notices in contracting; Award 43719 was about bulletining vacancies; 43721, 43726, 43734, 43736 and 43772 were overtime cases, and 43725 was about assignment to a junior employe. Awards 43724 and 43735 involved emergencies where there was no notice requirement. A large number of cases did not discuss the notice given in the case (43730, 4373243733, 43767, 43769, 43771, 43774-43777, 42491, 42496, and 42521-42530), leading one to conclude that the notice was contractually compliant and the case revolved around other issues. In addition, Award 40756 found the Notice to be blanket, but nonetheless in compliance. This determination was made in reliance on prior awards.

In some of the cases, the focal point of the Organization's objection was the fact that a notice covered a full year or more. PLB 7096 was such a case, where the applicable notice requirements were deemed to have been met with a multi-year notice. Indeed, arbitrators appear to be largely in consensus that notices are adequate on this point if they are otherwise specific. We are in agreement that notices covering a year are not too vague so long as the nature of the work and the reasons for it are identified. There is no prohibition in the parties' Agreement against multi-month notices. This allows the Organization and Carrier to work together to efficiently address perennial issues like overgrown vegetation or snow removal.

It is clear that in Awards 43720, 43722, 43723, 43728, 43729, 43731, 43737 and 43738, the notices were deemed sufficient even though reasons were not supplied. In those cases, the rationale was that the work at issue was covered in the description of work in the notice, rendering it adequate. The awards did not discuss Appendix 15 or note is terms. No decision found the appendix unenforceable.

Not all of the cases cited by the Carrier found the notice to be sufficient. The claim in Award 43727 was sustained, with a finding that the notice in that case was inadequate and prevented the parties from having an informed dialogue as envisioned under Rule 1(B).

In general, the cases looked to the ability of the Organization to meaningfully engage in a conference aimed toward reaching an understanding about the contracting in question. In Award 43763, the Board reasoned that:

> **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.**

This analysis is rooted in the meaningfulness of the conferencing opportunity. It does not reference or discuss Appendix 15.

Significantly, in Awards 43768 and 43773, the reason for the outsourcing was deemed to be implied because the contracting was for equipment.

The Organization also has a large number of cases to cite in support of its position. In Awards 42425, 42427 and 42431, the Board faulted the notices' absence of reasons for the outsourcing, among other things.

The Notice in Award 42542 was deemed to be flawed because no time frame for the work to be done was identified, thereby precluding meaningful dialogue between the Carrier and the Organization. The lack of a time frame was a crucial point in Awards 42544, 42547, 42548, 42551, 42552 and 42554. The trouble in Award 43583 was the failure of the Notice to identify the work to be done and the time frame. The Notice in Award 43589 was rejected because it identified neither the work nor the time frame for its performance.

In Award 42437 the problem was that the Notice failed to identify the "contracting transaction." That decision stated that the reasons for the contracting must be given in the notice. In Award 42435, the Board determined that giving the reasons during the conference was not adequate. Awards 43577 and 43592 found that reasons were not given in the Notice and were not provided until after the work was performed.

The same defect was identified in Award 43578. Award 43582 opined that the plain language of Appendix 15 requires Notice to set forth the reasons.

This Board can find no jurisdiction to effectively void the language of Appendix 15 by leaning on the conference to make up for deficiencies. The Organization is at a definitive disadvantage upon entering a conference when it does not know the Carrier's reasons for wanting to subcontract. If the issue involves equipment, the Organization can prepare by figuring out what equipment the Carrier has and what it wants to use from a contractor, then evaluate the difference. By contrast, if the issue involves personnel, an entirely different investigation needs to take place to prepare for the conference. It is contrary to the mutual goal of improved communication articulated in Appendix 15 to hamper these communications by allowing inference and implication to take the place of actual notice. This was not the intent of the parties.

The second paragraph of the Appendix addresses the issue of notice. It states: "… advance notices shall identify the work to be contracted and the reasons therefor." This language is both clear and mandatory; it requires notices to identify the work to be contracted and the reasons it is being outsourced. Without these elements, a notice runs afoul the parties' express language. Whether or not the conference following a notice is capable of curing notices is irrelevant; the plain language of the Agreement requires that the nature of the work and the reasons for outsourcing be articulated in the notice.

The third paragraph reference to Appendix 15 Rule 1(B) is clear and express. It incorporates the Appendix by reference. Had the parties intended to eliminate the requisites of Appendix 15, they could have deleted the reference. They did not. The wording of the provision was the product of the parties' negotiations, and it must be respected. This Board does not have the authority to ignore or effectively erase contract language the parties have mutually agreed to. It follows that we are obliged to interpret and enforce Appendix 15.

We find the stream of cases enforcing Appendix 15 to offer the proper analysis. Any notice without identified reasons for the contracting is by definition out of compliance with express contractual requisites.

In this case, Claimants were fully employed during the entirety of the time that the contracting was going on. The Carrier contends that this fact precludes a remedy and cites substantial precedent: "monetary compensation is not awarded in the absence of a proven loss of earnings or work opportunity by Claimants notwithstanding the improper contracting of work." Third Division Award 37103.

The Organization counters, arguing that the Board has historically paid fully employed claimants under the applicable Agreement. Specifically, it cites Award 40819:

> **We turn, then to consideration of the remedy question. Although the Carrier asserted a full-employment defense, it did so on the basis of three prior Awards that involve a different Rule and a different Agreement. If full-employment was allowed to serve as a defense to a monetary remedy, the defense would effectively allow the Carrier to violate the Agreement with impunity. Thus, the asserted defense is not persuasive here.**

The problem here is that both parties are right, but it cannot be both ways. If the Carrier's argument is accepted, the Organization would by definition be denied a remedy in every single case where claimants were employed, and the Carrier would be free to repeatedly violate Rule 1(B) without consequence. By contrast, if the Organization's argument is given deference, Claimants would be paid when they have already been compensated for their work.

We are persuaded that the obligation of the Board to interpret and enforce the parties' Agreement is our preeminent function, and to allow contract violations to continue without consequence is an affront to that function. It is well accepted in remediating contract breach that the law seeks to fashion a remedy where breach has occurred. Applicable precedent provides us with only two options: look the other way or grant the claim. We find granting the claim to be the better choice for upholding the terms of the parties' Agreement.

Claim sustained in accordance with the Findings. Claimants C. Seig and D. Balow shall each be compensated for an equal share of ninety (90) hours straight time and ten (10) hours overtime, worked by contractor Holland on November 25 through December 17, 2013, at the applicable straight time rates of pay.

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 28th day of June 2023.