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

Award No. 45626
Docket No. MW-48345
26-3-NRAB-00003-240006

The Third Division consisted of the regular members and in addition Referee Michael Capone when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company (former Chicago, Milwaukee,
(St. Paul and Pacific 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 Services, Inc.) to perform routine Maintenance of Way and Structures Department work (including, but not limited to, the removal and relocation of the Hastings switch, removal of the old control point, switch installation and removal of H&D switch due to the stubbing of the track) in the vicinity of Hastings, Minnesota on the River Subdivision beginning October 19, 2020 and continuing through October 21, 2020 (System File C-93-20-080-55/2020-00019129 CMP).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairperson with proper advance written notice of its intent to contract out said work referred to in Part (1) above and when it failed to enter into good-faith discussions to reduce the use of contractors and increase the use of Maintenance of Way forces as required by Rule 1 and Appendix I.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants K. Rutkowski, J. Hurtis, J. Krueger, K. Kruser, M. Radke, M. Kendall, D. Mesick, T. Wendler, D. Bryant, R. Heald and D. Taylor shall now '* be allowed a proportionate share EACH of two hundred eighty and one-half (280-1/2) hours at their applicable straight time and/or overtime rates of pay, along with all benefits and**

work opportunities lost on October 19, 20, and 21, 2020.'(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 Organization brings this claim asserting that the Carrier violated the Agreement when it assigned a third-party contractor to perform routine work customarily and historically provided by employees in the Maintenance of Way and Structures Department, beginning October 19, 2020 and continuing through October 21, 2020, as described in paragraph (1) of the Statement of Claim. It maintains that the work performed by the contractor's non-agreement employees is reserved to the Claimants as provided for in Rule 1 - Scope, Rule 4 - Department Limits, Rule 5 - Seniority Limits, Rule 46 - Classification of the Agreement, and Appendix I (Letter of Agreement, December 11, 1981).

The Organization claims the Carrier committed a procedural error as described in paragraph (2) of the Statement of Claim when it did not provide proper notice to the Organization of the contracting out of work as required by the "Note" to Rule 1, which it asserts is identical to Article IV of the May 17, 1968 National Agreement. It also argues that the Carrier has not made a good faith effort to reduce subcontracting or to buy or lease equipment it does not own instead of giving the work to third parties.

During oral argument before the Board, the Organization argued that the Carrier attached documents not presented during the on-property handling of the dispute to its written submission. It specifically cited the contracting out notice 2020-0009, dated January 27, 2020, as being improperly attached to the submission.

The Carrier claims it provided the Organization with proper notice of the assignment to the outside work force when it issued 2020-0009 and complied with Rule 1 by conferencing with the Organization on February 5, 2020. It argues that it provided the Board with the contracting out notice since it was replicated in the on-property correspondence between the parties.

The Carrier asserts that during the conference, it explained that contracting out work was necessary due to the size and weight of the machinery at various crossings, diamond, and turnout installations and the large excavators needed to move the material. The Carrier claims it does not own the equipment needed for the project and that the Claimants do not possess the skills to operate the large excavators, which are not used by its employees, to lift the heavier and larger equipment. The Carrier maintains the Agreement does not prohibit it from using third party resources, even where the type of work is customarily performed by its employees, and that it complied with the meaning and intent of the applicable contracting out provisions.

We first address the issue of the whether it was improper for the Carrier to attach the contracting out notice – 2020-0009 – to its written submission and find the specific and relevant factors render the exhibit properly before the Board. The document was extensively copied in the on-property correspondence and provided to the Board to confirm the accuracy of the record. The Carrier's written response, dated May 28, 2021, to the Organization's claim, is a copy of the notice of intent's relevant sections applicable to the dispute and used in the Board's review.

The National Railroad Adjustment Board ("NRAB") Uniform Rules of Procedure, dated September 19, 2023, paragraph (9), in relevant part, states, "Any and all Submissions, including Exhibits, . . . and the like that are filed with the Board must be furnished to the Board pursuant to the current NRAB Instructions Sheet." The NRAB Instruction Sheet, Section C, paragraph (5), Position of Carrier, dated October 1, 2023, in relevant part, states, "All data submitted in support of the Carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof during handling on the property." A review of the record confirms that the Carrier's exhibit containing the notice – 2020-0009 – contained the same relevant parts of notice provided during the on-property correspondence and therefore, is not new evidence.

The Organization's allegation, as stated in paragraph (2) of the Statement of Claim, that the Carrier did not provide proper notice of its plan to subcontract work is contradicted by the record where there are numerous references to the notice being provided to the Organization. The on-property correspondence between the parties indicates it was received, but that the Organization argued it was not sufficient.

The second part of paragraph (2) claims the Carrier did not engage in "good-faith discussions to reduce the use of contractors". However, the parties met to discuss the project described in the notice. The record does not contain evidence that the Carrier refused to consider rental equipment or that the discussions on February, 5, 2020 were not held in good faith. The on-property record indicates the Carrier provided the Organization with its reasoning to contract out the work. The Organization produces no relevant or factual basis to support its claim that the Carrier was acting in bad faith or in violation of the applicable rules.

Well established arbitral precedent requires the Organization to produce substantial evidence to support its assertions. We do not find such support for its allegations. The plethora of arbitral support provided by the Organization is distinguishable from the facts presented here. Most of the Awards indicate that in those cases the carriers failed to provide notice before contracting out the work.

In accordance with Article IV, <u>Contracting Out</u>, and where an agreement was not reached between the parties to assign the project to the Claimants, the Carrier exercised its contractual right to subcontract the work. While there is no dispute that the Carrier's employees perform similar work, there is no evidence that the Carrier owns the type of equipment used by the contractor, or that the Claimants have the skills to operate the same machinery to move the heavier equipment. The Organization's assertion that the Carrier does not provide proper training for employees to operate such equipment undermines the notion that the Claimants were capable of doing so. Moreover, nothing in the Agreement requires the Carrier to provide such training.

The relevant contract language indicates the parties came to an understanding that there would be efforts to reduce subcontracting. A review of Appendix I indicates the parties agreed to establish a committee ". . . to continue discussions on these subjects for the purpose of developing mutually acceptable recommendations that would permit greater work opportunities for maintenance of

way employees . . .” However, the record does not provide evidence that the parties have developed any mechanisms to reduce subcontracting or to “make a good faith attempt to reach an understanding” as provided for in the “Note” to Rule 1, Scope.

Moreover, Rule 1 expressly states “. . . if no understanding is reached the Carrier may nevertheless proceed with said contracting, and the Organization may file and progress claims. . .”. Without any recommendations from the “Committee” in the record to reduce subcontracting, the Board cannot find that specific criteria have been established to reduce subcontracting.

The Organization asks the Board to interpret arbitral awards to find that the Carrier improperly subcontracted work. However, arbitral precedent is viewed as persuasive argument and not substantial evidence. Nor do prior awards have a binding effect on subsequent disputes. Moreover, the Board cannot adopt findings from the cited Awards, which presumably contained substantial evidence that a carrier improperly outsourced work previously performed by its employees, where no such evidence is verified in the record here. To do so would be to impose new subcontracting rules on the parties, which is not within the Board’s jurisdiction.

It is well established by arbitral doctrine and canons of contract interpretation that a neutral cannot add, delete, or modify terms of an agreement. The unambiguous language in the “Note” to Rule 1 reads as follows:

*** * ***

> **Nothing in this Note shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and, if possible, reach an understanding in connection therewith. (See Appendix I)**

*** * ***

The provision is limited to “advance notice” and a meeting between the parties to “if possible, reach an understanding”. The Organization does not provide sufficient evidence to establish that the Carrier has not made efforts to reduce the use of outside contractors as noted in Appendix I or that it hires third parties on a regular basis. There is no data to support its contentions.

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 20th day of March 2026.