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

Award No. 42422
Docket No. MW-41885
16-3-NRAB-00003-120186

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 (Hulcher) to perform Maintenance of Way and Structures Department work (plow and remove snow from body tracks and industrial leads) in the Park Yard at St. Paul, Minnesota on December 12, 2010 (System File B-1101C-105/1546026 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance notice of its intent to contract out the aforesaid work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b) and Appendix 15.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants A. Stenen and M. Ganzer shall now each be compensated 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.

Carrier's Director of Labor Relations, B. W. Hanquist issued and directed to General Chairman, Wayne Morrow by letter dated December 8, 2009, what it indicated on the subject line as, "15-day notice of Carrier's intent to contract-out the following specific work: provide all labor, tools, equipment, and materials necessary to provide snow removal services at various points across the Union Pacific system (CNW & UP) through the 2010-2011 snow season." The letter further stated, "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 is an indication that such work is necessarily reserved, as a matter of practice to those employees represented by the BMWED. Additionally, the letter provided General Chairman Morrow contact information should the Organization desire a conference in connection with the notice.

Stymied as to whether said "15-day notice" was intended by the Carrier to comply with the obligations set forth in the Agreement's Scope Rule 1, specifically the provisions contained in 1b or the language set forth in the "Berge-Hopkins Letter" dated December 11, 1981, the Organization responded by letter dated December 15, 2009, stating that, if that was Carrier's intent, said 15-day notice was improper because it failed to provide such information as: exact locations; dates the work would be performed; a full description of the work to be contracted, the length of time it was contemplated it would take to complete the work and the failure to specify the reason for contracting out the specific work of snow removal. General Chairman Morrow characterized the subject 15-day notice as a "Blanket" notice asserting such notices do not meet Carrier's contractual obligations pursuant to Rule 1b and the Berge-Hopkins letter. Citing as an additional ground for the Organization's inability to agree with the intent of Carrier's 15-day notice, that the work of snow removal was work specifically reserved to Maintenance of Way employees as provided by the Scope Rule, Morrow, in accord with Rule 1b requested a conference be scheduled providing the parties the opportunity to make a good faith attempt to reach an understanding regarding Carrier's contemplated contracting-out of snow removal work.

In compliance with the Organization's request for conference, one was held on December 30, 2009. By letter dated January 12, 2010 from Organization Vice Chairman David R. Scoville to Carrier's Assistant Director Labor Relations, Justin Wayne, the Organization advanced several objections to the 15-day notice one of which was to note that Carrier's contractual obligation pertaining to contracting-out of work is to notify the Organization of <u>each</u> contracting transaction and that said notice was void of providing specific information regarding any specific transaction. In taking the position that snow removal work was Scope covered work reserved to the Organization's employees, the Organization put Carrier on notice that a blanket notice to contract-out such work constituted a violation of the Agreement and urged Carrier to reconsider its position.

By letter dated January 19, 2010, Carrier responded stating in pertinent part that the work [snow removal] is such that the Company is not adequately equipped to handle the work and time requirements must be met which are beyond the capabilities of Company forces to meet. In a subsequent letter dated February 8, 2010, Carrier asserted as it also did so at the December 30, 2009 conference, that the type of 15-day notice it had issued has been upheld by numerous Third Division Awards. Carrier also asserted contrary to the Organization's position the notice violated the language of the Berge-Hopkins letter arguing the letter no longer had applicability relative to such notices. In accord with its position it possessed the contractual rights afforded it under Rule 1b to contract out Maintenance of Way work, Carrier informed the Organization it would proceed with contracting out snow removal work as described in the 15-day notice dated December 8, 2009.

As predicted by weather forecasts, a massive snow storm moved through the State of Minnesota beginning late Friday, December 10, 2010 through late Saturday, December 11, 2010. News articles described the storm as a blizzard noting that the 17.1 inches of snow measured at the Twin Cities International Airport was the largest December storm on record for the Minneapolis/St. Paul region and the fifth largest snowstorm on record for any time according to the Minnesota State Climatology Office. On Sunday morning December 12, 2010 Carrier called Claimant M. Ganzer holding seniority in the Track-Bridge and Building (B&B) machine operator class on Seniority District T-7 and Claimant A. Stenen holding seniority as a track foreman on Seniority District T-7 to perform rest day overtime work removing snow from yard tracks at Park Yard in St. Paul, Minnesota for the purpose of getting train traffic moving within the Yard. Claimants reported for duty at 6:00 A.M. Claimant Stenen performed foreman duties while Claimant Ganzer operated his regularly assigned front end loader plowing, hauling and removing snow. Although both Claimants

continued to perform the snow removal work until 10:00 P.M., a 16 hour work day, by 11:00 A.M. train traffic had resumed and was moving normally within the yard areas. However, beginning at 2:00 P.M. that day, Carrier called in Hulcher Corporation, an outside contractor to perform work plowing and removing snow from body tracks and industrial leads in the Park Yard. Hulcher provided one foreman and one machine operator and one front end loader to perform the contracted work. Each of the contractor's employees worked eight hours, ending their work at 10:00 P.M., the same time Claimants ended their work.

The Organization alleges Carrier violated applicable provisions of the Agreement by assigning outside forces (Hulcher) to perform basic Maintenance of Way and Structures Scope covered work of snow removal instead of allowing Claimants or other Maintenance of Way employees to accomplish the work at hand. The Organization further alleges Carrier violated both Rule 1 and Appendix 15 of the Agreement by failing to comply with providing it advanced notice and meeting requirements in order to make a good-faith attempt to reach an understanding concerning the utilization of outside contractor forces to perform the snow removal work; and failing to make good faith efforts to reduce the incidence of contracting out as a means of increasing the use of Maintenance of Way employees.

Carrier notes that while winter snow is not at all unusual in Minnesota, it asserts that the storm that pounded the State on December 10-12, 2010 was unusual imposing emergency conditions on its operations thereby alleviating extant limitations on its right to utilize contractor outside forces to assist its own Maintenance of Way employees to perform the necessary work of snow removal in order to resume regular operations. Carrier refutes the Organization's position that it did not comply with the contractual 15-day advanced notification requirement to utilize contracted outside forces to perform snow removal, noting that such notice was provided to the Organization in December 2009, in anticipation of snow storm events throughout its System in the coming winter of 2010. Additionally, after issuing such 15-day notice it further complied with contractual obligations in honoring the Organization's request to meet in conference in a good faith attempt to reach an understanding concerning its intent to utilize contractor forces to perform snow removal. In any event however, it does not concur in the Organization's position that snow removal is work exclusively belonging to Maintenance of Way bargaining unit employees. Carrier argues its right to have utilized contracted out services to perform snow removal under the emergency conditions brought about by the storm is supported by Rule 1b of the Controlling Agreement which reads in pertinent part as follows:

"Nothing contained herein shall be construed as restricting the right of the Company to have work customarily performed by employees included within the scope of this Agreement performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up the emergency condition in the shortest time possible."

Carrier argues the Organization has failed in this case to satisfy its burden of proof, specifically, it has not proven it has an exclusive right to perform snow cleaning nor proven why it (Carrier) would be prohibited from relying upon the negotiated language of Rule 1b pertaining to emergency situations such as that which prevailed during the subject snow storm and the exceptions thereof attendant to emergencies which allow the use of contracted out services. Carrier submits that in the handling of this claim on the property it explained to the Organization that in addressing the subject emergency arising from the snow storm, it was using all of its available employees and equipment and simply did not have enough additional operated equipment to resolve the issue of resuming regular/normal operations within the shortest time possible.

Carrier submits there is no basis to find in favor of the Organization's claim noting that aside from not having violated any provision of the Agreement as so asserted by the Organization, there is no basis to award the remedy requested by the Organization as both Claimants were fully employed in snow removal activities having worked a combined 29 hours of overtime.

The Board does not concur in the Organization's argument that Carrier failed to provide a valid advanced notice of intention to utilize contracted out services for snow removal purposes throughout its System during the forthcoming winter of 2010 by the "blanket" notice it issued the Organization dated December 8, 2009. With regard to snow removal emergencies, unless and until Carrier acquires the power of clairvoyance or possesses the magic of a crystal ball to predict precisely when and where in its System a snow storm emergency will arise, it is, and will always be an impossibility to comply with providing specifics required of a 15-day advanced notice given the present capability of modern meteorology to predict the weather so far in advance. Accordingly, the Board dismisses this argument as having any relevance to the circumstances prevailing in this case.

With regard to the Carrier's argument the work of snow removal is not work exclusively reserved to employees of the Organization, the Board concurs in the Organization's position that the concept of exclusivity is inapplicable in this case as

exclusivity pertains to jurisdictional issues between organizations. Rather, inarguably, Rule 1, the Scope of Work rule does recognize that snow removal is work that has historically and customarily been performed by employees of the Organization. Thus, any utilization of outside forces by Carrier to perform snow removal work must be validated by the existence of an emergency which contractually permits such utilization pursuant to specified exceptions. Here, the exceptions relied upon by the Carrier to support its use of the two contractor employees to assist both Claimants in clearing snow at Carrier's Park Yard are found by the Board not to be valid. The evidence before us establishes that a snow emergency did exist at Park Yard Sunday morning at 6:00 A.M. when the Claimants were called out on their rest day to perform the work of snow removal, but by 11:00 A.M., sufficient snow removal of the tracks had been accomplished to resume operations at the Yard which was not refuted by the Carrier. However, notwithstanding that movement of trains within the Yard had resumed starting at 11:00 A.M., thereby indicating the snow emergency had for all intents and purposes ended at the Yard, Carrier nevertheless utilized the services of two outside contractor employees of Hutch Corporation starting at 2:00 P.M. to assist in snow removal at the Yard.

As to Carrier's argument pertaining to remedy, it has been well established that even though a claimant was fully employed during the time outside forces were employed to assist in the completion of scope work in a timely manner during an emergency situation, nevertheless, if it can be proven that a carrier committed a violation by an invalid utilization of outside forces, the result is that the claimant under such circumstances has been deprived of a work opportunity and therefore is entitled to be compensated for the amount of time the outside forces spent performing the disputed work. In the case at bar, notwithstanding that the Organization asserted both Claimants worked a total of 16 hours on Sunday, December 12, 2010, Carrier to the contrary asserted that Claimant Stenen was compensated for 16 hours whereas, Claimant Ganzer was paid for only 12 hours of work. By the very fact that Ganzer worked a total of four hours less than Stenen, persuades the Board that by Carrier having utilized the services of two contractor employees for eight hours each is evidence that Claimant Ganzer was, in fact, not fully employed and therefore, indeed, was deprived of a work opportunity.

Based on the foregoing findings, the Board rules to sustain the claim in its entirety.

AWARD

Claim sustained.

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

THIRD DIVISION AWARD 42422 - DOCKET MW-41885

And

THIRD DIVISION AWARD 42425 - DOCKET MW-41910

(Referee George Larney)

The Majority's rationale in these cases is the same. The Majority held the Carrier failed to demonstrate an emergency and thus, did not have a meet one of the exceptions of Rule 1(b). The Majority appears to rest this determination on the fact trains began to operate at approximately the same time the Carrier required contractor forces assistance.

The Carrier respectfully disagrees with the Majority's view of the facts. There was no dispute this was the fifth largest snowstorm in the history of the Minneapolis/St. Paul area with a record 17.1 inches. The fact trains were able to operate through the Yard did not prove the emergency had ceased. In Third Division Award 32273 the Board upheld the Carrier's defense of emergency due to wash outs and heavy rains though trains continued to run. It stated:

> **"This Board has reviewed the record in this case and we find that the work that was subject of contracting out dispute related to the Carrier's attempt to deal with heavy rains and flooding that had washed out track various locations. At the time, the trains were all subject to slow orders in the affected area."**

The roof of the Metrodome collapsed due to the unusually large amount of snow that fell. The Carrier needed additional forces to assist in clearing and moving snow. This was not a normal snow fall. An emergency situation existed.

Additionally, 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 that the emergency ceased was not proper. It should be considered 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