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

Award No. 42491
Docket No. MW-42032
17-3-NRAB-00003-120404

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig 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 (Minowa) to perform Maintenance of Way and Structures Department (bridge repairs) at Mile Post 202.50 near Boone, Iowa on the Boone Subdivision on April 18, 19, 20, 21 and 27, 2011 (System File G-1101C-58/1556451 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 J. Fagen, D. Broich, R. Romick and G. Koski shall now '* each be compensated for an equal share of 144 hours of straight time and 96 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.

The Organization filed its Claim on June 10, 2011 and alleged that the Carrier violated the Agreement when it utilized outside forces, Minowa, to perform bridge repairs. The Organization argued that the work occurred on April 18–21, 2011 and on April 27, 2011 near Boone, Iowa, on the Boone Subdivision. The Organization asserted that the work involved approximately 3-5 employees who worked various numbers of hours each day.

Engineering Supervisor Mitchell W. McClure denied the Claim on August 8, 2011. Supervisor McClure noted that the Organization had failed to present sufficient proof to support its position. Supervisor McClure identified that the work was not exclusively reserved to the Organization. The Carrier explained that the Carrier had provided proper notice on October 13, 2010, and that the Claimants were fully employed and lost no work opportunity. The Carrier did not agree that the Berge-Hopkins Letter of Understanding was determinative. Based upon the above, Supervisor McClure denied the Organization's Claim.

By letter dated September 30, 2011, the Organization appealed the Carrier's determination and indicated that its members had performed similar work in the past and that the work was scope-covered.

According to the Organization, the Carrier had customarily assigned work of this nature to BMWE employees. It further claims that the relevant work is consistent with the Scope Rule and the Carrier's employees were fully qualified and capable of performing the designated work. The work performed by Minowa is within the jurisdiction of the Organization and therefore, Claimants should have performed said work. Further, the Organization contends that the work could have been postponed to allow BMWE employees to complete the work. Because Claimants were denied the right to perform the work, the Organization argues that they should be compensated for the lost work opportunity. In addition, the Organization contends that the Berge-Hopkins Letter supports its position.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that the work that was contracted out was done so because the Carrier did not possess sufficient manpower to complete the required work in a timely fashion. Under the language of the Scope Rule, the Carrier had the right to use outside forces in such a case and such work does not belong to BMWE employees under either the express language of the Scope Rule or any binding past practice. According to the Carrier, controlling precedent has upheld the Carrier's position. Further, regarding the alleged Notice violation, the Carrier contends that it did provide proper advance notice to the Organization. Further, the Carrier contends that the Berge-Hopkins Letter is irrelevant and does not change the result in this case.

Rule 1(B) provides as follows:

> **"B. Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common Carrier service on the operating property. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.**
>
> **By agreement between the Company and the General Chairman, work as described in the preceding paragraph, which is customarily performed by employees described herein, may 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.**
>
> **In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less**

than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith.

Nothing contained herein shall be construed as restricting the right of the Company to have work customarily performed by employees included within the scope of this Agreement performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible."

We carefully reviewed all evidence regarding whether the Organization proved that the involved work belongs to BMWE forces. The Organization was unable to rebut the Carrier's evidence that manpower requirements required that outside forces be procured to complete the work in a timely fashion. It is within the Carrier's jurisdiction to make decisions concerning the efficiency of the operation, provided that it does not violate specific rights set forth in the Agreement. Based on the record before the Board, the Carrier's use of outside forces did not violate the Agreement. Further, the Berge-Hopkins Letter does not change the result. The Agreement specifically permits the Carrier to contract out work customarily performed by its own employees when manpower requirements so require.

Based on the evidence, we cannot find that the use of the outside forces violated the Agreement. The burden was on the Organization to prove that a violation occurred; however, it failed to do so. The Board concludes that the Notice was proper and that it was not inappropriate for the Carrier to contract out the work. Accordingly, the instant claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 11th day of January 2017.

LABOR MEMBER'S DISSENT
TO
AWARD 42491, DOCKET MW-42032
(Referee Steven M. Bierig)

In this instance, the Majority erred on multiple accounts in its decisions. First, the Majority incorrectly determined that the Carrier complied with Rule 1B and Appendix 15 prior to contracting out the reserved Maintenance of Way work. The Majority further erred when it held that the Carrier established an exception pursuant to Rule 1B allowing it to contract out the reserved Maintenance of Way work.

Rule 1B and Appendix 15 Notification and Conference Provisions

The Majority's determination that the Carrier complied with Rule 1B and Appendix 15 prior to contracting out the claimed work was in serious error. Rule 1B of the Agreement requires the Carrier to notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in "emergency time requirements" cases. Moreover, Rule 1B specifically directs the reader to "See Appendix 15," which provides: "In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor." Recent on-property Awards 41102, 42419, 42421, 42435 and 42438 have directly addressed the requirements for notification pursuant to this Rule 1B and Appendix 15. Representative thereof are Awards 41102, 42419 and 42423 which, in pertinent part, read:

AWARD 41102:

> "*** Instead, the Carrier failed to set out the reason for the contracting in violation of the specific contractual mandate set forth in Appendix 15. The Appendix language provides for strict adherence to notice requirements. Accordingly, the Board concludes that the Carrier did not comply with the notice requirements."

AWARD 42419:

> "Next, the Board attends to the elements of the Notice of Intent served by Carrier to the Organization in instances it plans to contract out work that qualifies the Notice as a 'proper' one, the basis upon which in any given case, the Organization generally advances contesting the Notice issued arguing it is improper and therefore the claim should be sustained by the Board. Here, the Board looks no further than the provisions set forth in Rule 1(b) of the Agreement and the commitments made by the Carrier and the Organization as memorialized in Appendix 15, the December 11, 1981 Berge-Hopkins Letter. As the Board stated in a prior case before it, we reject the Carrier's argument that Appendix 15 is no longer applicable given the evolution of changes that

> have occurred since 1981. The Board is persuaded that if, as Carrier argues, Appendix 15 is no longer applicable then we ponder why the Parties continue to include the Letter as an Appendix in subsequently negotiated national agreements. The Board subscribes to the principle of contract construction that if language is included in an agreement it must have some meaning and, if not, the Parties at some point in future negotiations would jettison the language altogether. So far, jettisoning Appendix 15 has yet to have occurred. Accordingly, the Board confers upon the Berge-Hopkins Letter as having some significance as it pertains to instances where the Carrier utilizes the services of outside forces in place of utilizing its own maintenance of way forces. Thus, a proper Notice of Intent embraces the dictates of Rule 1(b) which requires and makes incumbent upon Carrier to issue such notice 'not less than fifteen (15) days in advance of the date of the intended contracting transaction. Appendix 15 imposes on Carrier two additional requirements, to wit: 1) the advance notice shall identify the work to be contracted and, 2) the reasons given for contracting out the work." (Emphasis in original)

AWARD 42423:

> "*** Casting aside the fact this asserted exception constitutes new evidence and therefore must be rejected for consideration by the Board, the fact is, that if either or both of these exceptions were evident at the time it issued the 15-day Notice of Intent, Carrier was contractually obligated to list these exceptions in the Notice as the reasons for subcontracting the work. As noted elsewhere above, Carrier failed to provide any reasons for subcontracting the work in question in the Notice of Intent."

Accordingly, the record in this instance clearly established that the Carrier did not comply with the clear notification requirements of the Agreement prior to contracting out the Maintenance of Way work and the instant claims should have been sustained solely on that basis.

Rule 1B Contracting Exceptions

The Majority committed another serious error when it held the Carrier established an exception by which the Carrier may contract out the claimed work. Rule 1B specifically lists five (5) exceptions when the Carrier can contract out Maintenance of Way work. In this case, the Majority incorrectly made the determination that the Organization was unable to overcome the Carrier's defense of "manpower." First, it should be noted that "manpower" is not one of the five (5) exceptions listed within the Agreement so it was inappropriate for this Board to determine that asserted "manpower" requirements allowed the Carrier to contract out the claimed work. As established above, the Carrier's advanced notification of intent to contract out work must include "reasons therefore." Because these alleged reasons were not included in the notification, the Carrier clearly violated Rule 1B and such alleged reasons should not have been considered. Notwithstanding, the Majority incorrectly relied solely on the Carrier's blanket

assertion that an exception existed. This Board has routinely held that the Carrier has the burden of proof to establish an exception as evidenced by Award 40409.

Moreover, it should be noted that the notification letter the Carrier relied on was issued six (6) months prior to the claimed work being contracted out. The work involved herein was a five (5) day project. Accordingly, all the Carrier had to do was find five (5) days over a six (6) month period to schedule its own forces to perform the work. Situations virtually identical to this one have previously been addressed by this Board. See Third Division Awards 37376, 42423, 42435, 42437 and 42438. Representative thereof are Awards 42435 and 42438 which, in pertinent part, read:

AWARD 42435:

"*** 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."

AWARD 42438:

"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. ***"

For the above reasons and in connection with the above-cited precedent, it is clear that the Majority in this instance erred when it determined that the Carrier complied with Rule 1B and Appendix 15 and when it determined the Carrier established an exception listed in Rule 1B allowing it to contract out work. The Majority's decision that the Carrier was justified in contracting out this basic Maintenance of Way work is therefore palpably erroneous and must be considered to be without precedential value. Therefore, I respectfully dissent.

Respectfully submitted,

Zachary C. Voegel
Labor Member