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

Award No. 45140
Docket No. MW-42904
24-3-NRAB-00003-220903

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 (Rybak) to perform Maintenance of Way and Structures Department work (construct drainage ponds for water run off) in the Itasca, Wisconsin rail yard beginning on October 7, 2013 and continuing through October 26, 2013 (System File B-1301C-178/1595848 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out the above-referenced work 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 M. Schmidt, C. Seig, S. Campbell, S. Pettis, D. Balow, J. Popp, A. Hervey, R. Melheim, C. Gronewold, E. Nelson, A. Hartman, B. Bass, M. Ganzer, T. Lane, A. Steffen and A. Stenen shall each '... be compensated for the lost opportunity to work, all man/ hours that the contractor's employees performed Maintenance of Way work, at the appropriate 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, Claimants M. Schmidt, C. Seig, S. Campbell, S. Pettis, D. Balow, J. Popp, A. Hervey, R. Melheim, C. Gronewold, E. Nelson, A. Hartman, B. Bass, M. Ganzer, T. Lane, A. Steffen and A. Stenen, established and held seniority within various classifications in the Maintenance of Way and Structures Department.

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, operated, 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."

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

Rule 1 – SCOPE

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24 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 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, non-emergency work of constructing drainage ponds for water run-off in the Itasca, Wisconsin railyard, 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 Organization asserts that the notice was deficient. The substantial evidence contained in the record supports this contention. The notice provided by the Carrier would essentially cover all work – "program work, emergency, work, and routine maintenance." Moreover, the type of equipment identified in the purported notice was overly broad – "any and all fully operated, fueled and maintained and or non operated equipment." Additionally, the notice purported that contracting out may occur over a thirteen-month period, from November 1, 2012 through December 31, 2013.

Here, the notice provided to the Organization was so vague and/or overly broad, as to the equipment, type of work, and time period, that the notice was essentially without meaning. Because the Carrier failed to provide adequate notice, there is no need to address the question of whether the work would have been permitted under an exception specified in Rule 1B. Thus, the record establishes no proper notice was provided and, therefore, a violation of the Agreement was established.

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,**
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> **"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 on October 7, 2013 and continuing through October 26, 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.