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

Award No. 45036
Docket No. MW-42929
23-3-NRAB-00003-220910

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 Carrier violated the Agreement when it assigned or otherwise allowed outside forces (Hulcher, Inc. and Rybak) to perform Maintenance of Way Track Department work (haul, dump and spread rock) on right of way roads at the Altoona, Wisconsin Rail yard on November 4, 5 and 6, 2013 (System File B 1301C-191/1597055 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance notice of its intent to contract out the aforesaid work and 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 Appendix '15'.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Calkins, M. Kuberra, P. Wilson, M. Schmidt and C. Seig shall each be compensated '* for an equal share of one hundred and twenty (120) hours of straight time and fifteen (15) hours of overtime, that the contractor's forces spent performing their 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 maintain seniority in the Carrier's Track Subdepartment of Maintenance of Way and Structures Department. On the dates relevant to this dispute, they were regularly assigned and working their respective positions on section gangs on Seniority District T-7.

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, non-operated and maintained equipment and materials necessary to replace with new, repair & maintain asphalt, concrete, pavement, and all other roadways commencing November 1, 2012 thru December 31, 2013.**

On November 4, 5, and 6, 2013, the Carrier assigned outside forces (Hulcher, Inc. and Rybak) to haul, dump and spread rock on right of way roads at the Altoona, Wisconsin Rail yard. Five contractor employees utilized a motor grader and dump trucks to grade Carrier-owned right of way roads, working a total of 135 hours.

In a letter dated December 17, 2013, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated January 20, 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, as evidenced by the presented statements and photographs concerning the Carrier's historical use of BMWED employes to perform such work.

The Organization contends that the General Chairman was not properly 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. The Organization contends that the purported notice does nothing more than inform the Organization that the Carrier might assign contractors to perform some work, at some point within a fourteen-month period, somewhere within the Twin Cities Service Unit, which encompasses the states of Minnesota, Iowa and Wisconsin.

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

The Organization contends that while the Carrier asserted that it was not adequately equipped or that it did not have the equipment needed to perform the work, the record demonstrates that the Carrier's forces have historically and customarily performed this type of work through the use of the Carrier's equipment and/or leased machinery and equipment. Furthermore, the Carrier failed to schedule this work with any urgency, demonstrating that the Carrier had ample opportunity

to schedule the work so as to be performed by the Claimants.

Finally, the Organization contends that its requested remedy is appropriate and has been confirmed by numerous Boards. Each of the Claimants should be compensated with an equal share of the 135 hours of straight time, 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 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 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 record clearly shows that the Carrier was not adequately equipped to handle the work, as it did not possess the equipment required to grade roadways and distribute additional roadbed. The Carrier contends that the on-property statements of Manager Knapp established that the Carrier did not possess the necessary equipment to perform the work at the particular time and location. The equipment that was alleged to be available was nowhere near the location required and was not available for use at the time. Thus, the Carrier contends, it was "not adequately equipped" to complete the grading and associated roadbed distribution work.

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 Claimants were fully employed, working their own assignments, including overtime.

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')

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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."**

The Board finds that the Organization has satisfied its burden of demonstrating that the work is customarily and historically performed by the Organization's members. 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 November 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.

The Carrier's Notice stated that it intended to contract out work to replace with new, repair & maintain asphalt, concrete, pavement, and all other roadways 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 43577 and 43578.

After the fact, the Carrier asserted that use of third-party contractors was necessary because while the Carrier possessed a road grader, it was not in the location where the work was to be performed, 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.

Even if the Carrier had indicated that it was not adequately equipped because its road grader was in a different location, it has failed to show that in the thirteen months between issuing the contracting notice and performing the work, it had no opportunity to schedule the work when the road grader and its forces were available at the requisite location. *See,* Third Division Award 42423.

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 Claimants were fully employed during the claimed period, and the Carrier asserts that they suffered no compensable loss. The Board will follow the findings of numerous on-property awards that the award of a monetary penalty is necessary even as to the Claimants who were fully employed in order to protect the integrity of the Agreement. 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.