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 (cut and chip brush and trees on the right of way) between Mile Posts 192.3 and 193.8 at Mason City, Iowa on February 13 and 14, 2003, instead of Messrs. J. Coolican, J. Holding, R. Buol, D. Bohl and M. Kath (System File 2RM-9421T/1361235 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 J. Coolican, J. Holding, R. Buol, D. Bohl and M. Kath shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and one and one-half hours at their respective time and one-half 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 Brother-

hood 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 (Albert Lea Tree Service) commencing February 13, 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.

* * *

For reasons discussed in *Award 1* of this Board [and awards cited therein], contrary to the Carrier's position "'... exclusivity is not a necessary element to be demonstrated by the Organization in contracting claims'" and, as further discussed in *Award 1* "... brush cutting

is typical Maintenance of Way work" falling under the Scope Rule and therefore imposing the contracting of work notice obligations by the Carrier in Rule 1(B).

In this case, the Carrier met its notice obligations. Notice was given to the Organization by letter dated January 20, 2003 of the Carrier's intent to contract the disputed work. The work did not begin by the contractor's forces until February 13, 2003. The Carrier's 15 day notice obligation was therefore met in this case.

The Organization's argument that in another case before this Board the Carrier's same notice concerning the contractor used in this case at another location was untimely does not change the result. We can only address the individual claims presented to this Board on a case-by-case basis. Rule 1(B) plainly states that the Carrier is obligated to "... 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 ...." In this particular case for the specific work in dispute, the Carrier met that obligation.

The focus of this case is on the language in Rule 1(B) that governs when the Carrier can contract work falling under the Scope Rule — "[h]owever, 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." The Carrier argues that language allows the contracting in this case. The Organization argues the opposite.

As demonstrated by the exchange of correspondence on the property, the Carrier contends that it contracted the brush cutting work to Albert Lea Tree Service because "'Albert Lea Tree Service has a bucket truck used for cutting trees high in the air, which the Engr. Dept does not have, plus Albert Lea Tree Service is trained in the use of treating chemicals on tree stumps, which our employees are not trained to do and is a requirement of the state.'" The Organization counters that po-

sition with the assertion that the Carrier could have rented a bucket truck in Mason City if it needed one; the Carrier had access to a bucket truck through the Signal Department, which has, in the past been shared with the Engineering Department; the Carrier had chain saws in its possession at Mason City; and the Carrier also had a boom truck and a brush hog mower, which would have been sufficient tools to complete the work utilizing the Carrier's forces. With respect to the chemicals used by the contractor, the Organization asserts that the chemical was Tordon RTU, which can be bought over the counter at many business establishments; no special training is required; and "[a]ny individual can buy this herbicide over the counter and apply [it] by following the instructions provided." The Carrier counters the Organization's assertions, contending that the Carrier does not own the type of bucket truck utilized by the contractor and further states that "[t]he trees removed were high in the air and could not be safely removed with the equipment owned by the Carrier." The Carrier further contends that the contractor's forces were "... trained in chemical treatment whereas claimants are not." With respect to the herbicide used by the contractor, the Carrier disputes the Organization's contention that it was easily obtainable, asserting "... the herbicide is not an over the counter type herbicide and does require a special permit to perform this work."

In rules disputes such as this, the burden is on the Organization to demonstrate all the necessary elements of its claim. Based on the development of the record on the property as just discussed, there are irreconcilable factual conflicts concerning whether the Carrier did not possess the required equipment and whether the Carrier's forces were not capable of applying the chemicals. But those are the relevant criteria under Rule 1(B).

A record in factual conflict on those criteria under Rule 1(B) such as this record is not sufficient for us to conclude that the Organization has sufficiently carried its burden. On that basis, the claim shall be denied.

AWARD

Claim denied.

Edwin H. Benn
Neutral Member

D. A. Ring
Carrier Member

R. C. Robinson
Organization Member

Chicago, Illinois

Dated: March 18, 2008