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

Award No. 42427
Docket No. MW-41912
16-3-NRAB-00003-120211

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 (Snellton) to perform Maintenance of Way and Structures Department work (plow and remove snow from right of way roads, parking lots, material yard and yard leads) throughout the terminal in Janesville, Wisconsin on December 7, 12, 14 and 20, 2010 (System File B-1101C-101/1546966 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 D. Kopp, J. Edges and S. Peterson shall now each be compensated for a total of twenty-four (24) hours at their respective straight time rates of pay and for ten (10) 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.

By letter dated November 5, 2010, Carrier issued a 15-day Notice of its intent to contract specified work pursuant to Rule 1(b) of the Maintenance of Way Agreement. Said Notice was directed to the Organization's General Chairman, W. E. Morrow and reads in pertinent part as follows:

> **"snow plowing, snow removal at all entrances into roads connecting parking lots, parking lots, loading and unloading areas, maintenance areas on the entire Chicago Service Unit territory including . . . Janesville, Wisconsin; . . . .**
>
> **The Company does not own the equipment and is not adequately equipped to handle the work. 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 BMWED."**

Subsequent to the issuance of this Notice, Chairman Morrow exercising the Organization's contractual rights under Rule 1(b) requested a conference to discuss matters relating to the said contracting transaction. Said conference was held November 16, 2010 for the purpose of providing the Carrier the opportunity to comply with its contractual obligation pursuant to Rule 1(b) to make a good faith attempt to reach an understanding concerning said contracting. In a follow-up letter dated April 10, 2011, from Assistant Director Labor Relations, Justin T. Wayne to General Chairman Morrow, Carrier summarized the Parties' respective positions articulated in the November 16th conference as follows:

- **To the Organization's position the 15-day Notice is improper in that it is vague and inconsistent with the specific requirements of Rule 52 of the current Agreement, Carrier explained the type of Notice given has been upheld by**

numerous Third Division Awards. As to the adequacy of the Notice disputed by the Organization, Carrier asserted the subject Notice was in the same format and contained the same information furnished to the Organization for years and referenced in support of its position 12 Third Division Awards.

- **To the Organization's position the work specified in the Notice of "all salting, snow plowing, and snow removal", is work reserved to Maintenance of Way employees pursuant to Rule 1(b) of the collective bargaining agreement, Carrier countered asserting its belief it could contract out such work under Rule 1(b) based upon the 12 Third Division Awards it referenced above along with established past practice of customarily and traditionally utilizing contractor's forces to perform the disputed work. Carrier rejected the Organization's position the disputed work in question was work exclusively reserved to Maintenance of Way employees noting that Rule 1(b) gives Carrier certain latitude in situations where it does not have the required equipment to handle such work. In support of its position on this point, Carrier cited the following language of Rule 1(b):**

> **"<u>. . . work is such that the Company is not adequately equipped to handle the work; or requirements must be met which are beyond the capabilities of Company forces to meet</u>."**

Carrier contended that given the work involved the clearing of switches and crossings and the time constraints regarding the expeditious handling of safety issues associated with winter storms, that is, snow fall, its utilization of the contracted forces to perform the disputed work did not, as alleged, constitute a violation of the Agreement.

- **As to the Organization's position contracting out the services of outside forces to perform the disputed work in question constitutes a violation of Appendix 15 of the Agreement (the 1981 Berge-Hopkins Letter), Carrier posits there is no basis or support for the Organization's position said Letter destroyed a carrier's contractual rights afforded under Rule 1(b) to contract out maintenance of way work, citing in support Third Division Award 40800 that held the following:**

> **<u>The LOU expresses a general assurance that carriers will make good faith efforts to reduce subcontracting and to use employees . . . to the extent practicable, including the procurement of rental</u>**

> **equipment . . . for operation by the employees. Other than the rental equipment reference, the letter provides no standards for determining where the line of practicality is to be drawn or, in other words, what is 'practicable'. It is therefore, a general statement of aspiration without meaningful guidance.**

Based on the afore-stated ruling, Carrier contends the Berge-Hopkins Letter does not give the Organization a new right to work that was never owned by the BMWE, even if that letter had any remaining vitality, which it does not.

Noting the conference did not result in an understanding regarding the specified contracting out of the work in question, Carrier advised the Organization it would proceed with the performance of work by outside forces as described in the November 5, 2010, 15-day Notice as permitted by Rule 1(b) of the Agreement. Having proceeded with having the specified work performed by utilizing contractor employees, the Organization filed the instant claim.

In refutation of Carrier's afore-stated positions, the Organization maintains the following points in argument:

- **In the November 16th conference convened to discuss the November 5, 2010 15-day Notice, Carrier failed in its obligation to make a "good-faith" attempt to reach an understanding concerning the expressed contracting out of the snow removal work. The Carrier representative did not come to the conference prepared to discuss the subject contracting out of the disputed work as evidenced by the fact Carrier was unable to provide information pertaining to the extent of the work the contractor would perform or the type of equipment the contractor employees intended to operate that Carrier did not have and is considered to be "special equipment". The Organization asserts that without providing such pertinent information, Carrier had no intention to discuss any resolutions thus exhibiting complete disregard for its obligation to make a "good faith" attempt at a resolution.**

- **Given the deficiency of the 15-day Notice and failure on the part of the Carrier at conference to support by any substantive evidence the exceptions it now asserts here to justify its utilization of outside forces to perform the disputed work, specifically, that special tools, skills, or equipment not owned by the Carrier was required to perform the disputed work and that there was a time requirement that needed to be met for the work in question to be performed,**

the Organization maintains that since Carrier has dealt with Wisconsin winters since the mid-1800s, it fully knows and understands the manpower needs required for snow removal on the operating property. Thus, the Organization contends that with a little planning, the Carrier could have accomplished the disputed snow removal work by utilizing Claimants to perform said work; and arguing that a lack of good planning or maintenance is not a valid exception to utilize contractors to perform Scope covered work. The Organization notes that in a statement provided by Claimant Edges, Carrier once had the equipment to perform the snow removal work in question but has since moved all the snow equipment to other locations.

- **The Organization totally rejects Carrier's position that Appendix 15 of the Controlling Agreement (the 1981 Berge-Hopkins Letter) is a "dead letter" in that it has ceased to have any applicability to circumstances such as those that pertain to the instant case. The intent of the Letter as mutually agreed upon by Carriers and the Organization, is unambiguously stated in its first paragraph, to wit, on Carriers' part 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, including the procurement of rental equipment and operation thereof by carrier employees. In the second paragraph the letter addresses that advance notices of subcontracting shall identify the work to be contracted and the reasons therefor. Under the circumstances surrounding the instant case, the Organization submits Carrier, lacking equipment for snow removal, was obligated by Appendix 15, to rent the necessary equipment thereby obviating the need to employ contractor forces to perform the disputed work.**

The Board finds as it has found in other snow removal cases that contrary to the Carrier's position, there is absolutely no dispute that the work of snow removal falls under the Scope of work customarily and historically performed by employees represented by the Maintenance of Way Organization. That being the case, the only circumstance that permits the contracting of outside forces to perform the scope covered work of snow removal, are the limited specified exceptions that arise as a result of "emergency" situations.

In the case at bar, the Board concurs in the Organization's position that the prevailing conditions that existed on the four claim dates did not constitute an emergency and therefore there was no basis or justification for the Carrier to utilize outside forces to perform the scope covered work at the Janesville location. The

record evidence before us clearly proves that Carrier's inability to utilize its own maintenance of way employees was due to decisions of its own making to wit: poor planning exemplified by transferring its own snow removal equipment to other of its property locations; and its failure to comply with the pledge specified in Appendix 15 that in the absence of owning the proper equipment to perform the work as specified in an advance notice that it would rent the necessary equipment. Notwithstanding the finding there was no emergency attendant to the prevailing circumstances, nevertheless, inaction by Carrier to secure the proper equipment whether by retrieving some or all of the snow removal equipment that once had been sited at the Janesville property location or, temporarily replaced by rental equipment resulted in undermining its obligation to comply with good-faith efforts to reduce the incidence of sub-contracting.

As to the remedy, based on the foregoing findings, the Board further finds that two of the identified Claimants, J. Edges and S. Peterson were deprived of work opportunities as they were available to perform the work of snow removal on the four claim dates specified in Item (3) under the preceding Statement of Claim section and therefore subject to the monetary compensation requested, notwithstanding the fact they were fully employed on the four claim dates specified. The Board is of the view that such compensation does not represent an enrichment of Claimants but rather acts as a check against actions taken by the Carrier to undermine the obligation to limit, where possible, the subcontracting out of work in order to increase the utilization of its maintenance of way employees. As Claimant D. Kopp was noted to have been on vacation on the four claim dates specified and therefore unavailable to perform the disputed work in question, the Board is of the view that any of the options Carrier may have had to make him available is mere conjecture. That being the case, Claimant Kopp is not entitled to receive the requested monetary 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

THIRD DIVISION AWARD 42427 - DOCKET MW-41912,

THIRD DIVISION AWARD 42429 - DOCKET MW-41941,

And

THIRD DIVISION AWARD 42431 - DOCKET MW-41943

(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 an exception of Rule 1(b). The Majority appears to rest this determination on a conclusion the emergency of the "Carrier's own making". The Carrier respectfully disagrees with the Majority's view.

First and foremost, the Majority states the only circumstance permitting the contracting out of snow removal is that of "emergency". Such proposition was never raised on the property. Further, there is no support for such a view. Rule 1(b) of the Agreement lists several reasons the Carrier may contract out work. It states:

> **[M]ay be let to contractors and be performed by contractor's forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or unless work is such that the Company is not adequately equipped to handle the work; or time requirements must be met which are beyond the capabilities of Company forces to meet.**

The contracting out of snow removal is not limited to "emergency" circumstances only.

Secondly, the Majority incorrectly states the inability to utilize maintenance of way employees was the Carrier's own making by moving equipment to other locations. The Majority appears to be imposing its judgment on the Carrier's managerial prerogative to move and place equipment in accordance with its operations.

The Majority also states the Carrier should have secured rental equipment as argued by the Organization. However, there was never any evidence presented that such rental equipment was available. The Carrier presented evidence of significant snow fall. The Organization failed to properly refute this evidence or prove the availability of rental equipment. Clearly an emergency existed and the Carrier had the right under the language of Rule 1(b) to contract out the work.

Additionally, the Majority awarded fully employed Claimants monetary damages with the exception of one Claimant in Award 42427. In Award 42427, the Claimant was on vacation and therefore, determined to be unavailable. It is the Carrier's position that as other Claimants were fully employed and engaged in other duties they were also unavailable, particularly for time sensitive duties of snow removal. Such work can't be done at a later date. 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 *Matthew R. Holt*

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October 31, 2016