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

Award No. 42425
Docket No. MW-41910
16-3-NRAB-00003-120206

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, yard leads and right of way roads) at the Valley Park Terminal on December 13, 2010 (System File B-1101C-103/1546027 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 C. Reiswig and E. Esser shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for nine and one-half (9.5) 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.

The circumstances surrounding the snow storm that occurred on the weekend beginning late Friday, December 10, 2010 and continuing through late Saturday, December 11, 2010, throughout the State of Minnesota as fully described in Third Division Award 42422 are identical to the fact circumstances of this instant case. Additionally, the arguments asserted by both the Organization and the Carrier are also identical to the arguments advanced by the Parties in Award 42422.

As such, the Findings in this case are identical to the Findings in Award 42422. Restated, these Findings are as follows:

- **The Organization's position Carrier failed to issue a proper 15-day Notice of its intent to utilize the services of outside forces to perform the work of snow removal throughout its System during the coming winter of 2010, work that is embodied by Rule 1 of the Controlling Agreement and established by past precedent as historically and customarily performed by Maintenance of Way employees, is rejected by the Board on grounds that when applied to the work of snow removal, compliance with requirements of a 15-day notice is, in reality, an impossibility as the science of meteorology presently is incapable of predicting snow storms that far in advance of their occurrence. Accordingly, the Board finds that the Carrier notice issued to the Organization dated December 8, 2009, a year in advance of the occurrence of the subject snow storm was proper and valid and that Carrier's honoring the Organization's request to meet in conference to make a good faith attempt to reach an understanding concerning the intended utilization of outside forces to perform snow removal work under emergency conditions met compliance with the provisions of Appendix 15 of the Controlling Agreement.**

- **In accord with all record evidence presented before the Board, it is our conclusion that by the time Carrier called for and utilized the**

services of the two Hulcher Company contract employees to assist in the snow removal at the Carrier's Valley Park Terminal location on December 13, 2010, emergency conditions had abated. In the absence of emergency conditions, no exceptions existed that would allow Carrier to utilize the services of contractor employees to engage in the Maintenance of Way work of snow removal contractually reserved to its bargaining unit members.

- **Finally, as to the remedy requested, The Board rejects Carrier's argument Claimants are not entitled to additional compensation as they both were fully employed on December 13, 2010 performing the work of snow removal. As we stated in Award 42422, "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."**

Accordingly, based on the foregoing findings, the Board rules to sustain the subject 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

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Matthew R. Holt

Matthew R. Holt

October 31, 2016