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

Award No. 45043
Docket No. MW-42973
23-3-NRAB-00003-220921

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division – (IBT Rail Conference
(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 utilized outside forces (Utilco) to perform Maintenance of Way and Structures Department work (brush and tree cutting) at various locations on the Carrier right of way on the Altoona, Mankato and Albert Lea Subdivisions and on the Roseport Industrial lead beginning on November 17, 2013 through December 16, 2013 and continuing (System File B-1401C-105/1598236 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 K. Utpadel, M. Schmidt, M. Homan and C. Larson shall each '* be compensated at their respective rates of pay for an equal share of all man/hours, worked by Contractor forces performing the brush cutting on the dates under claim.' (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 within various classifications in the 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 tractors, mowers, brush cutters, and other equipment necessary to control vegetation commencing November 1, 2012 thru December 31, 2013.**

The parties held a contracting conference on October 23, 2012.

On November 17, 2013, through December 16, 2013, and continuing, the Carrier assigned outside forces (Utilco) to perform brush and tree cutting at various locations along the right of way on the Altoona, Mankato, and Albert Lea Subdivisions and on the Roseport Industrial Lead. Two contractor employes utilized a brush cutter to accomplish the subject work.

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 11, 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 brush cutting. 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 further contends that the Carrier has failed to establish that special equipment was in fact used in this instance.

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 on October 10, 2012, it served appropriate notice of its intent to contract out equipment on the Twin Cities Service Unit. The Carrier contends that the notice requirement of Rule 1(B) was satisfied.

The Carrier contends that in Third Division Award 40810, the Board accepted

a Carrier notice that was limited in detail as sufficient. Similarly, Third Division Award 40812 did not disapprove of a general notice. *See also,* Third Division Awards 43737, 42539, and 42605.

The Carrier contends that it provided a statement explaining why it needed to utilize outside forces to assist, specifically that it did not own the special equipment necessary to do the claimed work. Rule 1 of the applicable agreement unambiguously states that the Carrier is permitted to contract out work when it does not own the special equipment necessary to do the work. Throughout the on-property correspondence, the Carrier repeatedly advised the Organization that the contractor forces utilized specialized equipment not owned or operated by Carrier employees. Additionally, the ability to properly operate a Utilico Brush Cutter requires a specialized skill set since the machine itself is unique. As stated previously, the Carrier does not own such a machine, and does not have employees qualified to operate it.

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.

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."

Here, there is no dispute that the claimed work is 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 October 10, 2012, contracting notice was sufficient with respect to the work performed in November and December 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.

This Board has considered and found other notices regarding brush-cutting on this property to be sufficient. In Third Division Award 43763, this Board considered a contracting Notice which stated that the Carrier intended to contract out work "necessary for brushcutting, tree trimming, remove dead communication wire from poles includes vegetation debris, wire, and scrap material." The Board found that the Notice was sufficient to notify the Organization that the work involved "much more than just brush and tree cutting."

In Third Division Award 42605, the Carrier notified the Organization that it intended to contract out "Brush cutting with Utilico brush cutter." Just as in the case at bar, the Carrier argued that the Utilico brush cutter was specialized equipment that the Carrier did not own. The Board there found that the Notice was sufficient to meet the criteria outlined in the collective bargaining agreement.

In other words, previous decisions of this Board approved of notices from which the reason for the contracting could be determined. However, we find that while those notices specifically referred to the claimed work or the reason for contracting out the work, this Notice is a more general, generic notice which does not provide sufficient detail to explain why contractors were needed to perform the Scope-covered work.

While this Notice purported to offer a reason why the contracting out was necessary, it did not identify any of the exceptions set forth in the parties' agreement. In Third Division Award 43592, the Board wrote, "The plain language of Appendix 15 requires that the Notice set forth the reasons underlying the Carrier's intent to subcontract the work at issue." The Notice is deficient where it does not contain the Carrier's reasons for needing to use a contractor. Third Division Awards 42552, 42554, 43583, and 43589.

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. *See,* 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.