

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45041
Docket No. MW-42971
23-3-NRAB-00003-220919**

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

**(Brotherhood of Maintenance of Way Employees 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. and Rybak) to perform Maintenance of Way and Structures Department work (torch cut rail, make grade, remove track, install switches, hauling and dumping ballast and related work) at the siding switch at Mile Post 129.2 at Merrilan, Wisconsin on November 18 and 19, 2013 (System File B 1401C-109/1598240 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 R. Wohlk, M. Kuberra, M. Schmidt, J. Lilly, S. Stahley, D. Fiore, P. Wilson and J. Knuth shall now each “*** be compensated for, an equal share of all hours of the lost work opportunity, reportedly eighty (80) hours of straight time and sixteen (16) hours overtime, at the applicable rates 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 their respective classes of the Carrier's Track Subdepartment of Maintenance of Way and Structures Department on Seniority District T-9.

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 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 1, 2012 thru December 31, 2013.

On November 18 and 19, 2013, the Carrier assigned outside forces (Hulcher, Inc. and Ryback) to torch cut rail, make grade, remove track, install switches, haul and dump ballast, and related work at the siding switch at Mile Post 129.2 on Seniority District T-9 at Merrilan, Wisconsin. The contractor's forces worked a total of eighty straight time hours and sixteen overtime hours, utilizing ordinary hand tools, a dozer, front end loader, and trackhoes.

In a letter dated January 11, 2014, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated February 12, 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 and customarily performed the work of track maintenance and repair. The Organization contends that this Scope-covered work may only be performed by outside forces under certain stipulated conditions, in accordance with Rule 1(B) of the parties' Agreement.

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. The Organization contends that the Carrier did not inform the Organization that it intended to contract out track maintenance and repair at the siding switch at Mile Post 129.2 at Merrilan, Wisconsin at any time prior to the date the contractor commenced its work.

In addition, the Organization contends that 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 the Carrier has failed to show that any special skills were required that the Company's employees did not possess, that any special equipment not owned by the Company was used, that any special materials were needed, or that the Carrier was not adequately equipped to handle the work. The Organization contends that even if any of these factors applied, the Carrier failed to notify the Organization until after the contracting had occurred.

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 hours worked by the contractors on the claimed dates. This remedy would compensate the Claimants for the work opportunity they lost and 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.

The Carrier contends that it was required to use contractor forces due to the fact that it did not have the equipment needed to install switches that weighed in excess of 150,000 lbs. The contract forces did not replace BMWED forces, but rather assisted the Carrier's employees with additional equipment support. The Carrier contends that it was not adequately equipped with the necessary equipment in this location.

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 on the claimed dates, 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')

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. The Carrier's forces worked alongside the

contractors. 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 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.

In Third Division Award 43589, this Board considered an identically worded contracting Notice, writing, "If accepted by the Board, it would be tantamount to allowing the Carrier to contract out all of the Organization members' work at any time in the future. It is virtually no notice at all. We agree with the reasoning in those Awards that this cannot be what the parties intended in the subcontracting provisions of their Agreement." We find no reason to depart from these decisions. *See also*, Third Division Awards 42551, 42552, 42554, and 42556.

The Organization has met its burden of proving a violation of the parties' Agreement. 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.

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.