CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 42225 - DOCKET MW-42016

and

THIRD DIVISION AWARD 42231 – DOCKET MW-42060

(Referee Andria S. Knapp)

The Majority's conclusions with respect to the contracting notices failed to recognize and respect the precedent set by past Arbitrators. We anticipate that the Majority's ill-advised action will create further turmoil and unwittingly add fuel to BMWE's burning desire to alter the nature of contracting notices that have been historically provided on Union Pacific Railroad Company property. Consequently, we are compelled to register our vigorous dissent so that future readers of these Awards will recognize the injustice that the Majority sanctioned. It goes without saying that no future decision makers should be tempted to reach similar unwarranted conclusions with regard to the adequacy of such notices.

The basis for the Majority's decision to declare the contracting notices in these cases improper was an alleged failure to comply with the terms of Rule 52 and the Berge-Hopkins Letter of Understanding. We must first point out that Rule 52 is devoid of <u>any</u> language regarding what is required to be provided by the Carrier within a notice. This is recognized by the Majority, as evidenced by the fact that the Majority held: "While the Agreement does not itself explicitly state what a contracting notice must contain . . . ."

The Majority then chose to look to the Berge-Hopkins December 11, 1981 Letter of Understanding. However, the Berge-Hopkins letter is not applicable to the matters at hand. The claims were filed under and relied upon the Parties' July 1, 2001 Agreement. Significantly, the Berge-Hopkins letter was <u>not</u> retained in the Parties' Agreement. Rather, the Parties negotiated an alternative path from the Berge-Hopkins letter and brought forward Article XV of the September 26, 1996 National Agreement within Rule 52 when the Agreement was updated on July 1, 2001. Article XV mandates that the amount of contracting out performed by the Carrier must be measured by a ratio and such level maintained. The Berge-Hopkins letter called for a reduction of contracting out. Article XV and the Berge-

Hopkins letter are mutually exclusive. Because the Parties chose to bring forth Article XV into their Agreement, the Berge-Hopkins letter has no application or bearing on the Parties.

Additionally, such general notices have been historically used by the Carrier and have been found as adequate by the Board in the past. See recently rendered Third Division Awards 40810, 40812, 42073, 42076 and 42080. These Awards addressed the same issues under similar facts. The Majority's decision to ignore them will create further unrest, which goes against the purpose of the Railway Labor Act. Award 40810, with Referee Wallin participating, outlined the principle as follows:

> **"Although the Organization alleged the Carrier failed to serve notice and refused to respond to the General Chairman's request for a conference, later correspondence from the Organization nullifies these contentions. The record establishes that the Carrier did serve notice by Service Order No. 36327 dated March 2, 2007. The parties did engage in a conference on the notice on March 14, 2007. Accordingly, on the record before the Board, we must reject the portion of the Organization's claim that alleges a violation of the applicable notice requirements.**
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> **Turning to the merits of the claim, we do not find the record to establish that the ditching work in question was unusually difficult or peculiar in any manner whatsoever. The notice merely describes the work as follows:**
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> > **'Specific Work: providing all supervision, labor and equipment necessary for the operation of a ditch cleaner to perform grading and sloping of drainage area near track structures on an 'as needed' basis.'**
>
> **The remainder of the record does not amplify the character of the ditching work beyond the description set forth in the notice."**

Prior arbitral precedent has found the Carrier's general notices as adequate. Nothing in the instant case records gives any rationale to deviate from the previous Awards, which are considered authoritative on the practice, if not stare decisis.

One of the oft-stated purposes of arbitration is to provide consistency in the work place so as to promote harmonious labor/management relations. To ignore and/or cast aside arbitral precedent that has clearly and unmistakably recognized the long-standing practice of providing general notices on this Carrier's property does a disservice to the process and the Parties to these disputes. Without a doubt, the Majority's determinations that the notices were improper are palpably erroneous and cannot be considered as precedent in any future cases. Because they will clearly create unwarranted chaos, we must render this vigorous dissent.

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November 17, 2015