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

Award No. 44994
Docket No. MW- 43010
Old NRAB-00003-150192
New 23-3-NRAB-00003-220927

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 (Snelton, Inc.) to perform Maintenance of Way and Structures Department work (remove and replace switches and related work) in Yard #9, at Proviso Yard on the Geneva Subdivision on November 11, 12, 13 and 14, 2013 (System File J-1301C-529/1596697 CNW).

(2) The Agreement was violated when the Carrier assigned outside forces (Snelton, Inc.) to perform Maintenance of Way and Structures Department work (remove and replace switches and related work) in Yard #9 at Proviso Yard on the Geneva Subdivision on November 16, 17 and 18, 2013 (System File J-1301C-530/1596696).

(3) The Agreement was violated when the Carrier assigned outside forces (Snelton, Inc.) to perform Maintenance of Way and Structures Department work (remove and replace a switch and related work) in Yard #9 at Proviso Yard on Geneva Subdivision on November 20, 21 and 22, 2013 (System File J-1401C-508/1598666).

(4) The Agreement was violated when the Carrier assigned outside forces (Snelton, Inc.) to perform Maintenance of Way and Structures Department work (remove and replace crossover switches and related work) in Yard #9 at Proviso Yard on the Geneva Subdivision on November 25 and 26, 2013 (System File J-1401C-509/1598667).

(5) 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 work referred to in Parts (1), (2), (3) and/or (4) above or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required in Rule 1 and Appendix '15'.

(6) As a consequence of the violations referred to in Parts (1) and/or (5) above, Claimants A. Ayala, G. Cline, S. Duda, B. Mendoza and T. Noakes shall now each be compensated for '...forty five (45) hours of time that the contractor's forces spent performing their work, at the applicable rates of pay.'

(7) As a consequence of the violations referred to in Parts (2) and/or (5) above, Claimants A. Ayala, G. Cline, S. Duda, B. Mendoza, C. Rapier and T Noakes shall now each be compensated for '...twenty seven (27) hours of time that the contractor's forces spent performing their work, at the applicable rates of pay.'

(8) As a consequence of the violations referred to in Parts (3) and/or (5) above, Claimants S. Duda, C. Rapier and T. Noakes shall now each be compensated for '...twenty eight (28) hours of time that the contractor's forces spent performing their work, at the applicable rates of pay.'

(9) As a consequence of the violations referred to in Parts (4) and/or (5) above, Claimants S. Duda, L. Jones and T. Noakes shall now each be compensated for '...seventy two (72) 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.

Factual Background:

In November of 2013 the Carrier had contractor, Snelton Construction of Illinois remove and replace switches in Yard #9 at Proviso Yard on the Geneva Subdivision. Four claims were filed and processed by the Organization protesting this outsourcing as a violation of the collective bargaining Agreement.

All four cases involve the same or very similar work (remove and replace switches) performed by a contractor (Snelton Construction) in the same general location (Yard #9, Proviso Yard, Geneva Subdivision). The basic differences between the four claims are the dates of occurrence for the work grieved and the named Claimants.

The parties' 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:

December 11, 1981 * * *

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"

Notice of an intent to subcontract was given on December 28, 2022:

PLACE: At various locations on the Chicago Service Unit.

SPECIFIC WORK: Providing any and all fully operated, fueled and maintained front end loader(s), back hoe(s), track hoe(s) and bulldozer(s) to assist with installing turnouts and road crossing installation commencing January 01,2013 thru December 31, 2013.

Position of Organization:

The Organization argued that the Carrier failed to provide advance notice. It maintained the Carrier had in its inventory of equipment similar machines capable of performing the work at issue (end loaders, crawler hoe, skid steer loader, backhoe, and truck). The Organization further argued that Claimants were ready and available to work on the dates in question (Nov. 11-14, 16-18 a20-22 and 25-26, 2013). Further, in the Organization's view, the Carrier should have attempted to lease/rent the needed equipment.

Position of Carrier:

The Carrier argues it used contractor forces to assist its own forces with removal and installation of switches. It asserts the project required greater equipment than what the Carrier possessed for this particular work project. In its view, Claimants were not ready and available to perform the work being grieved as they were working their regular assignments, most of which were assisting the contractor on the very work being grieved. The Carrier further argued that because Claimants lost no income as a result of the subcontracting, no remedy can be fashioned.

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.

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 will be assigned to the BMWE. We find the removal and replacement of switches and related work to fall squarely within the Scope of work reserved to the

unit. As such, the Carrier was under an obligation to provide the Organization with a proper notice of its intent to outsource this work.

The Notice given in this case failed to specify reasons for outsourcing the work. As such, it did not meet the express requisites of Appendix 15, incorporated by reference into the parties' Agreement. As more fully explained in Award NRAB-3-220922, this Board does not have the authority to negate a provision the parties have negotiated into their contractual obligations. Appendix 15 requires that notices of outsourcing "identify the work to be contracted and the reasons therefor." The Notice in this case was not in compliance with the Carrier's contractual obligations.

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 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:

> **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 compensated when they have not been deprived of payment 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 A. Ayala, G. Cline, S. Duda, B. Mendoza and T. Noakes shall each be compensated for forty-five (45) hours for the contractor's work on November 11, 12, 13 and 14, 2013 at the applicable straight time rates of pay. Claimants A. Ayala, G. Cline, S. Duda, B. Mendoza, C. Rapier and T. Noakes shall each be compensated for twenty-seven (27) hours of time that the contractor's forces worked on November 16, 17 and 18, 2013, at the applicable straight time rates of pay. Claimants S. Duda, C. Rapier and T. Noakes shall each be compensated for twenty-eight (28) hours of time that the contractor's forces spent working on November 20, 21 and 22, 2013, at the applicable straight time rates of pay. Claimants S. Duda, L. Jones and T. Noakes shall each be compensated for seventy-two (72) hours of time that the contractor's forces worked on November 25 and 26, 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.