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

Award No. 45665
Docket No. MW-48620
26-3-NRAB-00003-240209

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

(Brotherhood of Maintenance of Way Employes 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 (Stennes Excavating LLC) to perform routine Maintenance of Way and Structures Department work (including, but not limited to, work associated with removal/installation of track switch panels at road grade crossings) in the vicinity of Mile Post 120.3 in Glenwood, Minnesota on the Paynesville Subdivision on September 21, 2022 (System File C-89-22-080-38/2022-0031275 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 T. Wieme, M. Evje, J. Hoban, D. Schelinder, A. Haverkamp, M. Watercott, R. Cook and J. Wampach shall now '* be allowed a proportionate share EACH of one hundred (100) hours at their applicable straight-time rate of pay, along with all benefits and work opportunities lost on September 21, 2022.' (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 outside forces (Stennes Excavating LLC) to perform work associated with removal/installation of track switch panels at road grade crossings in the vicinity of Mile Post 120.3 in Glenwood, Minnesota on the Paynesville Subdivision on September 21, 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 employees, 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 employes.**
>
> **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 in this matter it met the requirements of that Rule by providing the required notice to the Organization, conferencing over that notice, and explaining that work required specialized equipment not owned by the Carrier or cost-effective to purchase.

The Organization contends that work of the character involved in this matter on the Carrier's property is contractually reserved to the Claimants and has customarily, historically and traditionally been performed by Maintenance of Way forces, 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 the Carrier failed to provide any

evidence whatsoever in support of its position and there can be no dispute that the equipment utilized by the outside forces in the performance of the work involved herein was not "specialized" as the Carrier alleges and, in fact, is identical to equipment operated by the Carrier's MOW Way forces on a regular basis.

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 employes, 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 of intention to contract was provided timely to the Organization and it included the time, place, and nature of the contracting transaction with enough specificity to facilitate the parties' obligation to engage in good faith discussions. The reason the Carrier gave for contracting in its notice was that the work requires specialized equipment not owned by the Carrier or cost-effective to purchase. Rule 1(c) does permit the Carrier to contract work when it requires special equipment not owned by the Company.

The crux of the Organization's position here is that the Carrier did not establish the reason it gave for contracting and, therefore, the Carrier did not meet its obligation to provide proper advance notice of its contracting plans. Specifically, the Organization disagrees with the Carrier's contention that the work performed by outside forces required the use of specialized equipment not owned by the Carrier. After asserting that specialized equipment it did not own in its contracting notice, the Carrier asserted in its first level denial of the claim that large excavators were necessary due to the weight and length of the crossover switch panels being removed and installed. The Organization disagreed with the Carrier's contention that the work performed by outside forces required the use of specialized equipment not owned by the Carrier, and the Organization included in the on-property handling of this matter employe statements attesting to the fact that they had used excavators on multiple projects. In the Carrier's appeal denial, it asserted that it discussed in detail during the parties' precontracting conference that due to the weight and length of the switch panels being moved, a large, extendable flatbed truck/trailer combination was required for the transportation of the panels. This may well be true, but after the Organization provided evidence in support of its position that MOW forces were capable of operating excavators, the Carrier failed to provide any record evidence to support its assertion that specialized equipment not owned by the Carrier was required to perform the work. Third Division Award 27485. Accordingly, the Carrier did not prove its affirmative defense, which must be rejected.

There remains the issue of determining an appropriate remedy. The Organization seeks to have Claimants T. Wieme, M. Evje, J. Hoban, D. Schelinder, A. Haverkamp, M. Watercott, R. Cook and J. Wampach compensated a proportionate share each of one hundred (100) hours at their applicable straight-time rate of pay, along with all benefits and work opportunities lost on September 21, 2022. The requested remedy raises the issue of whether it is appropriate to compensate the Claimants when they were gainfully employed. 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, 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 employes performed the work or the hours claimed, therefore, the compensation requested is supported by the evidence.

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 20th day of March 2026.