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

Award No. 45028
Docket No. MW-42838
23-3-NRAB-00003-220911

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago and North Western Transportation 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) to perform Maintenance of Way and Structures Department work (dig out a back wall of a bridge) near Mile Post 57.9 on the Troy Grove Subdivision close to Triumph, Illinois on October 1, 2013 (System File J-1301C-520/1592882 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1B and Appendix '15'.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant R. Law shall be compensated '... for at least ten (10) 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.

The Claimant established and holds seniority in respective classes within Seniority District T-3 of the Carrier's Track Subdepartment of Maintenance of Way and Structures Department. On the date relevant to this dispute, he was assigned to Gang 3078 and was working Monday through Thursday 7:00 A.M. to 5:30 P.M.

On March 8, 2013, the Carrier sent the Organization a 15 Day Notice of Intent to Contract Work, to wit:

This is a 15-day notice of our intent to contract the following work:

Specific work: Provide fully fueled operated and maintained equipment to assist our forces in bridge and facility repairs through 12/31/13.

Location: Chicago Service unit

On October 1, 2013, the Carrier assigned outside forces (Snelton) to perform the work of digging out a back wall of a bridge near Mile Post 57.9 on the Troy Grove Subdivision close to Triumph, Illinois. One contractor employee utilized an ordinary backhoe, for a total of 10 man hours.

In a letter dated October 8, 2013, the Organization filed a claim on behalf of the Claimant. The Carrier denied the claim in a letter dated November 8, 2013. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Organization contends that the Carrier assigned Scope-covered work to outside contractors without complying with the contracting provisions of the parties' Agreement. The Organization contends that its members have been customarily and historically assigned to perform all aspects of the claimed work and have regularly used

backhoes, excavators and other machinery to clean debris from track and underneath bridges. The Organization further contends that the Carrier had the necessary equipment to perform this work, as a long arm excavator was not necessary to perform the claimed work.

The Organization contends that the General Chairman was not notified in advance of the Carrier's intent to contract out this work. While the Carrier sent the contracting notice quoted above, this letter did not provide advance notification of the contracting at issue here. The failure to notify precluded the parties from engaging in a good-faith attempt to reach an accord. The Organization contends that the Carrier's letter was not issued in connection with any specific contracting out transaction but instead as a generic catch all letter. Similar notices were rejected by this Board in Third Division Awards 41052 and 41054 and Award 14 of PLB No. 7099. The Organization points out that the letter makes no reference to digging out a back wall of a bridge near Triumph, Illinois. The Organization further contends that while the purported notice refers to "bridge repair," the work involved was not repair, but maintenance.

In addition, the Organization contends, the letter failed to identify any purported reason for the Carrier's intent to contract out any work, a violation of Rule 1(B). The Organization contends that the Carrier's failure to comply with the advance notice and conference provisions of the Agreement requires a sustaining award. *See, e.g.,* Third Division Award 41166. The Organization further contends that no reason was given for contracting out this work during the contracting conference, when the Carrier admitted that it intended for the letter to refer to transactions of contracting that had not yet even been conceived.

The Organization contends that the Carrier belatedly attempted to argue that the claimed work involved specialized equipment, a long arm excavator, or that its forces were not adequately equipped to perform the claimed work. However, the Organization contends, the Carrier's failure to include these reasons for contracting out the work in its March 8 Notice precludes the Carrier from raising the Rule 1(B) exceptions as a defense now. Also, the Organization points out that the Carrier never asserted "specialized" equipment or a lack of adequate equipment during the pre-contracting conference held on March 27, 2013.

Finally, the Organization contends that its requested remedy is appropriate and has been confirmed by numerous Boards. The Claimant should be compensated with

10 hours of straight time at his applicable rate for the claimed hours. This remedy would not only compensate the Claimant for the work opportunity he lost but would also serve to protect the integrity of the Agreement. The Organization contends that the Claimant's qualifications are immaterial to the merits of the claim. *See,* Third Division Awards 18557, 29538, and 33937.

The Carrier contends that the Organization has failed to show any violation of the Agreement, as it specifically recognizes that the Carrier may contract work under its terms. The Carrier contends that it served appropriate notice of its intent to contract out equipment on an as-needed basis when the Carrier did not have such equipment available to perform bridge and facility repairs. The Carrier also contends that after the notice was sent, a good-faith conference was held between the parties.

The Carrier contends that the Organization has failed to demonstrate that the claimed work was scope-covered. The Carrier contends that there was no equipment available on the Chicago Service Unit to perform this same work in the same manner. The Organization has not set forth any documentation that conclusively establishes that such equipment was in the vicinity of the location and was functioning and/or available on the days in question.

The Carrier contends that Rule 1(B) of the parties' Agreement provides that the Carrier may contract out work when it does not possess the specialized equipment necessary to do the work. The Carrier contends that it is not adequately equipped to handle the claimed work. The Carrier contends that the contractor's forces utilized specialized equipment not owned by or readily available to the Carrier. The Carrier contends that it provided statements showing a Rule 1(B) contracting exception.

The Carrier contends that the Organization's reference to and reliance upon the December 11, 1981 document (the "Berge-Hopkins Side Letter") is misplaced. The Carrier contends that the Berge-Hopkins letter did not create a separate new contracting rule, but simply reaffirmed the notice requirement.

Finally, the Carrier contends that the Organization's requested remedy is improper and excessive. The Claimant was fully employed, working his own assignment, including overtime. In addition, the Carrier contends that the Claimant was not qualified to operate a backhoe; he was not able to operate the equipment.

The parties' collective bargaining agreement provides:

"Rule 1—SCOPE

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…

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's forces. 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 instated 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 . . . (See Appendix '15')

****

APPENDIX '15'
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."**

Here, there is no dispute that the claimed work is work customarily performed by the Organization's members. Thus, the Carrier was only privileged to contract BMWED's work under the conditions spelled out in Rule 1(B) of the Agreement.

The Carrier argues that its March 8, 2013, contracting notice was sufficient with respect to the work performed in October 2013. The Organization disagrees, pointing to the failure to identify the specific work, locations, times, or reasons for contracting out. As this Board has pointed out time and time again, in order for the parties to have a meaningful contracting conference, the Notice must include sufficient details to inform the discussion. Third Division Award 43768. Here, the Carrier admitted that it did not have this particular work in mind when it conferenced with the Organization.

The Carrier's Notice stated that it intended to contract out bridge and facility repairs at various locations on the Chicago Service Unit over a nine-month period. No reason was offered as to why the Carrier needed to use third-party contractors to perform this quintessential BMWED work. The Notice is deficient. *See,* Third Division Awards 43577 and 43578.

After the fact, the Carrier asserted that use of third-party contractors was necessary because the Carrier did not own a long reach excavator, and thus, the Carrier was not adequately equipped. In Third Division Award 42419, this Board explained why it was necessary for such reasons to be provided in the contracting notice and why providing a reason after the fact was insufficient.

Having found that the Organization has met its burden of proof, we next turn to the remedy. The Carrier protests the awarding of a monetary remedy as the Claimant

was fully employed during the claimed period, and the Carrier asserts that he suffered no compensable loss. In addition, the Carrier asserts that the Claimant was not qualified to operate the long reach excavator.

The Board will follow the findings of numerous on-property awards that a monetary award is necessary to protect the integrity of the Agreement even as to those Claimants who were fully employed during the claimed period. Third Division Awards 37647, 40409, 40812, and 40819. In addition, whether the Claimant has the superior right to the benefit of a penalty claim when a violation has been shown "is of no concern to the Carrier." Third Division Award 18557.

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 7th day of September 2023.