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

Award No. 42107
Docket No. MW-42128
15-3-NRAB-00003-130073

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference**
(Union Pacific 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 (KRW Construction and Hulcher Services) to perform Maintenance of Way work (cutting weeds, brush and trees and leveling ground) between Mile Posts 472 and 478 on the Falls City Subdivision in Omaha, Nebraska on July 26, 27, 28 and 29, 2011 (System File G-1152U-83/1560473).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out the aforesaid work and failed to make a good-faith attempt [to] reach an understanding and to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52 and the December 11, 1981 National Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Diaz, R. Jensen and J. Mumm shall now each be compensated for thirty-two (32) hours at their respective straight time rates of pay and for eight (8) hours at their respective overtime rates of pay."

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.

On January 31, 2011, the Carrier issued the notice set forth below to the Organization:

> **"Subject: 15-day notice of our intent to contract the following work:**
>
> **Specific Work: Provide equipment support, including but not limited to, backhoes, excavators, trucks on an as-needed basis for Maintenance of Way forces in the performance of their duties.**
>
> **Location: Various locations on the Council Bluffs Service Unit.**
>
> **Serving of this 'notice' is not to be construed as an indication that the work described above necessarily falls within the 'scope' of your agreement, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMWE.**
>
> **In the event you desire a conference in connection with this notice, all follow-up contacts should be made with Michael E. (Mac) McNulty in the Labor Relations Department at Telephone No. (XXX) XXX-XXXX."**

On February 2, 2011 the Organization requested a conference; it convened on February 15, 2011, but without an understanding or resolution. The Organization issued a post-conference letter dated March 23, 2011 summarizing its objections to the notice for Service Order CAL 013111.

On September 15, 2011, the Organization filed its claim alleging that the Carrier improperly assigned scope-covered work to outside forces without advance notice as required under Rule 52 and the December 11, 1981 National Letter of Agreement (LOU). The contractor deployed one Foreman and two Machine Operators to operate Hulcher Services' dozer and KRW's grader. Cutting weeds, brush and trees and leveling ground is reserved to BMWE-represented employees and is work customarily performed by them. A monetary remedy is warranted for the loss of work opportunity because the Claimants were qualified and available to perform the claimed work.

The Carrier denied the claim on November 4, 2011, by asserting that the Organization failed to prove any Rules violations, the work is not reserved to BMWE-represented employees and the LOU is not applicable. A prior and existing mixed practice allows contracting out even when no understanding was attained by the Parties following advance notice dated January 31, 2011, and a good-faith conference on February 15, 2011. Finally, the requested remedy is excessive and improper because the Claimants were fully employed on their regularly assigned hours including overtime and vacation.

On December 27, 2011, the Organization filed an appeal wherein it reiterated arguments in its claim along with an employee statement witnessing contractor forces working as alleged. The advance notice dated January 31, 2011 ("Callaway" notice) is for work on the Council Bluffs Service Unit, whereas the claimed work occurred on the Falls City Subdivision on the Kansas City Service Unit – "therefore the mentioned notice is without merit and the work was performed without notice being served." Also, section gangs have cut weeds since the railroad's inception showing the Organization's prior and existing right to the claimed work. The Carrier fails to maintain an adequate workforce or procure equipment. Full employment is no defense for denying a monetary remedy (Award 33 of Public Law Board No. 6304).

On February 9, 2012, the Carrier denied the appeal by reaffirming arguments set forth in its declination letter and asserting that the Organization did

not dispute or contest the 70-year mixed, past practice upon receipt of the Carrier's documentation during the period of 1995 – 2001 proving the practice. "The Carrier acknowledges that it inadvertently provided a notice [dated January 30, 2011] in its November 4, 2011 response [declination letter] that does not pertain to the present work" and "directs the Organization to the attached correspondence to illustrate that the Carrier had in fact provided proper notice [dated December 27, 2010] of the potential need to use outside forces."

The "proper notice" dated December 27, 2010 ("Hanquist" notice) states:

> **"Subject: 15-day notice of our intent to contract the following work:**
>
> **Location: Various locations on the Railroad's system**
>
> **Specific work: providing all labor, tools, equipment, and materials necessary to provide vegetation control services along various main lines, branch lines, yard tracks and railroad property through December 31, 2011."**

Attached to the Carrier's appeal declination is (1) the "Hanquist" notice, (2) an email dated September 21, 2011 wherein the General Director Labor Relations states "I mailed the notice to Mr. Morrow's office on December 27, 2010 which is the same manner as I have sent this type of notice in years past" and (3) another email (undated) from a Manager to the Engineering Supervisor stating "[w]e had our equipment down there too and was working my people down there too."

On May 30, 2012, a conference convened. At the outset of the conference, the Organization informed the Carrier that the Organization did not have a record of the "Hanquist" notice that the Carrier asserts that it mailed to the General Chairman. In a post-conference letter dated June 4, 2012, the Organization states:

> **"Carrier's claim denial dated November 4, 2011 presented the . . . Callaway notice of intent dated January [3]1, 2011 and then served a different notice of intent in correspondence dated February 9, 2012, serv[ing] [the] . . . Hanquist notice dated December 27, 2010, leaving the Organization unsure which notice the Carrier really intended, leaving the Organization no choice but to take the position that the**

> **Carrier is not even sure which notice was intended for the grieved work and therefore neither notice is valid. It should also be noted that the first time the Organization received the Hanquist notice of intent was in the February 9, 2012 correspondence, well after the work was complete. The Carrier served the second notice [Hanquist] only after the Organization replied to the original [Callaway] notice by way of correspondence dated December 27, 2011 from the Organization. It is clear the Carrier realized the [Callaway] notice did not cover the grieved work so they created another notice which would and dated it accordingly, which is the only explanation as to why the Organization did not receive the purported Hanquist notice until a year after it was dated. This type of practice by the Carrier is unacceptable to the Organization and the Carrier should now make a good faith effort to resolve the instant claim."**

The record before the Board does not reflect a response by the Carrier to the Organization's post-conference letter.

Having carefully reviewed the record, the Board finds that this claim was timely and properly presented and handled by the Organization at all stages of appeal up to and including the Carrier's highest designated officer.

With respect to the issue of notice, the Carrier acknowledged in its appeal declination that the "Callaway" notice (January 31, 2011) "does not pertain to the present work" because it was "inadvertently" cited and relied upon in the declination letter of November 4, 2011. Notwithstanding the irrelevant "Callaway" notice, there is no dispute that the General Chairman received it by "U.S. Certified Mail" with a return receipt requested because the Organization's letter dated February 2, 2011 requests a conference to discuss "Callaway" and a conference convened on February 15, 2011, as reflected in the Organization's post-conference letter dated March 23, 2011. Rule 52(a) requires the Carrier to "notify" the General Chairman; the notification must be actual notice as in documented receipt of that notification. The Board finds "Callaway" to be timely, but "irrelevant."

As for the "Hanquist" notice (December 27, 2010), the Organization informed the Carrier during conference on May 30, 2011 that the first time that it became aware of the "Hanquist" notice was upon the Organization's receipt of the

declination letter dated February 9, 2012. Conference (May 30, 2012) represents the Organization's first opportunity to inform the Carrier that the Organization did not have the "Hanquist" notice of intent to contract out. The email dated September 21, 2011 and attached to the appeal declination states that the "Hanquist" notice was "mailed" in the "same manner" as "these type of notices in years past" to the General Chairman. Unlike the "Callaway" notice, the "Hanquist" notice was not issued by certified mail with a return receipt request. Because the Organization was not aware of the "Hanquist" notice of intent to contract, it could not request a conference (and no conference could be convened without notice) in the same manner as occurred with regard to the "Callaway" notice.

Rule 52(a) requires advance notice "in writing" of the Carrier's intent to contract out scope-covered work. The Board finds that the claimed work is scope-covered and, pursuant to Rule 52(a), the Carrier was obligated to notify the General Chairman in writing at least 15 days prior to contracting out the claimed work. Rule 52(a) places the burden on the Carrier to demonstrate timely notice to the General Chairman. The Carrier issued the "Hanquist" notice in the "same manner" as it issued prior notices and, in doing so, it assumes the burden that the "same manner" is sufficient to prove timely notice.

The Organization's assertion that it was not notified in a timely manner of the "Hanquist" notice is accepted for what it states and the Carrier's assertion in the email that it mailed the notice in the "same manner" as other notices is accepted for what it states. The Board notes that there is no documentation, as in the "Callaway" notice, showing a request for a conference following close in time from the issuance date of the "Hanquist" notice. A request for conference is memorialized by letter and is part of the on-property exchange between the parties; it is not part of the on-property exchange for the "Hanquist" notice. The Board finds its absence supportive of the Organization's assertion that the first time that it was aware of the "Hanquist" notice was in the appeal declination (February 9, 2012). In the circumstances presented by this claim, the email, standing alone, is insufficient for the Carrier to satisfy its obligation under Rule 52(a).

In view of the foregoing, the Board finds that the Carrier did not comply with Rule 52(a) with its "Hanquist" notice to the Organization for the claimed work. On-property Third Division Awards 30066 and 40763 sustained claims for untimely notice; the Board will not deviate from that precedent in the circumstances of this case.

In addition to sustaining the claim due to untimely notice, on-property Third Division Awards 29577, 36516, 36966, 37315, 39301, as well as Awards 6, 8, 10 and 12 of Public Law Board No. 6205 show that the Carrier's reliance on full employment and observance of contractually provided paid time off from duty is not a justification for denying a monetary remedy. A monetary remedy preserves the integrity of the Agreement and is granted.

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 13th day of July 2015.