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

Award No. 43578
Docket No. MW-42359
19-3-NRAB-00003-180465
NRAB-00003-130366

The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman 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 (Snelton Construction) to perform Maintenance of Way and Structures Department work (remove crossing panels and grade track) at approximately Mile Post 14 in the Proviso Yard on May 3, 2012 (System File J-1201C-357/1573085 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 J. Alexander, H. Fraction, R. Perez and A. Martinez shall now '* each be compensated for the hours of straight time and any hours of overtime that the contactors' (sic) forces spent performing this work 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.

On December 27, 2011, the Carrier sent the Organization the following Notice of Intent to contract work:

"PLACE:	**At various locations on the Chicago Service Unit.**
SPECIFIC WORK:	**Providing any and all fully operated, fueled and maintained front end loader(s), back hoe(s) and bulldozer(s) to assist with installing turnouts and road crossing installation commencing January 1, 2012 thru December 31, 2012."**

Pursuant to the Organization's request, the parties held a conference on January 10, 2012; it was confirmed in Organization correspondence dated January 25, 2012. The parties were unable to resolve the matter.

On May 3, 2012, the Carrier utilized a contractor, Snelton Construction, to remove crossing panels and grade track at approximately Milepost 14 in the Carrier's Proviso Yard. The Organization asserts that the contractor had three operators and one foreman who each worked 11 hours, utilizing two John Deere 644 swing loaders and a Bobcat.

The Organization contends that the grading/track work performed by the contractor's employees is reserved to its members pursuant to the scope rule of the parties' Agreement, and the Carrier violated the Agreement by instead assigning the work to the contractor's employees.

The Carrier points out that even if the work is Scope-covered, the parties' Agreement gives it the right to use outside forces when proper advance notice is given and at least one of five listed exceptions in Rule 1(B) is present. The Carrier asserts that its Notice did meet the contractual standards, and it also satisfied an exception because it did not have the necessary equipment at the time and place required to perform the work, that it, it was "not adequately equipped" to perform the work. The Carrier also notes that the Claimants were fully employed at the relevant time and did not suffer a loss, so, it states, they were entitled to no remedy.

The Board is persuaded that the work at issue is reserved to the Organization's members. Thus, the next consideration is whether Carrier afforded the Organization "proper" Notice. That is a threshold requirement which must be met before the Board can consider whether the contracted-out work fell within the limited contractual exceptions permitting Carrier the latitude of not utilizing its maintenance of way forces to perform the disputed work.

Although, as the Carrier states, the Organization challenged the Notice because it did not provide specific information—such as the specialized tools required, how many employees would be involved, total number of man hours and work locations—which are not specifically required by the Agreement, the Organization primarily argued that the Notice was defective as it was completely devoid of any reason for the proposed contracting out, nor did it specify any exception relied upon by the Carrier.

The record shows that the Carrier did not provide any specific statement concerning its alleged lack of the necessary equipment until August 2, 2012, in its response to the instant claim. At that time, a Carrier manager informed the Organization that the work was part of a crossing rehab project and the needed equipment was being used elsewhere so it was necessary to utilize the contractor to assist.

The plain contractual language requires that the Notice set forth the reasons underlying the Carrier's intent to subcontract the work at issue. The Notice does not provide any reason for the proposed contracting, and it is apparent from the on-property record that the Organization raised this question at the conference which occurred shortly after the Carrier issued the Notice. However, the record includes no evidence that the Carrier provided a specific reason until after the instant claim was filed, at which point a Carrier manager sent the Organization a message indicating that the work required specialized equipment the Carrier did not own. Obviously, such notice, not provided until after the work had already been performed, falls far short of the contractual requirement that the Carrier provide reasons in its initial Notice. That information is critical for the parties to fulfill the additional contractual requirement set they engage in good-faith discussions to attempt to resolve the situation. See Third Division Award 42419. We therefore sustain the claim due to the insufficiency of the Notice, without reaching the merits of the Carrier's claimed exception.

As for the remedy, the Carrier asserts that the Claimants are due no monetary compensation, as, and the Organization does not dispute, they were fully employed at the time of the instant subcontracting. We have examined the numerous cases cited by the parties concerning this issue and are aware of the conflicting holdings concerning whether fully-employed claimants are entitled to monetary compensation. While, as the Carrier states, there are numerous awards holding that no compensation is due fully-employed employees, as it would represent a windfall, see, for example, Third Division Award 31016, we agree with the line of awards holding that the subcontracting represents a lost work opportunity and compensation for the employees, see Third Division Awards 40377, 40921, and 40964, and that a financial penalty is necessary to prevent the Carrier from subcontracting with impunity, see, for example, Third Division Award 42422. The Claimants shall be made whole for the actual number of hours of work performed by the contractor, at the Claimants' respective rate of pay.

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 27th day of March 2019.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARDS 43577, 43578, 43582, 43589 and 43592

(Referee Jacalyn J. Zimmerman)

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 awarded monetary damages to fully employed Claimants allowing for a windfall. 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.

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.

Additionally, 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 Jeanie Arnold

Katherine N. Novak **Jeanie L. Arnold**
March 27, 2019