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

Award No. 45044
Docket No. MW-43004
23-3-NRAB-00003-220914

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, Inc.) to perform Maintenance of Way and Structures Department work (remove and install switches and related work) in Yard #9 at Proviso Yard on the Geneva Subdivision on October 28 and 29, 2013 (System File J 1301C-527/1596693 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 A. Ayala, G. Cline, S. Duda, B. Mendoza and T. Noakes shall now each be compensated for '... eighteen (18) 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 Claimants established and maintain seniority in their respective classes in the Track Subdepartment of the Carrier's 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 December 28, 2012, the Carrier sent the Organization a 15 Day Notice of Intent to Contract Work, to wit:

> **THIS IS TO ADVISE OF THE CARRIER'S INTENT TO CONTRACT THE FOLLOWING WORK:**
>
> **PLACE: At various locations on the Chicago Service Unit.**
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> **SPECIFIC WORK: Providing any and all fully operated, fueled and maintained front end loader(s), back hoe(s), track hoe(s) and bulldozer(s) to assist with installing turnouts and road crossing Installation commencing January 01, 2013 thru December 31, 2013.**
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> **THIS WORK IS BEING PERFORMED UNDER THAT PROVISION OF THE AGREEMENT WHICH STATES "NOTHING CONTAINED IN THIS RULE SHALL AFFECT PRIOR AND EXISTING RIGHTS AND PRACTICES OF EITHER PARTY IN CONNECTION WITH CONTRACTING OUT."**

On October 28 and 29, 2013, the Carrier assigned outside forces (Snelton Inc.)

to remove and replace switches in Yard #9 at the Proviso Yard. The five contractor's employees utilized hand tools, end loaders, and back hoes to remove and replace switches, working a total of 18 hours each.

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 14, 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 removing and replacing switches. 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 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, while the letter purports to identify a reason for the Carrier's intent to contract out work, "prior and existing rights and practices" is not listed as an exception in the parties' collective bargaining agreement on this property.

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 contractually allowed reason for the contracting precludes the Carrier from relying on an exception under the Agreement now.

The Organization contends that the alleged notice does not mention nor describe the particular work claimed here or the contracting transaction which took place. The Notice only suggests that the Carrier might utilize contractors to perform

some work, at some time, and at some location in the Chicago Service Unit. The Organization contends that this Notice could not provide notice of work which took place nearly a year later. At no point does the Notice inform the Organization of the Carrier's intent to contract out the work of removing and replacing switches in Yard #9 at the Proviso Yard. This work was not mentioned during the parties' January 9, 2013 conference, either.

The Organization contends that the Carrier has an obligation to make good-faith efforts to increase the use of BMWED forces instead of contractors. The Carrier's obligations include proper staffing for planned work, or scheduling of work so that regularly assigned employes can perform it during regular hours.

The Organization contends that the Carrier has failed to show that it was not adequately equipped to perform the work without the use of contractors. The Organization provided documentation establishing that the Carrier's equipment was readily available on the property and that the Carrier has historically leased equipment for use by BMWED forces. The Organization contends that if any of the contractual exceptions applied, the Carrier failed to notify the Organization of the same 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 on December 28, 2012, it served appropriate notice of its intent to contract out equipment on the Chicago Service Unit on an as-needed basis when the Carrier did not have such equipment available. The Carrier contends that the Notice was timely in its creation and issuance and was properly conferenced. The Carrier contends that the notice requirement of Rule 1(B) was satisfied.

The Carrier contends that it was not adequately equipped to complete the removal and replacement of switches, as permitted under Rule 1. The Carrier contends that it found it necessary to call in contract forces to provide equipment assistance in order to complete the project. The Carrier contends that the equipment identified by

the Organization was insufficient to perform the work and it is not required to lease equipment. The Carrier contends that it provided a statement explaining why the Carrier needed to utilize outside forces to assist.

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.

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**
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> *** * ***
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> **Dear Mr. Berge:**
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> *** * ***
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> **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.**
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> **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 December 28, 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. Third Division Award 43768.

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. Additionally, although the December 28, 2012, notice suggests that a "provision in the Agreement" justifies its actions, the Carrier failed to identify the referred-to provision in this collective bargaining agreement. Thus, the reason offered in the contracting notice is not one of the exceptions identified 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. *See*, 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. 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.