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

Award No. 42429
Docket No. MW-41941
16-3-NRAB-00003-120248

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 (removing snow from yard leads, right of way roads, and around material piles) in the Janesville Yard, between Mile Posts 87 and 90 on the Harvard Subdivision and the Evansville industrial Lead on January 17, February 1 and 2, 2011 (System File B-1114C-104/1548310 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 Apendix 15.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant J. Edges shall now '. . . be compensated nine (9) hours on January 17, nine (9) hours on February 1, and twelve (12) hours on February 2, 2011 totaling twenty four (24) hours of straight time and five (5) hours of overtime at the applicable 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.

As in Third Division Award 42427, Carrier issued a 15-day Notice of intent to contract specified work dated November 5, 2010 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:

> **"Specific Work: All salting, 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."**

Except for the difference in claim dates specified above and the hours worked by the outside contractor Snellton to perform the work of snow removal as referenced in the above 15-day Notice, all arguments proffered by the Parties in support of their respective positions as set forth in Award 42427 are identical in this instant case. As such, said respective positions are incorporated in their entirety as if fully restated here. Accordingly, the Board, in addressing these same arguments advanced by the Parties also restates its core findings but tailored to the minor differences associated

with the prevailing circumstances accompanied by additional commentary. Said findings are as follows:

- **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 three claim dates specified 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 Carrier's locations in and around Janesville, Wisconsin. The record evidence before us clearly proves that Carrier's inability to utilize its own maintenance of way employees was due directly 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 indicated/described in the 15-day advance Notice, that it would rent the necessary equipment.**

  With respect to Appendix 15, the Board does not concur in Carrier's argument that the Berge-Hopkins Letter is a "dead letter" and therefore inapplicable to cases involving scope work. The sentiment expressed by the Parties in said letter was to strike a balance between the Carriers' utilization of contract forces and the Organization's goal of having Carriers to reduce the utilization of outside forces in favor of increasing the utilization of its member employees to perform all work deemed and recognized as scope covered work. If the Berge-Hopkins Letter was, as asserted by the Carrier truly a "dead letter" as a result of various contractual changes that have occurred since 1981 relative to subcontracting issues, then there is no reason at all for the Parties to continue to include the letter as an appendix to the subsequently negotiated collective bargaining agreements. Yet, the

letter's continued inclusion in subsequent collective bargaining agreements as Appendix 15 indicates to the Board that the Parties attach some degree of significance to the content and substance of the letter. As such, the Board is obligated to consider the pro and con arguments advanced by the Parties in any disputed case that comes before the Board.

- **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 pledge 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 even though Claimant was on furlough for two of the three claim dates specified at the time the snow removal work was performed by the two Snellton contract employees, Claimant did experience a loss of work opportunity as Carrier could have called Claimant to work and assigned him to perform the snow removal work in question on the dates of February 1 and 2, 2011. Even though Claimant performed snow removal work on the claim date of January 17, 2011, nevertheless, Carrier could have utilized his services on that date for a greater number of hours as evidenced by the fact that a contractor employee worked a total of nine hours on that date.**

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 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