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

Award No. 42438
Docket No. MW-42017
16-3-NRAB-00003-120372

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 (Root River Construction) to perform Maintenance of Way and Structures Department work (remove/replace roofing materials) at the St. James Depot on the Mankato Subdivision on March 30, 31 and April 1, 2011 (System File B-1101C-115/1554620 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 R. O'Neil, B. Elmberg and K. Sullivan shall now '* * * each be compensated for their share of ninety (90) hours of straight time and three (3) hours overtime that the Contractor's employees spent performing Maintenance of Way work on district B-7, 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 Rule 1(b) of the controlling Agreement, Carrier issued the following 15-day Notice of Intent dated January 28, 2010 to contract the following work:

> **"Location: Building 3250, St. James MN Depot, 300 W. Armstrong Blvd., St. James, MN.**
>
> **Specific Work: Replace roof on depot building at St. James, MN building 3250 Power wash, paint exterior and fix window issues.**
>
> **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 in all cases pertaining to Carrier's intention to contract out what the Organization alleges as "scope covered work," the Organization exercised its contractual right in accord with Rule 1 (b) and by letter to Carrier dated February 5, 2010, requested to meet in conference to discuss the intended subcontracting of the identified work. Said conference was held February 17, 2010. The Organization recounted that at this meeting Carrier informed that the work in question involved the roofing work of removing shingles and replacing shingles and further stated that its B&B employees could not perform the work because they were assigned and performing other work that would take priority. In response, the Organization informed Carrier its reason for contracting out the identified roofing work was not

justified pursuant to the applicable provisions of Rule 1(b) and the December 11, 1981 Letter of Understanding (Appendix 15). Thirteen months after the conference was held to no avail, that is, the Parties failed to make a good faith attempt to reach an understanding pertaining to the intended subcontracting the roofing work, Carrier proceeded to invoke its Rule 1(b) contractual rights and utilized outside forces to remove and replace rubber roofing material at the St. James Depot on the Mankato Subdivision, resulting in the filing of the instant claim.

Such contracting out of alleged scope covered work cases requires the Board to make determinations regarding whether or not Carrier issued a "proper" Notice of Intent and whether or not the alleged work constituted scope covered work, that is, work reserved to maintenance of way employees as provided for in Rule 1 of the Agreement. Finally, if the work in question is determined to constitute scope covered work the Board must then determine if the circumstances surrounding Carrier's utilization of outside forces to perform the disputed work meets one or more exceptions as set forth in Rule 1(b) permitting Carrier to subcontract the work.

A "proper" 15-Day Notice of Intent must contractually meet and satisfy three requirements, to wit: 1) pursuant to Rule 1(b), the Notice must be in writing and issued to the Organization as far in advance of the date of the contracting transaction as is practicable but not less than 15 days prior to said transaction except in 'emergency time requirements'. There is no question that the Notice Carrier issued the Organization in this case more than met the 15 day requirement as it was dated January 28, 2010 and the work was performed on the three claim dates identified in March and April of 2011, a year plus later; (2) Appendix 15 specifies two additional requirements, the first that the Notice identify the work to be contracted and, second, that the reasons for contracting out the work be specified. It is clear from a perusal of the Notice as reproduced elsewhere above that the Notice complies with the first of the two requirements but was not in compliance with the second requirement as it was devoid of stating the reason for Carrier's intention to utilize outside forces to perform the work. We concur in the Organization's position that Carrier specifying a reason for intending to subcontract the work at conference does not alleviate it from complying with the contractual obligation to specify the reason in the 15-day Notice.

In assessing whether or not the roofing work in question was, as asserted by the Organization, work contractually reserved to the maintenance of way craft, we are persuaded from a straight-forward reading of Rule 1(b) first paragraph which

provides in pertinent part that all work in connection with . . . 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, includes the work as indicated in Carrier's 15-day Notice dated January 28, 2010 of "replacing roof on depot building at St. James, MN." To be specific, the Board determines that as alleged by the Organization, the roofing work in question is scope covered work as provided for in Rule 1(b) and, as shown by past examples of roofing work performed by maintenance of way employees.

Finally, as to whether Carrier was permitted by any exception or exceptions to subcontract out scope covered work as provided for in Rule 1(b) must next be determined. As we noted above, Carrier failed to provide any reason for contracting out the disputed work as is required to be set forth in a 15-day Notice. Second, at conference, Carrier maintained the reason it intended to utilize outside forces to perform the roofing work was because maintenance of way forces would not be available to perform the work since they would be performing other work at the same time that would take priority. Subsequent to the time the conference was held and during on-property discussions regarding the subject claim, Carrier asserted a different exception allowing it to have utilized outside forces to perform the roofing work, specifically, that it "was specialized work that the Claimants did not possess the skills to perform." In correspondence pertaining to the instant claim here before us, Carrier expounded on this exception stating that, "we have neither the equipment nor expertise for this type of work. Carrier noted that for any warranty to be in effect, the installation had to be performed by a qualified installer."

Based on the whole of the record evidence we know the exception first relied on by Carrier cannot be deemed to constitute a valid reason for having utilized outside forces to perform the roofing work in question as there was a lapse in time of greater than one year between the date the 15-day Notice was issued and the work was performed. Surely, in that nearly 13 month period that followed the issuance of the 15-day Notice, Carrier could have scheduled the roofing work at a time their maintenance of way forces did not have a conflict resulting from assignment of priority work. As we have stated in other cases, not finding a period of non-conflicting work assignments within such a long period of time is solely attributed to bad planning on the part of the Carrier. As to whether the work involved any specialization of skill not possessed by maintenance of way employees or the work involved use of special equipment, we find Carrier was unable to proffer sufficient evidence to convince us that such was the case under all the given

circumstances. As such, we find to reject the asserted exceptions proffered by Carrier in justification of utilizing outside forces to perform the subject scope covered work. Accordingly, we conclude there were no extant exceptions as provided by the provision of Rule 1(b) to permit Carrier to contract out the subject roofing work.

Finding that Carrier, as alleged by the Organization violated the controlling Agreement in two respects now turns to remedy. The Organization argues Claimants are entitled to the same amount of compensation paid to the contractor employees for performing the disputed work whereas Carrier argues in opposition that Claimants are not entitled to any compensation as, at the time the disputed work was performed, Claimants were fully employed performing other assigned work. As we have previously held and re-state here, where violations committed by Carrier in cases involving utilizing outside forces to perform scope covered work in the absence of any contractually provided exceptions, Claimants are entitled to the compensation paid to contractor employees on grounds they were denied work opportunities even if the Claimants were shown to have been fully employed at the time the subcontracting transaction occurred.

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