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

Award No. 42435
Docket No. MW-41972
16-3-NRAB-00003-120326

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 (Clem Davis Roofing) to perform Maintenance of Way and Structures Department work (remove/replace roof) at the Depot in De Kalb, Illinois beginning on April 5, 2011 and continuing through April 8, 2011 (System File B-1101C-114/1552814 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper 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 B. Asselin, R. Hadsall, T. Ballard, B. Stichling, M. Scwartz, R. Law and J. Santos shall now each '* * * be compensated for their equal share of two hundred and twenty four (224) hours straight time and fifty six (56) hours of overtime that the Contractor's employees spent performing Maintenance of Way work on district B-3, 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.

In claims involving the Carrier utilizing outside forces to perform work such as here, the first determination to be made by the Board is whether, as asserted by the Organization, the work is scope covered work as set forth in Rule 1 of the controlling collective bargaining agreement. Upon consideration of all arguments advanced respectively by the Organization and Carrier, the Board concurs in the Organization's position the claimed work of replacing the roof at Carrier's depot in DeKalb, Illinois is scope covered work as evidenced by the language of Rule 1, which specifically states, "Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the . . . maintenance, repair . . . of . . . structures and other facilities used in the operation of the Company in the performance of common Carrier service on the operating property * * * ." Additionally, the Organization has successfully shown the roofing work in question has historically and customarily been reserved to its craft especially noted by the un-refuted example that the very same DeKalb depot was re-roofed by maintenance of way employees 21 years earlier in 1990.

Having established the claimed work in question is scope covered work, the second determination to be made by the Board is whether, as asserted by the Organization, Carrier failed to provide it with the a "proper" advance notice of intent to subcontract the work in question. We therefore scrutinize the notice Carrier issued to the Organization dated November 18, 2010, which reads in whole as follows as a means of assessing whether it complies with contractual requirements to deem it a "proper" notice of intent:

"This is a 15-day notice of our intent to contract the following work:

Location: 200 N. 6th street, DeKalb, IL 60115

Specific work: Supply all labor, permitting, supervision, material, and cleanup to replace the roof at the Union Pacific Railroad Depot in DeKalb, IL.

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."

As the Board has stated in prior awards, in order for a notice of intent to be deemed to constitute a "proper" notice it must comply with three contractual requirements, to wit: 1) the notice must be issued not less than 15 days in advance of the date of the intended contracting transaction as required by Rule 1(b); 2) the notice must identify the work to be contracted as required by Appendix 15 (the Berge-Hopkins December 11, 1981 Letter of Understanding); and 3) the notice must provide the reasons for contracting out the work, also as required by Appendix 15. Perusal of the November 18, 2010 Notice of Intent Carrier issued to the Organization clearly complies with the first two requirements, that is, the notice was issued well outside of the 15-day advance deadline and five and a half months in advance of the work being performed, and the notice clearly identified the work to be performed as re-roofing the DeKalb depot. The notice clearly was devoid of meeting the third requirement of providing a reason or reasons for Carrier's intention of subcontracting the work.

Notwithstanding the absence of a reason provided by the notice for Carrier's intention to subcontract the subject scope covered work thus disqualifying it as constituting a "proper" notice, the Organization exercised its contractual right and requested convening a conference for the explicit stated purpose as provided for in Rule 1(b) to make a good faith attempt to reach an understanding concerning said contracting. At the conference which was convened on November 30, 2010, the Organization related Carrier sought to identify but failed to support any exceptions as provided in Rule 1(b) that would justify the intended contracting out of the scope work in question. According to the Organization, Carrier speculated that parts of the roof were membrane in nature thus asserting the work in question was not within the capabilities of its own employees. However, this speculation was refuted by a satellite view of the roof revealing there was no membrane roof on the depot. In any event, the Organization related that in the past, maintenance of way forces have performed the

work on membrane roofs. Additionally, Carrier cited manpower and equipment issues as reasons for contracting out the scope work in question but the Organization related Carrier was unable to identify any equipment that might be utilized to perform the work much less identify equipment not owned by it. As to Carrier's citing manpower issues in light of the fact there was no set schedule for performing the work, the Organization asserted any such manpower problems could easily be overcome by either scheduling the work to fit with other projects or hiring to the craft.

Subsequent to meeting in conference and subsequent to proceeding with having the disputed work performed by outside forces, Carrier argues it was forced to subcontract the scope work of re-roofing the DeKalb Depot due to the Rule 1(b) exception it was not adequately equipped to handle the work and when time requirements were such that repairing the roof was beyond the capabilities of its own forces to complete the work.

Upon review of all argument asserted by both Carrier and the Organization, the Board finds the whole of Carrier's position unpersuasive. One consequence for failing to provide a reason required as part of a 15-day advance notice to inform the Organization of an intention to subcontract scope covered work is, that it allows the Carrier to retroactively seize upon a Rule 1(b) exception to justify having utilized outside forces to perform the work. Not one of the exceptions asserted by Carrier is deemed by the Board to be plausible. Certainly the most implausible exception asserted by Carrier is that it was not adequately equipped to handle the work, that is, maintenance of way employees were unavailable as they were assigned to work on other projects. The Board concurs in the Organization's position that the lead time of five and a half months that elapsed from the time Carrier issued the subject 15-day Notice of Intent to subcontract the re-roofing work, was more than sufficient for Carrier to find a total of four days within that span of time that would not conflict with other projects, thereby freeing seven maintenance of way employees to perform the disputed scope covered work. In not finding such a period to utilize its own forces to perform the disputed work strongly indicates to us that poor scheduling of work on the part of Carrier was responsible for Carrier having to subcontract the work. We hold this same reasoning applicable to Carrier's asserted exception that time requirements were such that it was beyond the capabilities of its own forces to complete the work. All that was required of Carrier was to find four consecutive days within the five and a half month time period that would permit assigning seven maintenance of way employees to perform the scope covered work thereby assuring its completion consonant with the time requirements.

As to the issue of remedy, we restate our position that subcontracting of scope covered work results in a loss of work opportunity for maintenance of way employees even though said employees may have been fully employed at the same time the subcontracting was occurring and were paid for the hours worked. Awarding Claimants the requested compensation is a matter of imposing on Carrier a penalty for having violated applicable provisions of the Agreement and casting aside its pledge as memorialized in Appendix 15 to assert good faith efforts to reduce the incidence of subcontracting and increase the use of its maintenance of way forces as opposed to viewing the awarded compensation as enriching the named Claimants.

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 42438 - DOCKET MW-42017

And

THIRD DIVISION AWARD 42435 - DOCKET MW-41972

(Referee George Larney)

The Majority's reasoning is the same in the cases listed. It found the Carrier failed to issue a proper notice when it did not include a reasoning therein. Additionally, it held the Carrier did not meet the exception of not adequately equipped. The Carrier would respectfully disagree with the Majority's view.

First, the Carrier will address the Notice. The Carrier did serve a proper notice. The Majority states the Carrier notice was defected in that it did not state a reason for the proposed contracting. It goes on to state that discussion during conference does not negate this lacking. The Carrier would disagree. To begin, the notice served in this case is similar to those that have been served for years on the property and upheld in prior arbitration.

Moreover, the dismissal of the ability for the parties to resolve issues within the conference renders the conference provision of the agreement hollow. Rule 1 of the agreement specifically states the parties at the request of the General Chairman are to meet to "discuss matters relating to the said contracting transaction". Though the Carrier disagrees with the Majority's view of Appendix 15, if it is to be considered applicable, then the language reinforcing Article IV of the May 17, 1968 (meet and confer) provision must also be given weight. The conference is the opportunity for the parties to discuss and reach understanding of the matter. Most significantly, is the Majority view is in conflict with prior arbitration precedent. Award 9 of Public Law Board 7096 held the parties' conference allows for the opportunity to cure any deficiency in the notice.

> **"**On this record, the Board finds that the work in dispute here was adequately identified in the Carrier's notice, and that the Organization has failed to prove in this instance that the Carrier violated the requirement of Rule IB to make a good faith attempt to reach an understanding about the contracting of the work in question. See,e.g., Third Division No.31170 ***("The fact that a full discussion of all issues the parties***

> ***wished to bring forward was held during the conference, ... negates any deficiency in the specificity of the notice.")*** The Organization has failed to show that the Carrier violated any of the contract provisions cited, and the claim is denied on that basis, without need to reach any other issues raised by the parties." (Emphasis added)

We anticipate that the Majority's ill-advised action will create further turmoil and add fuel to BMWE's burning desire to alter the nature of the contracting notices that have been historically provided on Union Pacific Railroad Company property. Consequently, we are compelled to register our vigorous dissent so that future readers of these Awards will recognize the injustice which the Majority sanctioned. It goes without saying that no future decision makers should be tempted to reach similar unwarranted conclusions with regard to the adequacy of such a notice.

The second error of the majority was holding the Carrier did not meet the exception of not adequately equipped. It reasoned this was due to the fact the notices were served several months prior to the work occurring, thus, the Carrier poorly planned. This reasoning is flawed and contrary to the language of the agreement and arbitration precedent. Rule 1 of the agreement states the Carrier is to serve notice not less than 15 days prior to a contracting out transaction. There is no limitation of how far in advance the Carrier may serve notice. The Majority is inappropriately creating a limitation that is neither within the agreement nor with its jurisdiction to do so. The Majority only has the ability to interpret the agreement not write language into it. Additionally, Award 9 of Public Law Board 7096 cited above upheld a notice served for work to be contracted out over a five year period. Again, the Majority has created turmoil by findings that are contrary to the precedent o n the property.

Lastly, 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.

Based on the above, the Majority's determinations were 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

Katherine N. Novak

Matthew R. Holt

Matthew R. Holt

October 31, 2016