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

Award No. 45129
Docket No. MW-42856
24-3-NRAB-00003-220892

The Third Division consisted of the regular members and in addition Referee Sarah Miller Espinosa 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 (remove and replace track panels and related work) at Mile Post 86.75 on the Fairmont Subdivision on August 14, 2013 (System File B-1301C-159/1592869 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance notice of its intent to contract out the above-referenced work and when it 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. Horstmann and J. Clausen shall each '... be compensated for and (sic) equal share of sixteen (16) hours of straight time and eight (8) hours of overtime that the employees of the contractor worked, performing Scope Rule covered maintenance of way work, 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.

This claim was made on behalf of the named Claimants. At the time of the dispute, the Claimants established and held seniority within various classifications.

In this case, on October 10, 2012, the Carrier provided notice of its intent to contract work at "various locations on the Twin Cities Service Unit." The notice identified the specific work as "providing fully fueled, operate, and maintained track excavators (track hoes) to assist Railroad with removing, replacing, loading and unloading switches, and track panels, excavating ditches, drains and installing culverts commencing November 1, 2012 thru December 31, 2013." This work, removing and repairing track panels, was performed on August 14, 2013, by contractors utilizing a crawler hoe.

Rule 1B is central to the determination of this claim. Rule 1B states:

Rule 1 – SCOPE

Rule 1B is central to the determination of this claim. Rule 1B states in relevant part:

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 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. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.

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 contract's forces. However, 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 far advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in "emergency time requirements" cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith.

In addition to Rule 1B, the Berge-Hopkins letter, which is located at Appendix 15 in the Agreement, is also referenced by the Organization in support of its position.

The Organization established that the work at issue, removing and repairing track panels, is within the scope of Rule 1. As stated in Third Division Award 43737 (Referee Jeanne M. Vonhof), this Board has consistently held that "if the work comes within the scope of Rule 1, the Organization need not establish that it has performed

the work exclusively in the past. Exclusivity is not a necessary element to be demonstrated by the Organization in contracting cases."

In the instant matter, the Notice was timely in that it was provided more than 15 days in advance of the date of the intended contracting transaction. Specifically, notice was provided on October 10, 2012 and the work was performed on August 14, 2013. The notice adequately identified the work to be contracted out.

The question is, therefore, whether the work met one of the exceptions to permit contracted work as delineated in Rule 1B. According to Rule 1B:

> **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 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.**

The record shows that special equipment, the crawler hoe, was needed to perform the work in question and that the Carrier did not own such special equipment at that location. The work in question, therefore, falls within a negotiated exception, special equipment not owned by the Company, that permits the Carrier to contract the work.

The Organization asserts in part that if the equipment necessary was not owned by the Carrier at that location, the Carrier had an obligation to rent the equipment and allow claimants to perform the work. The Organization further asserts that the Carrier had rented such equipment on at least one occasion within the past five years. Rule 1B, however, does not require the Carrier to explore and exhaust the possibility of renting equipment prior to contracting work. Rather, the plain language of the Agreement includes an exception for "special equipment not owned by the Company", and the circumstances at issue here fall within this exception.

In sum, the Carrier met its obligation under Rule 1B by providing the Organization with more than 15 days advance notice of the work to be contracted out. Further, the Carrier was permitted to contract out said work under the special equipment exception of Rule 1B.

Thus, the claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of November 2023.

LABOR MEMBER'S DISSENT
TO
AWARD 45125, DOCKET MW-42833
AWARD 45126, DOCKET MW-42835
AWARD 45128, DOCKET MW-42855
AWARD 45129, DOCKET MW-42856
AWARD 45130, DOCKET MW-42857
AWARD 45132, DOCKET MW-42860
AWARD 45135, DOCKET MW-42864
AWARD 45137, DOCKET MW-42893
AWARD 45139, DOCKET MW-42903
AWARD 45141, DOCKET MW-42925

(Referee S. Espinosa)

I must dissent to the Majority's findings in these cases. Specifically, the Majority improperly held that the Carrier's notification letters complied with the terms of Rule 1B and Appendix 15. Rule 1 requires the Carrier to notify the General Chairman not less than fifteen (15) days in advance of a contracting transaction. Moreover, the text of Rule 1 directs the parties to (See Appendix '15'), which clarifies what must be included within any notification pursuant to Rule 1. Appendix 15 clearly mandates that such "*** notices shall identify the work to be contracted and the reasons therefor." To state it more concisely, Rule 1 provides the general language that the Carrier shall notify the General Chairman. However, Appendix 15 specifically clarifies the requirements of such a notification. This same principle of contract interpretation was espoused by the Carrier to this Board and as stated above, it must be applied consistently. Accordingly, any notification that fails to identify the work to be contracted out and/or the reason therefor, is in direct violation of the Agreement. Awards 42419, 42423, 42435, 42438, 43577, 43578, 43580, 43592 already hold to this effect and should have been followed in these cases.

I must also note that this list was one (1) of three (3) virtually identical lists argued at the NRAB. Notably, the other two (2) deadlock lists fell directly inline with the precedent cited above. See Awards 44992, 44993, 44994, 44995, 44996, 44997, 44998, 44999, 45000, 45003, 45004, 45006, 45028, 45029, 45030, 45031, 45032, 45034, 45035, 45036, 45037, 45038, 45039, 45040, 45041, 45042, 42043 and 45044. I acknowledge that these awards were not provided to the Majority or the Deadlock Neutral in these cases at the hearing as they were not yet rendered. Nonetheless, they are indicative of the recent arbitral precedent on this property.

For these reasons, I must respectfully dissent.

Respectfully Submitted,

Zachary C. Voegel
Labor Member