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

Award No. 42431
Docket No. MW-41943
16-3-NRAB-00003-120252

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 (Roscoe Ready Mix) 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 February 4, 5 and 7, 2011 (System File B-1114C-105/1548309 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 said work or make a good-faith attempt to reach an understanding concerning said 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 J. Edges and S. Peterson shall now be compensated for a total of ' . . . sixty four (64) hours of straight time and eighty four (84) 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 prior claim cases involving snow removal work at Carrier's Janesville, Wisconsin Yard at specified Mile Posts locations on the Harvard Subdivision and the Evansville Industrial lead, specifically Third Division Awards 42427 and 42429, but occurring on different claim dates, the Board has concurred in the Organization's position that snow removal work is Scope covered work under the provisions of Rule 1(b) of the Controlling Agreement.

Carrier asserts that on the three claim dates specified, February 4, 5 and 7, 2011, a snow emergency occurred as a result of a winter blizzard that generated an enormous amount of snow fall. Carrier further asserted that under the prevailing circumstances it did not have the capability by way of forces or equipment to address the enormous accumulations of snow thereby having to rely on utilizing the services of an outside contractor. Carrier noted that although it is not obligated to provide a 15-day advance notification of an emergency situation as required under Rule 1 of the Agreement, it nevertheless issued such a notice. Additionally, Carrier argued it was not limited to the exceptions specified in Rule 1 permitting the utilization of outside forces to perform Scope covered work.

The Organization argued in contradiction to the Carrier's position that a snow emergency did not exist on any of the three claim dates specified thereby necessitating the need for Carrier to issue a 15-day advanced notice and thus be held to the limitations for utilizing outside forces to perform Scope covered work such as routine snow removal. As noted, Carrier did issue a 15-day advanced notice dated November 5, 2010 wherein it informed the Organization of its intention to use outside forces to perform the work of snow removal but the Organization argues said notice was

deficient in that it failed to provide requisite information in greater detail to qualify it as a "proper" notice. The Organization submits that Carrier's position a snow emergency existed on the claim dates specified is simply a subterfuge on its part to exempt itself from the contractual constraints of utilizing outside forces to perform Scope covered work and to alleviate it from compliance with Appendix 15, of the Agreement, the 1981 Berge-Hopkins Letter pledging that in the absence of owning equipment necessary to perform the work of snow removal, it would rent the necessary equipment so as to be able to assign the work to its maintenance of way employees.

In review of the arguments advanced here by both Parties, the Board finds more persuasive the arguments advanced by the Organization that contrary to the Carrier's main position, a snow emergency did not exist on any of the three claim dates specified. Notwithstanding the fact that snow falls of various magnitudes throughout the winters in the Midwest are a fact of life and to be expected, it is therefore suspect that Carrier deliberately divested itself of ownership of snow removal equipment and decisively maintains an insufficient force of maintenance of way employees at its Janesville, Wisconsin Yard and surrounding property, two developments of its own making, in order to declare that any snow fall, even routine snow fall, is too big and overwhelming to be performed solely by its own maintenance of way forces; thereby declaring any snow fall event to constitute an emergency situation necessitating the need to supplement the work of snow removal utilizing outside forces.

The Board finds puzzling the fact Carrier would issue a 15-day notice to inform the Organization of its intent to utilize outside forces to perform the Scope covered work of snow removal when it acknowledges that such a notice is not required to be filed nor applicable to responding to an emergency situation. It is crystal clear that the 15-day notice requirement is intended to be applicable to non-emergency Scope covered work given that true emergencies are incapable of prediction in advance of their occurrence. The irony here is that Carrier acknowledges it had no contractual obligation to issue the November 5, 2010, 15-day Notice of Intent to utilize outside forces to perform snow removal work under emergency snow fall conditions yet, it nevertheless did so apparently in anticipation there would be non-emergency snow fall events that would eventuate the need to utilize outside forces knowing full well it no longer owned the snow removal equipment nor maintained the proper and necessary staffing to adequately respond to even a routine snow fall event. To compound this irony, the Organization then asserts the argument that given the subject snow fall event did not constitute an emergency the 15-day Notice of Intent issued by Carrier

was deficient in that the notice failed to disclose the precise location of the snow fall, the equipment to be used and specifying the reason(s) for justifying the utilization of outside forces to perform the snow removal work.

As to the remedy, the Board acknowledges from the record evidence before it that the two identified Claimants were both on furloughed status on the three claim dates in question and that Carrier did not call them to service to perform any of the snow removal work. In this regard, Claimants were truly deprived of work opportunities. The underlying rationale for compensating Claimants shown to have suffered such deprivation, even if fully employed during the time Carrier utilizes the services of outside forces to perform Scope covered work, is reserved to members of the Organization's bargaining unit. In so finding, we further find Claimants' are to be compensated but concur in the Carrier's position that the two Claimants so identified should not receive pay for the hours worked by the four contractor employees who performed the subject snow removal work. The Board therefore remands the issue of proper payment to be made to the Claimants.

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