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

Award No. 42492
Docket No. MW-42055
17-3-NRAB-00003-120421

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 utilized outside forces (Razorback Rail Service and R. J. Corman) to perform Maintenance of Way and Structures Department work (repair slide area) at Mile Post 36.5 on the Trenton Subdivision beginning on June 1, 2011 and continuing through July 15, 2011 (System File G-1101C-63/1558561 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 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. McGinness and G. Chaney shall now each be compensated for one hundred ninety-two (192) hours at their respective straight time 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.

On February 10, 2011, the Carrier sent Notice to General Chairman Wayne Morrow regarding the Carrier's intent to use outside forces to perform work upon the Council Bluffs Service Unit. The parties met on March 17, 2011.

The Organization filed its claim on July 26, 2011, alleging that the Carrier violated Rule 1(B) of the Agreement when between June 1, 2011 and July 15, 2011, the Carrier had Razorback Rail Services and R. J. Corman Railroad Services repair a slide area at MP 36.5 near Melcher, Iowa on the Trenton Subdivision. The Organization argued that each contractor had one employee who used track-hoes to perform the relevant work, and each employee worked eight hours per day for 24 days to complete this work. The Organization requested that Claimants must be compensated for the number of hours worked by the contractors.

The Carrier's Engineering Supervisor denied the Claim on September 16, 2011 and indicated that the Carrier had properly notified the Organization of the relevant work. Manager of Track Projects Gary L. Dein indicated that Notice was served to the Organization that the Carrier was forced to use outside forces because it did not have the equipment necessary to perform the work at that time and location.

According to the Organization, the Carrier had customarily assigned work of this nature to BMWE employees. It further argues 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 the contractors is within the jurisdiction of the Organization and, therefore, Claimants should have performed said work. Because the Claimants were denied the right to perform the work, the Organization argues that they should be compensated for the lost work opportunity. 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 required the use of equipment that the Carrier did not have at that time. Under the specific language of the Scope Rule, the Carrier had the right to use outside

forces under such circumstances and the relevant 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.

We note that 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.**
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> **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.**
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> **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.**
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> **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."**

Further, the Berge-Hopkins letter indicates as follows in relevant part:

> **"The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees."**

We have carefully reviewed all the evidence regarding whether the Organization has proven that the relevant work belongs to BMWE employees. The Organization was unable to rebut the Carrier's evidence that the work performed by Razorback and Corman was necessary because the Carrier did not possess the necessary equipment. 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 the contractor and its equipment did not violate the Agreement. The Agreement specifically permits the Carrier to contract out work customarily performed by its own employees when the relevant equipment is required and not within the control of the Carrier.

Further, the Berge-Hopkins Letter does not change the result of this case. As indicated by Referee Gerald E. Wallin in Third Division Award 40802:

> **"Our careful review of the so-called Berge-Hopkins December 11, 1981 Letter of Understanding shows that it speaks in general terms. However, the second paragraph of Scope Rule 1(B) recognizes five specific situations in which the Carrier is permitted to contract out work otherwise reserved to scope-covered employees in non-emergency circumstances. One of those exceptions permits the contracting of work when the Carrier does not own specialized equipment. The equipment ownership exception does not require the Carrier to try to lease equipment for operation by its forces. It is undisputed that the**

> **Carrier did not own any off-track cranes. In addition, there is no proven contention that Carrier forces were qualified to operate such crane equipment.**
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> **The clash between the general language of the December 11, 1981 Letter of Understanding and the specific language of Scope Rule 1(B) requires an interpretation by the Board. Traditionally, such conflicts are resolved in favor of the specific terminology. Accordingly, we find that the specific language of Scope Rule 1 prevails over the general language of the Berge-Hopkins December 11, 1981 Letter of Understanding that may be in conflict."**

Based on the evidence, as well as the above-cited precedent, we cannot find that the use of the contracted equipment violated the Agreement. The burden was on the Organization to prove that a violation occurred, and it failed to do so. The Board concludes that the Notice was proper and that it was appropriate for the Carrier to contract out the work. Further, we cannot find that the Berge-Hopkins Letter is determinative. Therefore, the instant claim is 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 42490, DOCKET MW-41970, AWARD 42492, DOCKET MW-42055,
AWARD 42494, DOCKET MW-42058, AWARD 42496, DOCKET MW-42094
(Referee Steven M. Bierig)

In these cases, 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, in this instance, the Carrier did not comply with the 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 had established an exception allowing it to contract out the claimed work. In these cases, the Majority incorrectly made the determination that the Organization was unable to overcome the Carrier's defenses which were belatedly referenced. 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.

The Majority further erred when it cited Award 40802 for the proposition that Appendix 15 does not change the results of these cases. For the reasons outlined in the Organization's dissent to Award 40802, it is palpably erroneous and should not have been cited as precedent. Moreover, reliance on the opinion of the Board in Award 40802 ignores the more recently established on-property precedent holding that Appendix 15 has continued applicability and must be applied in contracting out of work disputes. Within Awards 41102, 42419, 42423, 42427, 42429, 42435, 42437 and 42438, the Board held that Appendix 15 creates certain obligations and requirements for the Carrier prior to contracting out work reserved by Rule 1B of the Agreement. These obligations include the obligation to attempt to procure rental equipment and the obligation to reduce the incidence of subcontracting. Said awards further held that the Carrier's failure to make its own equipment available or to procure rental equipment violated the Appendix 15 obligation to reduce the incidence of subcontracting; and failure to schedule work when men and equipment were available violated the Appendix 15 obligation to reduce the incidence of subcontracting. Specifically, Awards 42423 and 42429 held:

AWARD 42423:

> "*** The Board further notes that Carrier asserted at conference the exception for contracting out the work was due to time requirements which are beyond the capabilities of the Carrier's forces to meet yet, as observed by the Organization, the Notice was issued in January but the work in question did not occur until the following October and November. ***
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> It is evident from the foregoing findings that the initial exception cited by Carrier permitting it to utilize outside forces to perform the scope covered work in question was a circumstance of Carrier's own making as the work in question could have been scheduled at a time when maintenance of way forces were available to perform the work. It is further evident that not scheduling the work in question at a more propitious time, Carrier failed to adhere to the pledge set forth in Appendix 15, to assert a good faith effort to reduce the incidence of subcontracting and increase the use of its maintenance of way forces."

AWARD 42429:

> "*** The record evidence before us clearly proves that Carrier's inability to utilize its own maintenance of way employees was due directly to decisions of its own making to wit: poor planning exemplified by transferring its own snow removal equipment to other of its property locations; and its failure to comply with the pledge specified in Appendix 15 that in the absence of owning the proper equipment to perform the work as indicated/described in the 15-day advance Notice, that it would rent the necessary equipment."

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