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

Award No. 42419
Docket No. MW-41831
16-3-NRAB-00003-120114

The Third Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference**
(Union Pacific Railroad Company (former Chicago and North Western 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 (All Exteriors Plus) to perform Maintenance of Way and Structures Department work (remove/replace roofing material) at the Yard Office in Janesville, Wisconsin beginning on September 7, 2010 and continuing through September 15, 2010 (System File B-1001C-118/1544178 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper 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 and Appendix 15.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Feltz, C. Moore and C. Mink shall now each be compensated at their respective and applicable rates of pay for an equal share of the one hundred eighty (180) man-hours expended by the outside forces in the performance of the aforesaid work."

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.

The instant claim is representative of the multitude of cases presented to the Board that pertains to Carrier's utilization of outside forces to perform work the Organization claims as Scope covered work as set forth in Rule 1 of the Controlling Agreement. These claims arise as a result of the tension between the Parties wherein Carrier tenaciously clings to the Management Right to sub-contract work it deems to comply with the limited restrictions set forth in Rule 1 and the unfettered right to contract-out work it evaluates as non-Scope covered work whereas, the Organization tenaciously clings to the preservation of Scope covered work and the protection of its bargaining unit members in all instances it believes Carrier is evading its pledge as set forth in Appendix 15 of the Controlling Agreement to make a good-faith effort to reduce the incidence of subcontracting and increase the use of its maintenance of way forces to the extent practicable.

As a result of the above-referenced competing contractual rights, in most, if not all instances involving a challenge to Carrier's utilization of outside forces to perform work alleged by the Organization as Scope covered work by the filing of a claim, the Parties invariably invoke the same argument(s) in support of their respective positions. This claim is no different from those claims that came before it and those claims that will follow in the future. Thus, the evaluation of each such claim as to whether or not it constitutes a valid claim begins by a determination as to whether the disputed work is Scope covered work as asserted by the Organization or whether as argued by Carrier the work does not lie within work exclusively reserved to employees of the Maintenance of Way craft. The second criterion to be evaluated is whether a mandatory contractual obligation imposed on Carrier to issue the Organization a written Notice of Intent to contract-out work meets the requirement of a "proper"

notice, except in cases of emergencies where such notification obligation does not apply and, whether the notice complied with the timing of the issuance of the notice in advance of the work to be contracted out to be performed by outside forces. Once those two determinations have been made, the next consideration is whether the contracted-out work fell within the limited contractual exceptions permitting Carrier the latitude of not utilizing its maintenance of way forces to perform the disputed work. The final determination if all prior findings have been resolved in favor of the Organization is a decision as to what constitutes a "proper" remedy.

With regard to this instance claim, the Board rejects Carrier's asserted argument that the disputed work is not "exclusively" reserved to employees of the maintenance of way craft as the concept of "exclusivity" of work pertains to the issue of the jurisdiction of work between organizations and does not pertain to a determination of whether disputed work constitutes Scope covered work. Scope covered work is determined by construing the language set forth in Rule 1 as to what work constitutes work belonging to the maintenance of way craft and, if subjecting the disputed work to this test falls short, then the task that befalls the Organization is to establish the disputed work has been work customarily and historically performed by its bargaining unit members. Here, in this case, the Board finds that a straight-forward reading of the language comprising Rule 1 of the Agreement is sufficient in determining that, as asserted by the Organization, the disputed work of removal and replacement of roofing materials is Scope covered work reserved to Maintenance of Way employees.

Next, the Board attends to the elements of the Notice of Intent served by Carrier to the Organization in instances it plans to contract out work that qualifies the Notice as a "proper" one, the basis upon which in any given case, the Organization generally advances contesting the Notice issued arguing it is improper and therefore the claim should be sustained by the Board. Here, the Board looks no further than the provisions set forth in Rule 1(b) of the Agreement and the commitments made by the Carrier and the Organization as memorialized in Appendix 15, the December 11, 1981 Berge-Hopkins Letter. As the Board stated in a prior case before it, we reject the Carrier's argument that Appendix 15 is no longer applicable given the evolution of changes that have occurred since 1981. The Board is persuaded that if, as Carrier argues, Appendix 15 is no longer applicable then we ponder why the Parties continue to include the Letter as an Appendix in subsequently negotiated national agreements. The Board subscribes to the principle of contract construction that if language is included in an agreement it must have some meaning and, if not, the Parties at some point in future negotiations would jettison the language altogether. So far, jettisoning

Appendix 15 has yet to have occurred. Accordingly, the Board confers upon the Berge-Hopkins Letter as having some significance as it pertains to instances where the Carrier utilizes the services of outside forces in place of utilizing its own maintenance of way forces. Thus, a proper Notice of Intent embraces the dictates of Rule 1(b) which requires and makes incumbent upon Carrier to issue such notice "not less than fifteen (15) days in advance of the date of the intended contracting transaction. Appendix 15 imposes on Carrier two additional requirements, to wit: 1) the advance notice shall identify the work to be contracted and, 2) the reasons given for contracting out the work.

The Board deems that if all three of the above referenced requirements are met by Carrier, the Notice of Intent issued by Carrier is determined by us as constituting a "proper" notice. The Board is cognizant of the fact the Organization argues that a "proper" notice should also be more specific and provide information in greater detail such as, for example, the starting and ending dates of the contracted-out work, the number of contractor employees to perform the disputed work, the equipment to be operated by the contractor employees, the number of hours to be worked by the contractor employees, et. cetera. However, the Board is of the view that such information should be developed and discussed at conference which, as a contractually conferred right, the Organization can request upon receipt of a Notice of Intent. If such request is made in accord with the applicable provisions of Rule 1(b), it is incumbent upon Carrier to convene a conference prior to the starting date of the contracting out work in question. If such conference is convened, it is incumbent upon the Parties in accord with Rule 1(b) to make a good faith attempt to reach an understanding concerning said contracting. Rule 1(b) further provides that if no understanding is reached, Carrier may nevertheless proceed with the contracting out work in question and the Organization may, in response, file and progress claims in connection with the disputed work. This, is of course, exactly what occurred here when Carrier contracted out the disputed roofing work.

The record evidence reflects that Carrier issued the required 15-day Notice of Intent dated August 23, 2010. Said Notice provided the following information and read as follows:

> **"This is a 15-day notice of our intent to contract the following work:**
>
> **Location: Dekalb, IL Depot and the yard office building at Janesville, WI.**

> **Specific work:** **Remove and replace roofing materials at each location.**
>
> **Serving 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."**

The Organization contested this Notice as being improper as it was completely devoid of providing a reason or reasons for contracting out the work. The Board concurs in the Organization's argument and deems the Notice of Intent to have been deficient.

The Organization exercised its contractual right and requested Carrier to convene a conference. The Organization made this request in writing by letter dated August 30, 2010 and the conference was held on September 7, 2010. However, September 7, 2010 was the date the intended contracted roofing work commenced thereby precluding any opportunity for the Organization to obtain the more detailed information pertaining to the intended work in question such as determining whether the work constituted an exception allowing Carrier to contract out the work and resulting in an aborted effort by the Parties together to make a good faith attempt to reach an understanding concerning the work to be contracted.

Based on the foregoing violations of the Controlling Agreement committed by Carrier, the remaining issue is one of remedy. As noted, Carrier is opposed to granting a monetary award to Claimants which it notes they were all fully employed on the identified claim dates. As the Board stated in a prior holding, granting claimants a monetary award on the rationale of suffering lost work opportunities is not a matter of enriching claimants in cases involving wrongful utilization of outside forces to perform Scope covered work as the carrier has argued, but rather a penalty imposed on the carrier so as to prevent them from subverting their pledge set forth in Appendix 15 to assert good faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable. However, the Board does not concur in the remedy sought here by the Organization in that the Organization requests that the three named Claimants share equally in the 180 hours worked by six contractor employees. We hold that the ratio of Claimants to contractor employees should be one to one. In that case, Claimants each are entitled to 30 additional hours of compensation.

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 31st day of October 2016.

CARRIER MEMBERS' DISSENT

to

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(Referee George Larney)

The Carrier can respect the Majority's conclusion to the merits of the case. However, it takes exception to the remedy awarded. The Majority awarded fully employed Claimants monetary damages. During the arguments presented, both on-property and at the hearing, the Carrier presented extensive arbitral precedent holding Claimants that are fully employed are not entitled to a remedy.

Without a doubt, the Majority's determinations were palpably erroneous and cannot be considered as precedent in any future cases. Because they clearly create unwarranted chaos, we must render this vigorous dissent.

Katherine N. Novak

Katherine N. Novak

Matthew R. Holt

Matthew R. Holt

October 31, 2016