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

Award No. 45006
Docket No. MW-43091
Old NRAB-00003-150283
New 23-3-NRAB-00003-220935

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 (Hulcher) to perform Maintenance of Way Track and Structures Department work (remove a bridge abutment and associated clean-up work and ice removal and ditching) near Mile Posts 297 and 288 on the Albert Lea Subdivision on January 13, 2014 until January 24, 2014 (System File B-1401C-123/1601487 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 effort 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 T. Woodfill, J. Horstman, C. Peterson and D. Seeger shall each '* be compensated for, an equal share of all man/hours of the lost work opportunity, 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:

Rule 1(B) holds that:

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 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 Carrier asserts it sent the following Notice on November 12, 2013:

**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 equipment necessary to assist with program work, emergency work, and routine maintenance commencing November 12, 2013 through and including December 31, 2014.**

Position of Organization:

The Organization contends there was no notice. It notes that this assertion was never rebutted by the Carrier. As such, it concludes that it is undisputed that the Organization never received the November 12, 2013 letter. It argues this Board has consistently upheld the principle that the burden of proof is on the sender to show that it actually sent the letter and that the letter was delivered.

As the Organization sees it, the letter was never sent to the Organization. Accordingly, the letter was never discussed in conference with the General Chairman as contemplated by Rule 1(B). It cites Awards 27004 and 27005, Second Division Award 10157 and Third Division Awards 25100 and 40475 in support of its contention.

The Organization contended that because the contractor had to bring in the equipment, the Carrier could have likewise have brought in equipment from different locations to meet the equipment demands. It asserts the Carrier had the equipment necessary to do the work, but simply decided not to use its own equipment. The Organization describes the work as routine maintenance. It maintains the machinery used by the contractor in this instance is nearly identical to that currently owned and operated by the Carrier's own Maintenance of Way forces. It references Award 40554 which held:

> **Having established that the work was reserved to BMWE-represented employees under the Rule I (b) the inquiry moves to remedy. This record contains no showing that the work could not have been scheduled in a manner so as to include the Claimants. The Claimants were assigned to the territory at the time of the contracting of the track work and we conclude that the Organization established a loss of work opportunity.**

Position of Carrier:

The Carrier maintained it provided advance written notice of its intent to contract on November 12, 2013. It noted the Organization amended its initial post conference letter, hampering the Carrier's opportunity to research and respond to the document.
It references Third Division Award No. 37022, where Referee Gerald E. Wallin ruled that it was improper to file documentation so late in the claim handling process.

It claimed it lacked the necessary heavy equipment needed for this work at that particular time and location, and noted weather conditions directly contributed to out of service (OOS) conditions that affected the movement of traffic. According to Director of Track Maintenance Eric J. Gehringer, winter conditions were forcing ice onto (over) the rail creating a disruption to train operations. Likewise, the oncoming spring conditions would create a situation where the tracks would "flood with water above the rail and undermin[e] the ballast section." The equipment needed for this project included bull dozers and excavators; equipment that Director Gehringer was adamant that the TCSU (Twin Cities Service Unit) "did not own or maintain."

The Carrier contends Claimants were fully employed, meaning there has been no harm to remedy in this case.

Analysis:

Rule 1(B) of the parties' Agreement states: "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 …." The is mandatory language requiring actual notification. It is unrebutted that the General Chairman did not receive the November 12, 2013 letter. It follows that he was not notified as required by the contract.

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 remedy for upholding the terms of the parties' Agreement.

Claim sustained in accordance with the Findings. Claimants T. Woodfill, J. Horstman, C. Peterson and D. Seeger shall each be compensated for an equal share of all claimed man/hours performed by Hulcher from January 13 to 24, 2014, 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.