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

Award No. 44999
Docket No. MW-43045
Old NRAB-00003-150234
New 23-3-NRAB-00003-220924

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 (Industrial Lube) to perform Maintenance of Way and Structures Department work (replace greaser pans and carpet for curve greasers) around Mile Post 137 near Clinton, Iowa beginning on December 3, 2013 through December 6, 2013 (System File J-1401C-505/1598289 CNW).

(2) The Agreement was violated when the Carrier assigned outside forces (Industrial Lube) to perform Maintenance of Way and Structures Department work (replace greaser pans and carpet for curve greasers) around Mile Post 98.1 near Dixon, Illinois on December 10, 2013 (System File J-1401C-507/1598665).

(3) 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) and/or (2) above 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').

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants M. Bates and M. Decker shall now each '... be compensated proportionately for sixty four (64) man hours of time that the contractor's forces spent performing their work, at the applicable rates of pay.'

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimant M. Bates shall now '... be compensated for eight (8) hours of time that the contractor's forces spent performing his 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:

On December 3, 4, 5, 6 and 10, 2013, the Carrier assigned outside forces from Industrial Lube to replace greaser pans and carpet curve greasers near Mile Post 137 near Clinton, Iowa as well as Mile Post 98.1 near Dixon, Illinois. The claim in this case contests the Carrier's decision to contract out this work and asserts the subcontracting constituted a violation of the parties' collective bargaining Agreement.

That Agreement addressed 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:

PLACE: At various locations on the Chicago Service Unit.

SPECIFIC WORK: Providing any and all fully operated, fueled and maintained equipment and/or non-operated equipment necessary to assist with program work, emergency work, and routine maintenance work commencing November 12, 2013 through December 31, 2014.

Position of Organization:

The Organization maintains the work at issue was classic maintenance work: replacement of greaser pans and carpet for curve greasers, as opposed to a new installation project. In addition, it pointed out that both Claimants were furloughed while the work was going on and were therefore injured by the Carrier's actions. In its assessment, both Claimants were experienced with this work, having performed it in the past, and were therefore qualified. The Organization also argued that the Carrier failed to issue the notice which was compliant with the Agreement. It concludes the claim must be granted.

Position of Carrier:

The Carrier's statements support the conclusion that Claimants were never trained in this work, never took the special classes to learn how to perform this work, and had never performed this work. Statements from the Carrier's managers and directors indicated this was a new installation project. The Carrier argued the project required the trained expertise of contract forces in order to validate the manufacturer's warranty, and denied it had the needed tools and equipment. In its view, the factual dispute here is irreconcilable, and under precedent, the moving party carries the burden of proof.

It maintained Claimants were either fully employed and suffered no loss (Claimant Decker in J-1401C-505/1598289) or not furloughed as a result of this contracting event and would not have performed the work in question had he been working (Claimant Bates in both claims).

Analysis:

The Organization provided statements from Dave Stanton, a 37 year employee, who contended that part of his regular duties as Track Supervisor was to maintain

wayside lubricators in accordance with the Engineering Track Maintenance Field Handbook. He said he needed no special tools to do the work and had received no special training since the Handbook provided the needed instructions. Randy Weatherman, a foreman for 36 years, provided a statement said the same thing. Track Inspector Mike Lada substantiated these statements. Manager of Rail Life Extension Daniel Torres stated that his main concern in bringing in a contractor was loss of the manufacturer's warranty.

In our assessment, installation and maintenance of wayside lubricators and carpet for curve greasers falls within the general scope of maintenance of way work. As a result, notice is required and the work needs to fall within one of the exceptions.

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.

The Carrier maintains Claimants were fully employed during the entirety of the time that the contracting was going on. It 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 that furlough was involved, and in any event, 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. Applicable precedent provides us with only two options: look the other way or grant the claim. We find granting the claim to be warranted in order to uphold the terms of the parties' Agreement.

Claim partially sustained in accordance with the Findings. Claimants Bates and Decker shall each receive equal shares of the sixty-four (64) man hours worked by the contractor's forces from December 3, 2013 through December 6, 2013, at the applicable straight time rates of pay. Claimant Bates shall be further compensated for eight (8) hours' time that the contractor forces spent working on December 10, 2013, at the applicable straight time rate.

AWARD

Claim sustained in accordance with the Findings.

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.