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

Award No. 45034
Docket No. MW-42927
23-3-NRAB-00003-220906

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 (Hulcher, Inc.) to perform Maintenance of Way and Structures Department work (operate vacuum truck to clean switches and crossovers) at various locations along industry tracks in Mankato, Minnesota including the 'New Construction yard', 'East yard' and 'New' yard on October 14, 15, 16 and 17, 2013 (System File B-1301C-181/1595884 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with 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 1 and Appendix '15'.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Brooks and S. Pettis shall now each '* be compenstated for an equal share of sixty four (64) hours of straight time and nine (9) hours of overtime, that the contractor's forces spent performing their Agreement covered work, at the applicable rate of pay.' (Emphasis in original)."**

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 Claimants have established and hold seniority in their respective classes within Seniority District T-7 of the Carrier's Track Subdepartment of Maintenance of Way and Structures Department.

On October 10, 2012, the Carrier sent the Organization a 15 Day Notice of Intent to Contract Work, to wit:

> **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 fully fueled, operated, and maintained Vac truck(s) for cleanup of spills, debris and or other materials commencing November 1, 2012 thru December 31, 2013.**

On October 14, 15, 16 and 17, 2013, the Carrier assigned outside forces (Hulcher, Inc.) to perform right of way cleaning at various locations along industry tracks in Mankato, Minnesota, including the "New Construction yard," "East" yard and "New" yard. Two contractor employees utilized an ordinary vacuum truck to clean debris from switches and crossovers, working a total of 73 man-hours.

In a letter dated December 3, 2013, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated January 8, 2014. 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 vacuum trucks and other machinery to clean debris from switches and crossovers in the past.

The Organization contends that it presented evidence that in 2009, the Carrier obtained a Vactor 2100 vacuum truck which the parties agreed to place into the Common Machine classification. The Organization contends that the vacuum truck used by the contractor in this instance is nearly identical to the model currently owned and operated by the Carrier's own Maintenance of Way forces.

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 transaction 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. In addition, the letter failed to identify any purported reason for the Carrier's intent to contract out any work, a failure to comply with 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. In addition, the failure to identify any alleged reason for the contracting precludes the Carrier from relying on an exception under the Agreement now.

Finally, the Organization contends that its requested remedy is appropriate and has been upheld by numerous Boards. Each of the Claimants should be compensated with an equal share of the 64 hours of straight time and 9 hours of overtime, at their applicable rates, for the hours worked by the contractors on the claimed dates. This remedy would not only compensate the Claimants for the work opportunity they lost but would also serve to protect the integrity of the Agreement.

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 the cited vacuum work. 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 Twin Cities 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 was not adequately equipped to handle the claimed work. The Carrier contends that the contractor's forces utilized specialized equipment not owned or readily available to the Carrier.

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 excessive. The Claimants were both fully employed, working their own assignments, including overtime. In addition, Claimant Pettis observed scheduled vacation during the claimed period.

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

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 . . . (See Appendix '15')

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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."

This Board has found in numerous awards on this property that the claimed work is customarily performed by the Organization's members. *See, e.g.*, Third Division Awards 42552, 42554, 43583, 43589, and 43592. Thus, the Carrier was only privileged to contract out the BMWED's work under the conditions spelled out in Rule 1(B) of the Agreement. The Carrier argues that its October 10, 2012 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.

The Carrier's Notice stated that it intended to contract out vac truck work at various locations on the Twin Cities Service Unit over a thirteen-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 42552, 42554, 43583, 43589, and 43592. We find no reason to depart from this line of cases.

With respect to the remedy, 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. As the Organization has not presented sufficient proof of overtime hours, that portion of the claim is denied, but is sustained in all other respects.

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 7th day of September 2023.