

PUBLIC LAW BOARD NO. 7096

PARTIES) **BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**
TO)
DISPUTE) **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 (DeAngelo Brothers) to perform Maintenance of Way and Structures Department work (cut brush and weeds on the right of way) at crossings on the Oskaloosa Subdivision beginning on August 25, 2003 and continuing through September 12, 2003 instead of Seniority District T-4 employees R. Weatherman, D. Corwin and S. Penberthy (System File 4RM-9479T/1378999 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 R. Weatherman, D. Corwin and S. Penberthy shall now each be compensated for one hundred twenty (120) hours at their respective straight time rates of pay and for ninety-six (96) hours at their respective time and one-half rates of pay.

OPINION OF BOARD

The Carrier entered into a five year contract with DeAngelo Brothers, Inc. to perform brush cutting on various portions of the Carrier's right of way. By letter dated February 11, 2001, the Carrier advised the Organization of "... notice of our intent to proceed with the second year of a contract for the following work: ... [c]learing and maintaining vegetation control at public grade crossings ... [t]he program will entail the use of chemical applications to retard and control the growth of vegetation" The notice also

specified that the work to be performed by the contractor was "[s]ystemwide".

According to the Carrier, the work performed by the contractor required equipment, skills and licenses not possessed by Claimants; the Carrier does not have the capabilities to undertake vegetation control work that requires proper licensing; Carrier forces have not applied chemicals or herbicides that require special licenses; and DeAngelo Brothers possess the necessary licenses. The Organization disputes those assertions, particularly contending that Carrier forces have applied chemicals as part of brush clearing functions they have performed.

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 sub-departments 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 Employees.

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 construc-

tion, 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 of the Carrier's intent to use outside forces for the work and the work did not begin by the contractor's forces until more than 15 days thereafter. The Organization points out that the Carrier's February 11, 2001 notice to the Organization was for the "second year" of the contract with DeAngelo Brothers and that the disputed work was performed in August and September 2003, which was beyond the "second year" of that contract. According to the Organization, there is no evidence that the Carrier notified the Organization of its intent to contract out the brush

cutting work for the "third year" — which would cover the period covered by the claim in this matter.

While logically made, the Organization's argument places form over substance. The contract with DeAngelo Brothers was for five years — certainly a lengthy contract. However, the evidence shows that prior to entering into that contract with DeAngelo Brothers, the Carrier met with the General Chairman and explained the contract and what the Carrier was doing. While the Organization disputes the substance of what may have been said at the meeting with respect to licensing requirements and whether the Organization stated that it did not want its members exposed to the chemicals during application, the fact remains sufficiently unrebutted that there was a meeting between the Carrier and the Organization and the Organization was made aware of the long term contract with DeAngelo Brothers. Rule 1(B) does not specifically address the length of contracts the Carrier can enter into (*i.e.*, the back end of such contracts). Instead, the focus of the notice obligation in Rule 1(B) is on the front end of those contractual relationships (*i.e.*, *advance* notice of the Carrier's intent to contract

work). Here, the Organization had that advance notice and in 2001 was notified that the contract would continue for the second year. The Organization cannot now claim that it did not have sufficient advance notice of the Carrier's intent to enter into a multi-year contract with DeAngelo Brothers. We therefore find that the Carrier met its notice obligations under Rule 1(B).

The focus of this case is really 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.

Similar to *Award 2* of this Board, the crux of the dispute in this matter addresses the necessary equip-

ment and application of chemicals which the Carrier asserts requires special licenses that the Carrier's employees do not possess but are possessed by the contractor. And, like in *Award 2*, there is a substantial factual dispute. While the Carrier asserts that its forces do not have the appropriate licenses, the Organization argues that Maintenance of Way forces have routinely applied chemicals as part of the brush clearing process and that the Carrier possesses the equipment to perform those functions.

As we found in *Award 2*, the burden is on the Organization to demonstrate all the necessary elements of its claim and a record in such substantial factual conflict cannot be found sufficient for us to conclude that the Organization has carried its burden.

We have examined the statement provided by Claimant Weatherman concerning his past performance of similar work; the type of equipment used by Carrier forces; information he obtained from speaking with the Iowa Department of Agriculture; and further conversations with an employee of DeAngelo Brothers concerning a different contract than the five year contract relied upon by the Carrier. The problem with Weath-

erman's statement is that with respect to conversations with third parties, the statement is mostly hearsay based and, most significantly, Weatherman's statement does not disprove the Carrier's assertions that Carrier forces have not applied chemicals in their brush clearing duties when application of those chemicals required licenses. Weatherman's statement is just not enough to resolve the factual disputes remaining in this record. Nor would the result be changed by the fact that as part of its performance of the five year contract with the Carrier, DeAngelo Brothers' forces may have been observed performing brush cutting without simultaneously applying chemicals. It is reasonable to assume that in such a large contractual undertaking — one that is "systemwide" — there will be occasions when the need to clear brush does not *always* require the application of chemicals. The Carrier was not required to piecemeal such a large project to have Carrier forces perform the work on those occasions where a part of the project did not require simultaneous application of chemicals.

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