AWARD NO. 1
CASE NO. 1

PUBLIC LAW BOARD NO. 7096

PARTIES TO DISPUTE	)	**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**
	)	
	)	**UNION PACIFIC RAILROAD COMPANY (FORMER CHICAGO NORTHWESTERN 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 to perform Maintenance of Way and Structures Department work (cutting and chip brush and trees on the right of way) between Mile Posts 253.0 and 253.6 on the Albert Lea Subdivision on January 20, 21 and 28, 2003, instead of Messrs. D. Seeger, J. Berding, B. Hagen and C. Westeng (System File 2RM-9420T/1360667 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 above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Seeger, J. Berding, B. Hagen and C. Westeng shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay.

OPINION OF BOARD

On January 20, 2003, the Carrier advised the Organization that with respect to "Blue Earth MN — Mason City, IA — Albert Lea, MN ...", the Carrier was going "... to contract the following work: ... [p]rovide all labor tools and equipment to cut and remove all brush and vegetation and to apply a herbicide to prevent regrowth." By letter dated January 29, 2003, the Organization's General Chairman wrote the Carrier stating the Organization's "... desire to conference the ... contracting notice, at your earliest opportunity ... [t]he Brotherhood requests an immediate conference of this notice ... [and i]t is imperative the Brotherhood be able to present its position BEFORE the Carrier commits itself to using outside contractors."

Conference was held on February 6, 2003, without agreement.

The record shows that for this claim, the disputed work was performed by outside forces commencing January 20, 2003 and thereafter on January 21 and 28, 2003.

Rule 1 provides, in pertinent part, as follows:

> **RULE 1 - SCOPE**
>
> A. The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employees in any and all subdepartments of the Maintenance of Way and Structures Department, (formerly covered by separate agreements with the C&NW, CStPM&O, CGW, Ft.DDM&S, DM&CI, and MI) represented by the Brotherhood of Maintenance of Way Employes.
>
> B. Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the 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 contractor's forces. However, such 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 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 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.

* * *

The Carrier initially argues that the disputed work is not exclusively reserved to the Maintenance of Way craft. For the sake of discussion, in this case we will assume the Carrier is correct. However, "... exclusivity is not a necessary element to be demonstrated by the Organization in contracting claims." *Third Division Award 32862* and awards cited

therein. *See also, Third Division Award 30944*:

> ... [T]he Carrier's argument that the Organization has not shown that the covered employees performed the work on an "exclusive" basis does not dispose of the matter. On its face, Article 36 does not specifically provide that the disputed work must be exclusively performed by the employees. Rather, Article 36 addresses "work within the scope of the applicable schedule agreement". Based upon the statements of the employees that they have performed this type work in the past, we are satisfied that the work at issue was "within the scope" of the Agreement. Third Division Award 29158. ...

Turning to the language of Rule 1 and putting aside the specific circumstances under which the Carrier can contract out work as allowed in the rule, Rule 1(B) provides that "... work as described in the preceding paragraph, which is customarily performed by employees described herein, may be let to contractors and be performed by contractor's forces." In terms of the rule, the contracted work in this case "... to cut and remove all brush and vegetation and to apply a herbicide to prevent re-growth" as specified in the Carrier's January 20, 2003 notice is "... work in connection with the ... maintenance ... of tracks ... used in the operation of the Company in the performance of common Carrier service on the operating property" as described in Rule 1(B) — *i.e.*, brush cutting is typical Maintenance of Way work. Further, the Organization's assertions on the property such as that made in its March 6, 2003 letter that "Maintenance of Way employees have historically performed this type of work" have not been rebutted. Therefore, because the work fell under the Scope Rule, the notice obligation in Rule 1(B) applied.

The Carrier's notice was defective. Rule 1(B) provides that "[i]n 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 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." Here, the Carrier gave notice to the Organization of its intent to contract the work on January 20, 2003 and the work began *that day*. The 15 day advance day notice requirement in Rule 1(B) was not met.[1]

Because the Carrier failed to *timely* notify the Organization of its intent to contract the work in dis-

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[1] There is no evidence that this was an "'emergency time requirements'" case so as to excuse the 15 day notice requirement.

pute as required by Rule 1(B), the conference procedure established by the Agreement was frustrated. *See Third Division Award 32862, supra*:

> ... [O]ur function is to enforce language negotiated by the parties. In Article IV and as a result of negotiations, the parties set forth a process of notification and conference in contracting disputes. The Carrier's failure to follow that negotiated procedure renders that negotiated language meaningless. This Board's function is to protect that negotiated process. Our discretion for fashioning remedies includes the ability to construct make whole relief. The covered employees as a whole are harmed when the Carrier takes action inconsistent with the obligations of the Agreement (here, notice) to contract work within the scope of the Agreement. ...

The same rationale applies here. The notice was given by the Carrier on the day the outside forces commenced work; the work under this claim was completed before the parties held a conference; and, as a result, the Organization was given no opportunity to use the conference established by Rule 1(B) to attempt to reach an understanding with the Carrier to attempt to prevent the contracting of the work. If, as the Carrier argues, there were special circumstances concerning the work (*e.g.*, equipment not possessed by the Carrier, special qualifications for use of certain chemicals, etc.) which would otherwise permit the Carrier to contract the work under Rule 1(B), those circumstances could have been discussed with the Organization in conference after timely notice. However, that process was not allowed to unfold because the Carrier failed to give timely notice as required by Rule 1(B).

The end result was that because of the Carrier's failure to give timely notice under Rule 1(B) and the frustrating of the notice and conference provisions in that rule, Claimants lost overtime opportunities. With the frustrating of the notice and conference procedures resulting from the Carrier's failure to give timely notice, make whole relief for those lost work opportunities is therefore appropriate. Claimants shall be made whole for the lost work opportunities based upon the number of hours worked by the contractor on the dates in dispute.

The awards cited by the Carrier do not change the result. For example, *PLB 1844, Award 39* determined that the disputed work was "salvage" and not "track maintenance duties" under the Scope Rule. The general work in dispute here — brush cutting — clearly falls under the Scope Rule as track maintenance work. In *Third Division Award*

37363 timely notice was given by the Carrier ("... the Carrier complied with the notice and conference requirements set forth in Rule 1(b)."). The same finding was made in *Third Division Awards 37480* ("... a proper contracting notice was issued ....") and *37576* ("with respect to the threshold question of whether the Carrier met its notice and conference requirements in this subcontracting case, given the record before us, we again must respond affirmatively."). Here, the notice was given on the day the outside forces began the work when Rule 1(B) requires "... not less than fifteen (15) days ..." advance notice thereby leading this Board to conclude that the notice and conference provisions of Rule 1(B) were frustrated.

Because of the defective notice, we do not have to address the merits of the parties' arguments concerning whether the circumstances permitting contracting work under Rule 1(B) existed in this case. The notice violation is sufficient basis to sustain this claim.

AWARD

Claim sustained.

Edwin H. Benn
Neutral Member

D. A. Ring
Carrier Member

R. C. Robinson
Organization Member

Chicago, Illinois

Dated: March 18, 2008