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

Award No. 42423
Docket No. MW-41886
16-3-NRAB-00003-120191

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 (Root River Construction) to perform Maintenance of Way and Structures Department work (paint, install rain gutters and door and related work) at the depot in St. James, Minnesota beginning on October 18, 2010 and continuing through November 12, 2010 (System File B-1001C-127/1546028 CNW).

(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 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 K. Sullivan, J. Mandel, R. O'Neil and B. Elmberg shall now each '* * * be compensated at their respective rates of pay for an equal proportionate share of the one hundred twenty (120) man/hours worked by Contractor forces performing the building painting and repair cited herein.'"

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.

In a 15-day Notice of Intent to sub-contract work dated January 28, 2010, Carrier advised the Organization of the following:

> **"Location: Building 3250, St. James MN Depot, 300 W. Armstrong Blvd., St. James, MN**
>
> **Specific Work: Replace roof on depot building at St. James, MN building 3250 Power wash, paint exterior and fix window issues."**
>
> **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 that you desire a conference in connection with this notice, all follow-up contacts should be made with the Labor Relations Department representative responsible for your collective bargaining agreement."**

The Organization responded to this Notice by letter dated February 5, 2010 wherein it informed Carrier that if the Notice was served in accord with either Rule 52 or Rule 1 of the Agreement in conjunction with Appendix 15, the December 11, 1981 Berge-Hopkins Letter of Understanding, the Notice was improper due to insufficient information as to the following: 1) dates the work is to be performed; 2) a full description of the work to be contracted; 3) the length of time it is contemplated that it

will take to have this work completed; and 4) failure to specify the reason for contracting out the specific work. The Organization further apprised it was exercising its contractual right to meet in conference in connection with Carrier's intention to contract out the specific work as specified in the Notice. As preparation for the conference, the Organization requested Carrier to have available the following information:

(1) Copy of the contract or proposed contract
(2) Full description of the work to be contracted
(3) Scheduled commencement date / ending date
(4) Number of contractor employees to be used
(5) Estimated number of hours/days/months/years to be consumed
(6) Reasons for the contemplated transaction as referred to and required by Rule 52 or 1(b) and the 12-11-81 Letter of Agreement respectively
(7) Any Engineering Department representative who has information concerning the contemplated transaction and authority to delegate the work involved or any portion thereof to Maintenance of Way Department employees.

The requested conference was convened on February 17, 2010. At this meeting the Organization reasserted its position that the 15-day Notice was deficient for lack of required information. By letter dated March 1, 2010, the Organization summarized the discussion held between the Parties pertaining to the intended subcontracted work. The Organization related that based on the discussion held it was clear that the work to be contracted out was routine roofing and building maintenance work, work reserved to its represented maintenance of way employees pursuant to Rules 1, 3, and 7 of the Controlling Agreement. While the Organization noted that Carrier asserted its Building and Bridge forces were occupied with projects that would take priority, in its view Carrier did not adequately explain the reason why it refused to utilize furloughed employees to perform the scope covered work or simply hire to the craft. The Organization asserted it was up to the Carrier to prioritize work and that the roof work it intended to subcontract did not arise overnight. The Organization noted to Carrier that the Berge-Hopkins December 11, 1981 Letter of Understanding obligated it to make good-faith efforts to reduce subcontracting and its refusal to make such a good-faith effort with regard to the subject work in question constituted yet another and distinct violation of the Agreement.

Contrary to the Organization's allegation the 15-day Notice was improper, Carrier maintained otherwise asserting it provided the contractually mandated information to comport with the serving of a "proper" notice. Additionally, Carrier maintained the work in question involved the "specialized fabrication and installation of seamless gutters which it related it lacked the necessary tools, machinery or equipment to perform such installation. In the conference discussion, Carrier rejected the Organization's assertion it had any obligation with regard to the Berge-Hopkins Letter of Understanding maintaining said Letter did not have any present-day validity or application. As to the scheduling of the work in question, Carrier asserted it was not obligated to "piecemeal" a project. Carrier further submitted the Organization's claim was "excessive" given that during the time the contracted out work was being performed, Claimants were either fully employed performing other work or were taking vacation time.

As the Board has noted in previous cases involving subcontracted work, the first order of consideration is to the issue of whether or not the work in question is work reserved to the maintenance of way employees pursuant to the provisions of Rule 1 of the Agreement the Scope of Work rule. Upon review of all evidence and argument, the Board finds that the work in question is scope covered work reserved to maintenance of way employees.

The second order of consideration is to the issue of whether Carrier provided a proper 15-day Notice of Intent to utilize outside forces to perform the work in question. As we noted in prior cases, the Board does not concur in the Organization's position that Carrier is obligated to provide the extent of information it asserts is required to perfect the notice as a "proper" one. Requirements of a proper 15-day notice are set forth in Rule 1(b) of the Agreement supplemented by the Berge-Hopkins 1981 Letter of Understanding which, contrary to the Carrier's position, we hold to continue to have significance based on the fact the Parties have continued to incorporate this Letter in successor collective bargaining agreements as Appendix 15, thereby conferring upon the Letter a mutual understanding of its applicability to cases involving the subcontracting of scope covered work.

In accord with Rule 1(b) a proper notice of intent must be issued 15 days in advance of the date of the intended contracting transaction. In accord with Appendix 15, a proper notice must meet two additional requirements, to wit: 1) identification of the work to be contracted; and 2) the reasons given for contracting out the work. Thus, it is obvious after a straight-forward reading of the January 28, 2010 Notice of Intent reproduced in its entirety elsewhere above that said notice did not constitute a

"proper" notice in that it was devoid of providing any reason or reasons for contracting out the specified work. The additional information the Organization insists should constitute a "proper" notice of intent is information apropos of discussion which Carrier should be prepared to address at conference. By failing to address the more detailed information requested by the Organization in the case at bar, Carrier prevented engaging in an effort to make a good faith attempt to reach an understanding concerning the work to be subcontracted, which is an obligation imposed on the Parties by Rule 1(b) of the Agreement.

We further find upon review of all evidence and argument constituting the record before us in its entirety that Carrier failed to show that the subcontracted work fell within one of the exceptions allowing Carrier to utilize outside forces to perform scope covered work. The Board further notes that Carrier asserted at conference the exception for contracting out the work was due to time requirements which are beyond the capabilities of the Carrier's forces to meet yet, as observed by the Organization, the Notice was issued in January but the work in question did not occur until the following October and November. Thus, the Board concurs in the Organization's position that because the work occurred ten to eleven months after the Notice of Intent was issued, we are persuaded such an intervening time span permitted Carrier sufficient opportunity to schedule said work at any point within this duration of time when its maintenance of way forces were available to perform the work thus negating its asserted exception. Moreover, subsequent to the February conference Carrier proffered a second exception in justification of its utilization of outside forces to perform the work in question, to wit, the work involved the specialized fabrication and installation of seamless gutters which it lacked the necessary tools, machinery or equipment to perform such installation. Casting aside the fact this asserted exception constitutes new evidence and therefore must be rejected for consideration by the Board, the fact is, that if either or both of these exceptions were evident at the time it issued the 15-day Notice of Intent, Carrier was contractually obligated to list these exceptions in the Notice as the reasons for subcontracting the work. As noted elsewhere above, Carrier failed to provide any reason for subcontracting the work in question in the Notice of Intent.

It is evident from the foregoing findings that the initial exception cited by Carrier permitting it to utilize outside forces to perform the scope covered work in question was a circumstance of Carrier's own making as the work in question could have been scheduled at a time when maintenance of way forces were available to perform the work. It is further evident that not scheduling the work in question at a more propitious time, Carrier failed to adhere to the pledge set forth in Appendix 15,

to assert a good faith effort to reduce the incidence of subcontracting and increase the use of its maintenance of way forces.

As to Carrier's objection that the remedy requested by the Organization is excessive due to the fact all identified Claimants were either fully employed or on vacation at the time the scope covered work was performed by contractor employees, the Board restates its position from previous cases that the compensation sought to be paid Claimants is for a loss of work opportunities and not as a matter of enriching Claimants due to the fact they were fully employed and compensated for work performed or, on paid vacation time over the same claim dates the subcontracted work was performed. Rather, the compensation the Organization seeks for Claimants to be paid is in the nature of a penalty payment imposed on Carrier for utilizing outside forces to perform scope covered work when, it was within Carrier's discretion and complete control to schedule the work at a more advantageous time in order to utilize its own maintenance of way forces.

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.