

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 45662
Docket No. MW-48617
26-3-NRAB-00003-240206

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

(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (MP Johnson Construction Inc.) to perform routine Maintenance of Way and Structures Department work (various work associated with the remodeling of a section house, including installing new floor coverings, painting and patching interior walls, removal/replacement of furniture and installation of cubicles) at the Buffalo Section House beginning on August 16, 2022 and continuing (System File C-75-22-080-28/2022-0030905 SOO).
- (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 the 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 O.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Kuss, R. McCumber, C. Hoffert, N. Higgins, T. Waling, W. Springstead and D. Voeller shall now be allowed ‘... a proportionate share each of all straight-time and/or overtime at their applicable rates of pay for all time, benefits, and work opportunities lost and to which they were entitled by virtue of their seniority rights

and regular assignments, but which they were denied, beginning August 16, 2022, and continuing.' (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 dispute involves whether the Carrier violated the Agreement when it assigned contractor MP Johnson Construction Inc. to perform work associated with the remodeling of the Buffalo Section House beginning on August 16, 2022 and continuing until October 10, 2022.

The parties agree that the instant dispute is covered by Scope Rule 1(c), which states:

When the Company plans to contract out work because the work requires special skills not possessed by the Company's employes, special equipment not owned by the Company, special materials available only when applied or installed through supplier, or when time requirements must be met which are beyond the capabilities of Company forces to meet, the Company shall notify the General Chairman of the Brotherhood in writing as far in advance as practicable and in any event, not less than fifteen (15) days prior thereto. 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 representative should 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. Nothing herein contained shall be construed as restricting the right of the Company to have worked customarily performed by employees included within the scope of this agreement performed by contract in emergencies that affect the movement of traffic when additional forces or equipment is required to clear up such emergency condition in the shortest time possible.

Appendix O to the Agreement is also applicable to this matter. It states, in relevant part:

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.

The parties jointly reaffirmed 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 notice shall identify the work to be contracted and the reasons therefor.

The Carrier contends that the Agreement does not prohibit contracting out work. Rather, the Carrier submits that Rule 1(c) lays out a framework that must be followed if it intends to bring contractors onto the property. In that regard, the Carrier claims that it met the requirements of that Rule by providing the required notice to the Organization, conferencing over that notice, and explaining in detail the specialized equipment it did not have and the skills and expertise required that its employees do not have.

The Organization contends that Carrier forces perform the work at issue on a daily basis throughout the Carrier's property using Carrier owned equipment and/or equipment obtained via rental/lease arrangements, and the Carrier's notice was improper and made it impossible to have good-faith discussions for the purpose of reaching an understanding concerning the Carrier's desire to contract out the work in

accordance with the spirit and intent of the Scope Rule and Appendix O. Specifically, the Organization contends that there can be no dispute that the equipment utilized by the outside forces in the performance of the disputed work was not “specialized” and the Carrier failed to provide any evidence identifying such equipment, that it was necessary, or that MOW forces could not do the work.

In contracting cases, the Organization bears the initial burden to establish a prima facie case of a claim to the work under the Agreement, and to produce sufficient evidence to establish a violation of the Agreement. Third Division Awards 44259, 41159 and 36208. In this matter, the Organization met this burden because the Carrier did not dispute that the work at issue was scope-covered or that it was performed by the contractor.

Once the Organization has established a prima facie case, the burden shifts to the Carrier to establish as an affirmative defense that it met its obligations under Rule 1(c), including that at least one of the reasons in the Rule that allows contracting applies. Third Division Awards 44259, 40411 and 39685. Under Rule 1(c), when the Carrier plans to contract out work, the Carrier is obligated to provide notice to the Organization and—if the Organization requests a meeting to discuss the matter—the parties must meet and they “should” make a good faith attempt to reach an understanding concerning the contracting. Under Appendix O, the Carrier’s obligations in conferencing are no longer stated as merely an intention, as the Carrier pledged that it “will” assert good faith efforts to reduce the incidence of subcontracting and increase the use of MOW forces. Appendix O also requires that the Carrier “in the interests of improving communication ... on subcontracting ... shall identify the work to be contracted and the reasons therefor.” Because the Scope Rule identifies MOW work and preserves that work to MOW employees, it is implicit that the reasons the Carrier may contract work are limited to those in Rule 1(c), which the Carrier must identify and explain to meet its contractual obligations.

In the instant case, the Carrier’s notice to the Organization of intention to contract provided the following reasons for contracting the work: (1) additional manpower not cost effective to utilize for short periods; (2) contract work warranty applies only if contractor completes work; (3) contractor will complete entire project; (4) requires specialized tools and skills which BMWED does not possess; and (5) work which BMWED has not performed in the past. Reasons 1, 2 and 3 are not permitted reasons under Rule 1(c) that allow the Carrier to contract, and it has already been concluded that the remodeling work is scope covered work, so Carrier’s reason 5 fails.

The only reason provided by the Carrier that may permit contracting under Rule 1(c) is reason 4—that the work requires specialized tools and skills which BMWED does not possess.

The crux of the Organization's case here is that the Carrier did not meet its obligation to meet in good faith because it failed to identify the specialized equipment to be used by the contractor or explain why MOW forces could not perform the work. Further, the Organization argues that when the Carrier asserts facts or evidence in support of its decision to contract out scope-covered work and relies upon such facts or evidence to deny the Organization's claim, the Carrier must submit such evidence into the on-property record. We agree. The Carrier did not introduce sufficient evidence to establish that it identified the alleged specialized equipment or explained why MOW employees did not have the skills necessary to operate this equipment. Third Division Award 27485. For this reason, the Carrier has not met its burden to establish that it met its obligations under Rule 1(c).

There remains the issue of determining an appropriate remedy. The Organization seeks to have Claimants J. Kuss, R. McCumber, C. Hoffert, N. Higgins, T. Waling, W. Springstead and D. Voeller compensated for a proportionate share each of all straight-time and/or overtime at their applicable rates of pay for all time, benefits, and work opportunities lost from August 16, 2022 through October 10, 2022. The requested remedy raises the issue of whether it is appropriate to compensate the Claimants when they were gainfully employed and unavailable for work. It is an axiom in the law that there is no right without a remedy and many boards have recognized that if there are no consequences for violating a labor agreement that violations are likely to continue. Third Division Awards 19899, 20633, 21340, 30970, 35169, 37470, 40567, and PLB 2206, Award 52. Consistent with these principles, compensation is an appropriate remedy when there has been a violation of the Agreement, notwithstanding that the Claimants may have been gainfully employed or otherwise unavailable at the time of the violation.

Regarding the amount of compensation to be awarded to the Claimants, any compensation awarded should be reasonable in view of the record evidence and realistically related to the amount of work actually contracted that represents the loss of work opportunity for the members of the craft. PLB 6204, Award 32. The Carrier did not dispute the Organization's claim that the contractor employees performed the work identified in the claim. Under the circumstances presented in this case—where the Claimants were gainfully employed during the relevant period—damages at the

overtime rate are unreasonably punitive. Therefore, the Claimants shall be compensated at their straight time rate for a proportionate share of all hours worked by contractor employees on the dates identified above. To the extent that there is any dispute over the amount of hours worked by contractor employees, the Claimants are to be made whole by means of a joint review of the Carrier's records.

AWARD

Claim sustained in accordance with the Findings.

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 20th day of March 2026.