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

Award No. 42583
Docket No. MW-42385
17-3-NRAB-00003-130398

The Third Division consisted of the regular members and in addition Referee Robert A. Grey when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference**
(
(Union Pacific Railroad Company [former Southern Pacific Transportation Company (Western Lines)]

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Jammie's Environmental) to perform routine Maintenance of Way Track Sub-department work (clean-up debris and move old steel) on tracks and right of way roads within the yard located between Mile Posts 618 and 621 in Springfield, Oregon on May 21, 2012 (System File T-1259S-541/1574791 SPW).

(2) The Agreement was violated when the Carrier assigned outside forces (Jammie's Environmental) to perform routine Maintenance of Way Track Sub-department work (cut and remove scrap, clean ditch line, stockpile and organize material) on tracks and right of way roads within the yard located between Mile Posts 629 and 652 in Eugene, Oregon on May 22, 2012 (System File T-1259S-542/1574793).

(3) The Agreement was further violated when the Carrier failed to furnish the General Chairman a proper advance notice of its intent to contract out the work referenced in Parts (1) and (2) above and when it failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 59 and the December 11, 1981 National Letter of Agreement.

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants B. Prophet and C. Jones shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and for eight (8) hours at their respective overtime rates of pay.

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants B. Prophet and C. Jones shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and for six (6) hours at their respective overtime 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 met its burden to prove that the contracted-out work which is the subject of this dispute is arguably scope-covered pursuant to the Agreement. Therefore, the Carrier was required to provide notice in advance of contracting-out, even if it is work not performed exclusively by Organization members. See on-property Third Division Awards 18714, 29158, 28989, 36515, 39708 and 40932.

Awards on this property have ruled notice stating "as needed . . . at various locations in California and Nevada" to be sufficient, and notice stating "on an as needed basis" on a number of named subdivisions to be sufficient, for similar notice periods of time. See Third Division Awards 37852 and 40932, respectively. Therefore, the notice in this case, stating "various locations on the Portland Service Unit," was sufficient.

The Carrier met its burden to prove the existence of a mixed practice. Therefore, the Carrier did not violate the Agreement. See on-property Third Division Awards 40932 and 29158.

None of the above-cited on-property Awards are palpably erroneous. The Board notes that neither party dissented from any of them. Nothing in the record provides a basis for deviating from the on-property precedent established by these Awards. They will therefore be followed in the interest of stability.

In light of the above, the Board does not reach the parties' other arguments.

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 19th day of April 2017.

LABOR MEMBER'S DISSENT
TO
AWARD 42574, DOCKET MW-42066, AWARD 42581, DOCKET MW-42367,
AWARD 42583, DOCKET MW-42385, AWARD 42584, DOCKET MW-42388,
(Referee Robert A. Grey)

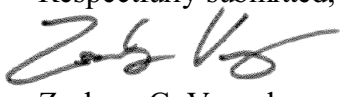
In these cases, the Majority erred on multiple accounts in its decisions. However, there are two (2) serious errors that must be specifically addressed regarding the precedent cited by the award. First, the Majority's reliance on Awards 37852 and 40932 was improper. Initially, it must be noted that neither of the awards quoted or contained the exact language of the notification letter. Rather, the awards summarized the notification letter from the on-property handling of their respective cases. Accordingly, the Majority's holding that those notifications were sufficient to allow it to accept the ones in these cases was based solely on speculation.

Notwithstanding, when accessing the archived files, the Majority's reliance on Awards 37852 and 40932 is even more problematic. In Award 37852, the Carrier relied on a statement from a manager paraphrasing a notification which allegedly applied in that case. Notably, the notification letter itself was never included within either parties' submission or within the on-property handling. Accordingly, any reliance on Award 37852 would be improper. The Majority's reliance on Award 40932 was also improper. Award 40932 also paraphrased a notification letter from the on-property handling of that case. Upon reviewing the notification letter that was paraphrased, it is substantially different than the ones involved herein as it was for a six (6) month period and provided specific mile posts on subdivisions and leads where the work would occur. Accordingly, the Majority's reliance on Awards 37852 and 40932 was improper.

The Majority also erred when it cited Awards 29158 and 40932 within its holding that the Carrier established a mixed practice allowing it to contract out the claimed work. Both awards were sustained in favor of the Organization and do not support the Majority's findings. Award 40932 specifically rejected the Carrier's mixed practice defense and held that the Carrier's voluminous documentation of an alleged practice of contracting out the claimed work was challenged and effectively countered by the Organization. Accordingly, the Majority's reliance on Awards 29158 and 40932 was improper.

For the above mentioned reasons, it is clear that the Majority erred in rendering its decision. Therefore, I respectfully dissent.

Respectfully submitted,



Zachary C. Voegel
Labor Member