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

Award No. 45003
Docket No. MW-43085
Old NRAB-00003-150269
New 23-3-NRAB-00003-220934

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 utilized outside forces (Utilco) to perform Maintenance of Way and Structures Department work (brush and tree cutting) at various locations on the Carrier's right of way beginning near Mile Post 325.9 to Mile Post 278 on the Albert Lea Subdivision beginning on January 25, 2014 through February 12, 2014 (System File B-1401C-127/1602322 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 or make a good-faith attempt to reduce the incidence of subcontracting 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. Horstmann and C. Peterson shall each '* be compensated at their respective rates of pay for an equal share of all man/hours, worked by Contractor forces performing the brush cutting on the dates under claim.'**

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 the dates in question, the Carrier used Utilco to perform brush and tree cutting work. The Organization protests that this work is inherently reserved to the unit, and the outsourcing was in violation of the parties' labor agreement. The claim has been processed through the grievance procedure and now stands before this Board.

The parties' 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:

"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"

Position of Organization:

As the Organization sees it, cutting and cleaning brush and trees is reserved to Maintenance of Way forces by way of the Agreement and the December 11, 1981 Letter of Agreement. It asserts Maintenance of Way forces have customarily and traditionally performed this very work and have done so using the same equipment used by the contractor in this instance. It denies that the contractor's equipment was necessary for the job, asserting the Carrier owned the needed equipment. Even if the Carrier lacked the equipment it needed, the Carrier could have rented or leased such equipment. It concludes the work unequivocally belongs to the unit.

The Organization denies that it received notification of the work contested here, and asserts the claim must be granted on this basis, even without more.

Position of Carrier:

On November 12, 2013, the Carrier provided the Organization with Notice of its intent to utilize contractors for controlling brush and vegetation commencing November 12, 2013 through and including December 31, 2014. The location was "At various locations on the Twin Cities Service Unit." Reasons were not given. Based on the information provided by the Organization, or lack thereof, the Carrier contends it was unable to determine that anyone had performed the work as alleged. The Carrier explained the specialized nature of the Utilco Brush Cutter and how the Carrier did not possess this specialized equipment. It claimed it provided the Organization with documentation and photographs to illustrate the fact Utilco's Brush Cutter has an "extended" reach for not only performing ground work, but also for encroaching reaching trees and branches. The Carrier concluded by arguing that Claimants were fully employed during the period in question with earnings including substantial overtime and paid time off.

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.

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 negotiated exceptions. In those cases, the Carrier is permitted to contract out work that would otherwise be considered BMWE work.

We find the work of brush cutting and removal of vegetation to fall within the general description of scope under Rule(B); as a result, proper notice was required.

The Notice given in this case failed to specify a location beyond "various locations on the Twin Cities Service Unit," and also failed to specify a reason for outsourcing the work. This Notice fails 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.

In this case, the Carrier provided payroll records establishing that 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:

> **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 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 remedy for upholding the terms of the parties' Agreement.

Claim sustained in accordance with findings. Claimants J. Horstmann and C. Peterson shall each be compensated at their respective straight time rates of pay for an equal share of all man/hours worked by Contractor forces performing the brush cutting on the dates under claim.

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.