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

Award No. 42437
Docket No. MW-42013
16-3-NRAB-00003-120358

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 (Rossie Brothers) to perform Maintenance of Way and Structures Department work (remove/replace tile, paint walls and door and related work) at the Maris Building near Northlake, Illinois on February 21, 22, 23 and 24, 2011 (System File J-1101C-354/1553475 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 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 S. Hugger and L. Jones, Sr. shall now '* * * each be compensated for an equal share of the man hours expended by the Contractor's employees spent performing Maintenance of Way work on district B-9, 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.

Pursuant to the obligations set forth in Rule 1(b) of the Controlling Agreement, the Carrier, by letter dated August 11, 2009, issued the following 15-day Notice of intent to contract the following work:

> **"Location: Chicago Area including suburbs**
>
> **Specific work: Supply all labor, supervision, equipment, permitting and material specified on 'as needed' basis to include painting, flooring, ceiling, door and lock repair/replacement, window repair, carpentry, removing or construction of non-load bearing walls and any associated incidental electrical and plumbing work, roofing (if and when no asbestos involved), concrete work or asphalt patch/fill work; all not to exceed $15,000 per job.**
>
> **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."**

In accord with provisions set forth in paragraph 3 of Rule 1(b) the Organization's General Chairman Wayne Morrow requested in writing by letter dated August 14, 2009 that a conference be scheduled and held prior to the work being assigned to and performed by a contractor so the parties may make a good faith attempt to reach an understanding concerning the contemplated contracting of work.

In this letter, Chairman Morrow made known the following reasons for requesting the conference and the reasons why the Organization could not enter into an agreement with the Carrier at the time to allow it to contract its work to outside forces:

- **The notice as presented is procedurally inadequate and/or defective, in part, as it is vague and inconsistent with the specific requirements of Rule 1 and the December 11, 1981 Letter of Understanding [Appendix 15]. The following information is lacking: Commencement date of the work; the scheduled ending date of the work; the exact location of the work identified by city, address, milepost, etc.; a complete description of all work to be performed by the outside forces; and the reason for intending to contract out the specific work.**

- **In requesting to convene a conference, the Organization specified the following as information it desired the Carrier to provide:**

  1. **Copy of the contract or proposed contract**
  2. **Full description of the work to be contracted**
  3. **Scheduled commencement date/ending date**
  4. **Exact location(s) involved (city, address, milepost, etc.)**
  5. **Number of contractor employees to be used**
  6. **Estimated number of hours/days/months/years to be consumed**
  7. **Reasons for the contemplated transaction as referred to and required by Rule 1 and the 12-11-81 Letter of Agreement, respectively**
  8. **Any Engineering Department representative who has information concerning the contemplated transaction and authority to delegate the work involved or any portion thereof to Maintenance of Way Department employees.**

The Carrier acceded to the Organization's request and held a conference on August 17, 2009. However, the Organization asserted the Carrier failed to identify any specific work or project or to specify any valid reason as to why it intended to contract out any work that the Carrier might later wish to retroactively associate with the August 11 Notice. Additionally, the Organization related to the Carrier at this conference its position that the subject Notice did not meet the minimal requirements of Rule 1(b) and the 1981 Berge-Hopkins Letter of Agreement. In a follow-up telephone conversation with the Carrier and written confirmation by the Carrier of said telephone conversation, Director of Labor Relations Hanquist acknowledged it

had already entered into a two-year contract with Rossi Brothers, an outside contractor to perform the work of building maintenance and that it had proceeded with such contracting out work without providing advance written notice for each occurrence. However, in a letter dated November 5, 2009, Hanquist informed Chairman Morrow that the Rossi Brothers contract was written to comply with the Controlling Agreement and gave assurance that the Carrier would continue to comply with the provisions of the collective bargaining agreement.

By letter dated November 18, 2009, Morrow acknowledged receipt of the Carrier's November 5 letter and went on to summarize the telephone conversation referencing assurance by the Carrier that it would comply with the contracting out restrictions in the C&NW Agreement but more specifically that the Carrier would provide a 15-day notice clearly identifying the work to be contracted and the reasons therefor in each instance in accord with the provisions of Rule 1 and the commitments made in the 1981 Berge-Hopkins 1981 Letter of Agreement.

Notwithstanding the Carrier's assurance it would comply with the provisions of Rule 1 and the commitments made by the Carrier set forth in Appendix 15, the Carrier did not provide a 15-day Notice of Intent to utilize the outside forces of the Rossi Brothers to perform the maintenance of way work on the specified four claim dates in question, work that occurred approximately 18 months after the issuance of the 2009 Notice of Intent. Asserting the Carrier's failure to provide such advance notice of the disputed work and its attendant failure to hold a conference for the purpose of engaging in a good faith discussion in an attempt to reach an understanding concerning said contracting and to reconcile any differences, the Organization filed the initial claim on April 8, 2011.

The Carrier argues it did not violate the Agreement as alleged by the Organization maintaining that the 2009 Notice of Intent covered the disputed work and that its utilization of contractor employees to perform the subject work fell under the exception provided by Rule 1(b) of not being adequately equipped to handle the work. The Carrier asserts its use of contractor employees to perform the disputed work was due to the fact that its own Maintenance of Way employees were assigned to resolving critical bridge issues at the time. Additionally, the Carrier notes the Organization in cases such as these bears the burden of proof to show by substantive evidence it has, by its actions, committed a violation or multiple violations of the Agreement. In this instant case, the Carrier asserts the Organization has failed to present such evidence in that, nowhere has the Organization indicated what specific Sub-department Classification in which Claimants hold to be entitled to the aggrieved

disputed work nor has the Organization provided any proof or evidence the alleged disputed work was performed on the dates and for the hours documented or that the work is work reserved to the maintenance of way employees it represents. With regard to the Organization's requested remedy, the Carrier argues that even if the disputed work were to be shown by the Organization to be reserved to employees of its craft, the prevailing factual circumstances show Claimants were fully employed on the claim dates the work was alleged to have been performed by the contractor employees. Since it is a physical impossibility for Claimants to have performed their assigned duties and, at the very same time, to have performed the duties associated with the work documented in this claim, is proof that Claimants were not deprived of a work opportunity as so asserted by the Organization.

Upon close review of all evidence comprising the substantial record before us, the Board respectfully does not concur with any of the defenses advanced by the Carrier in support of its position it did not, by any of its actions, violate applicable provisions of the Controlling Agreement by utilizing outside forces to perform the work in effecting the repairs to the Maris Building. Taking each defense one by one we find the following:

- **Although the Board acknowledges that a 15-day Notice of Intent as contractually required by Rule 1(b) of the Agreement is void of specifics other than making reference to the "contracting transaction" and that Appendix 15 is a tad more specific that the Notice be required to "identify the work to be contracted" and, should specify the reasons as to why the work is to be contracted, we find, as does the Organization, that the August 11, 2009 Notice of Intent did not meet even these minimal requirements to constitute a "proper notice". Said notice did specify a litany of duties to be performed on jobs not to exceed $15,000, but it failed to identify the "contracting transaction" of the repairs to be made to the Maris building. If, at the time the Carrier issued the subject Notice of Intent it had individual work projects in mind that entailed the performance of the listed duties by contractor employees, it was obligated to list those specific projects, that is, the "contracting transactions" in the Notice, in compliance with issuing a "proper" Notice, which it clearly failed to do. Absent such a listing, the Carrier could have avoided having this issue considered by the Board by issuing a second Notice of Intent 15 days or more in advance specifying precisely, the repair work to the Maris Building and apprising it intended said repair work to be performed by contractor employees.**

The Organization has made clear to the Board in this case as well as in past cases that the Carrier's obligation in a Notice of Intent is to provide it with more detailed information pertaining to the intention by the Carrier to utilize outside forces to perform the work in question. We are of the view however, that while the furnishing of more detailed information by the Carrier in a Notice of Intent is desirable and would go a long way in improving labor-management relations, nevertheless, the contractual obligations imposed on the Carrier associated with such Notices does not require it to provide any more information initially than that set forth and referenced above in Rule 1() and Appendix 15, the December 11, 1981 Berge-Hopkins Letter. The Board is further of the view that the furnishing of more detailed information relative to the Carrier's intention of contracting out of work, work that is reserved to the Maintenance craft employees is the function and purpose of the Organization's contractual right to request of the Carrier to convene a conference to discuss the details of the impending subcontracting in order to make a good faith attempt to reach an understanding pertaining to precise work to be performed by outside forces. In the case at bar, the Organization requested that a conference be convened and provided the Carrier in writing a list of eight items of information it wanted and expected to discuss at the conference. The record evidence establishes that the Carrier failed to provide the Organization with any of the itemized information it requested in advance of the conference.

- **The Board does not concur with a series of defenses proffered by the Carrier in its defense. Specifically, contrary to the Carrier's argument, we find the Organization has successfully shown the duties set forth in the Notice of Intent comprises Scope work reserved to its maintenance of way employees. Further, we find the Organization successfully identified Claimants as employees belonging to the specific Sub-Department Classification entitled to perform the subject aggrieved work and therefore entitled to the monetary remedy as set forth in the above itemized claim. As to the Carrier's position the Organization failed to provide any proof or evidence the alleged disputed work was performed on the dates and for the hours documented, we find this defense to be curious as such information is in possession of the Carrier not of the Organization and is information the Carrier should readily make available to the Organization especially in situations such as this where the Carrier is exposed to a monetary liability if found by the Board to have committed a violation or violations of the Controlling Agreement.**

- **Finally, with regard to the most significant defense proffered by the Carrier that the contracted out work performed under the prevailing circumstances met the exception set forth in Rule 1bB), utilizing outside forces to perform Scope covered work, due to not being adequately equipped to handle the work, the Board finds this defense as an excuse to obfuscate the more obvious reason of poor planning by the Carrier of its resources. The Carrier had 18 months from the time it issued the subject Notice of Intent, to accomplish the repairs made to the Maris Building but waited to schedule said repairs at a time its maintenance of way forces were being utilized to perform "critical bridge issues". Even if the Maris Building did not require the subject repairs at the time the Notice of Intent was issued, surely, at some time between then, August of 2009 and the first claim date specified of February 21, 2011, the Carrier knew such repairs needed to be made and therefore it could have scheduled the repairs at a time when its maintenance of way forces were not all assigned to perform "critical bridge issues".**

Thus, it can only be concluded that the Carrier alone created the condition deemed to constitute an exception under Rule 1(b) allowing it to utilize contracted out forces to perform the repair work to the Maris Building, work that indisputably is work reserved to maintenance of way employees. This finding leads the Board to consider the remedy requested by the Organization in this case as well as in past cases, to wit, the identified Claimants are entitled to compensation equal to the hours worked by the outside forces based on the rationale the compensation makes up for the loss of work opportunities. On the surface such an award of compensation can be construed as monetarily enriching claimants when it has been shown by the carrier that the identified claimants were fully employed at the very same time outside forces were utilized to perform the Scope covered work in question. Such was the circumstances of this instant case. However, the Board is of the view that if there were no monetary consequences to be borne by the carrier in circumstances where they were solely responsible for bringing about exceptions that would allow them to utilize subcontractor employees rather than their own employees to perform Scope covered work, it would provide multiple opportunities for the carrier to undermine the work contractually reserved to bargaining unit employees thus eventually eviscerating the bargaining unit itself at some point in the future.

Based on all the foregoing findings, the Board rules to sustain the 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 42437 - DOCKET MW-42013

(Referee George Larney)

The Majority's conclusions with respect to the contracting notices failed to recognize and respect the precedent set by past Referees. We anticipate that the Majority's ill-advised action will create further turmoil and unwittingly 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 basis for the Majority's decision to declare the contracting notice in this case improper is an alleged failure to issue and additional notice for the specific work contracted out. The notice was served prior to entering into the contracting agreement with Rossi Brothers 18 months prior to the repairs on the building. Serving of notice in this manner has been acceptable on this property. The Carrier specifically points to Award 9 of Public Law Board 7096, wherein Referee E. Benn held regarding a five year contract:

> **"….that observation does not undermine fact that the Organization received initial advance notice of the lengthy contract between the Carrier and DeAngelo Brothers and the relevant language does not obligate the Carrier to give such subsequent periodic notice once it meets its initial notice requirements."**

Past precedent has found the Carrier's general notices as adequate. Nothing in the present record gives any rationale to deviate from the previous awards which are considered authoritative on the practice, if not stare decisis.

The second error of the majority was implying the Carrier had to provide documentation in support of the Organization's claim. It was the Carrier's position the Organization failed to provide any proof or evidence of the alleged disputed work was performed on the dates or for the hours it alleged. The Majority surmised the Carrier had such information available and could have brought it forth. Thus,

the Majority clearly ignored the fundamental principle that as the moving party, the Organization bore the burden of proof and as such, it was the Organization's duty to prove each element of its claim to include the dates and hours the alleged work took place. The following awards make clear the Organization and the Claimant bear the entire burden of proof.

> **Third Division Award 41578 (BMWE vs UP – former C&NW)**
> **"It is fundamental that the Organization bears the burden of proof in cases of this kind**. In this case, the Organization failed to meet that burden. Therefore, the claim must be denied." (Emphasis added)
>
> **PLB 6781 Case 2, Award 2 (BMWE vs UP – former C&NW)**
> "**It is well settled that the Organization and Claimants bear the entire burden of proof to establish the essential elements of its Claim**. On this record, we find that burden has not been satisfied." (Emphasis added)

Thirdly, 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.

One of the oft-stated purposes of arbitration is to provide consistency in the work place so as to promote harmonious labor/management relations. To ignore and/or cast aside arbitral precedent which has clearly and unmistakably recognized the long-standing practice of providing notice for a multiple-year contract on this property, the Organization bears the burden of proof and not awarding a remedy to fully-employed Claimants does a dis-service to the process and the parties to these disputes. Without a doubt, 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 *Matthew R. Holt*

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October 31, 2016