

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45136
Docket No. MW-42866
24-3-NRAB-00003-220889**

The Third Division consisted of the regular members and in addition Referee Sarah Miller Espinosa 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 utilized outside forces to perform Maintenance of Way and Structures Department work (brush cutting) along the right of way between Mile Posts 22 and 96 on the Milwaukee Subdivision beginning September 12, 2013 through October 15, 2013 (System File B-1301C-173/1594526 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the work referenced in Part (1) above or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1B and Appendix ‘15’.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Harrison and D. De Witt 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.

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 December 28, 2012, the Carrier provided notice of its intent to contract work “at various locations on the Chicago Service Unit”. The notice identified the specific work as “providing fully fueled, operated and maintained tractors, mowers and other equipment necessary to control vegetation commencing January 01, 2013 thru December 31, 2013. The work in question, brush cutting, was performed by contractors utilizing a Utilco brush cutter from September 12, 2013 through October 15, 2013.

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

Rule 1 – SCOPE

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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 now 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 the Rules cited by the Organization, the Berge-Hopkins letter, which is located at Appendix 15 in the Agreement, is also referenced by the Organization in support of its position.

In the instant matter, the Organization established that the work at issue, brush cutting, is within the scope of Rule 1. As stated in Third Division Award 43737 (Referee Jeanne M. Vonhof), this Board held:

Brush cutting work falls within "all work" performed in connection with the "construction, maintenance and repair of tracks and structures used in the Carrier's operations." In addition, Carrier employees have customarily and historically performed the work of clearing brush and vegetation from tracks and areas around the tracks as part of their work

of maintaining tracks and structures. Other Third Division Awards have concluded that brush cutting falls under the scope of Rule 1.B as Maintenance of Way work, including Third Division Awards 42605 and 42539 and PLB 7096. Aw. Nos. 1, 3.

The Carrier contends that the work also has been performed by outside forces in the past, and therefore the Organization has not established an exclusive claim to the work. However, 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. Third Division Award Nos. 32862, 40078; PLB 7096, Aw. No. 1.

Further, while the Organization argues no proper notice was provided, the record reflects that 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 December 28, 2012 and was performed beginning September 12, 2013 through October 15, 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 Organization argues that the Carrier possessed equipment that could have been used to perform brush cutting, but chose to instead contract out the work. The Carrier argues that the Utilco brush cutter utilized to perform the work in question is specialized equipment. The Carrier asserts that the Utilco brush cutter allows brush cutting to occur at a faster rate than that which could be achieved by equipment owned by the Carrier, and that the Utilco brush cutter had a further reach capacity.

The Carrier has the burden to establish an exception under Rule 1B. After a careful review of the record, the Board is unconvinced that the Carrier met its

burden. That is, the Carrier possessed the equipment needed to perform brush cutting work and the forces necessary to do so. The record does not support a finding that the Utilco brush cutter constituted specialized equipment; nor does the record support a finding that the Company was not adequately equipped to handle the work or that time requirements needed to be met which were beyond the capacities of the Company forces to meet. There is, therefore, no permissible exception established and the actions of the Carrier therefore violated the Agreement.

Concerning remedy, as the Board stated in Third Division Award 43727 (Referee Vonhof):

The Carrier's argument that the Claimant was full-employed elsewhere has been rejected by this Board as a reason to deny a monetary remedy. In Third Division Award 40819, (Referee Gerald E. Wallin), this Board ruled,

"If full-employment was allowed to serve as a defense to a monetary remedy, the defense would effectively allow the Carrier to violate the Agreement with impunity."

The Claimants shall therefore be compensated for the hours worked by the contractor beginning September 12, 2013 through October 15, 2013.

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 28th day of November 2023.