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

Award No. 44997
Docket No. MW-43039
Old NRAB-00003-150226
New 23-3-NRAB-00003-220925

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 to perform Maintenance of Way and Structures Department work (fence construction) at the Short Line Material Yard in Des Moines, Iowa beginning on December 4, 2013 and continuing through December 9, 2013 (System File B-1401C-112/1599006 CNW).

(2) The Agreement was further violated when the Carrier failed to notify the General Chairman in writing 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 D. Murphy, C. Grafton, A. Scavo and D. Willis and shall now each '... be compensated for and (sic) equal share of one hundred and twenty (120) straight time hours and one hundred and twenty (120) overtime hours, that the employees of the contractor worked, 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:

The Organization has filed a claim asserting that the Carrier contracted out fence construction work at the Short Line Material Yard at Des Moines, Iowa from December 4 to December 9, 2013. It also alleges the Carrier failed to provide proper written notice of its intent to outsource this work. It maintains these actions constituted a violation of the parties' collective bargaining Agreement.

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 contractor. 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:

> **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 equipment necessary to assist with program work, emergency work, and routine maintenance commencing November 1, 2012 thru December 31, 2013." (Emphasis in original) (Employes' Exhibit "B-1 ")**

Position of Organization:

The Organization alleges the Carrier used unidentified contractor employees to perform the duties of fence construction at Des Moines, IA Short Line Yard. In the Organization's assessment, the Carrier had in its possession tools and equipment capable of erecting fences. It maintains members have performed similar work in the past with various types of Carrier equipment. In addition, it argues the Carrier failed to provide proper notice. The Organization acknowledged that Claimants were fully employed during the days under review.

Position of Carrier:

The Carrier asserts the work in question failed to meet the Scope definition in Rule 1(B) because it did not involve "work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities." It claims the work required equipment not owned by the company. It further argues the Organization's failure to identify the contractor or what tools and equipment were allegedly used left the Carrier in a vulnerable position of not being able to make a detailed examination of the allegations.

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 that fence construction is required for maintenance of way and therefore falls within the general description of Rule 1(B).

The second paragraph of Section B states that the work described in the first paragraph "is customarily performed by employees 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 employees. 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 special circumstances. In those cases, the Carrier is permitted to contract out work that would otherwise be considered BMWE work.

In our assessment, erecting fencing is part and parcel of maintaining right of way and therefore falls within the definition of scope in Rule 1(B). This accords with the decision by the Board in Award 37022 where the issue was outsourcing fencing construction: "The Carrier's initial reply to the claim acknowledged that covered employees had performed the type of work in the past." Award 37376 also dealt with fencing, with the claim being sustained. Hence the work at issue in this case falls within the Scope clause in Rule 1(B), giving rise to an obligation to issue proper notice.

The Notice in this case covered "program work, emergency work, and routine maintenance work," leaving no clue as to the particular type of work intended for outsourcing. Furthermore, it failed to specify a reason for outsourcing the work. This Notice fails to 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.

Though the Carrier protests the failure of the Organization to identify the contractor involved, it nonetheless maintained that the subcontracting was proper. This

is a strong indication that the Carrier knew what contracting was at issue, otherwise it could not take such a position.

As the Carrier sees it, 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 findings. Claimants Murphy, Grafton, Scavo and Willis and shall each receive an equal share of the one hundred and twenty (120) straight time hours worked by contractor employees between December 4 and 9, 2013, at the applicable straight time rates of pay. The Organization's claim for overtime is denied on the grounds that overtime must be worked in order to be paid.

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.