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

Award No. 43580
Docket No. MW-42371
19-3-NRAB-00003-180467
NRAB-00003-130386

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 track panels and grade track) in the vicinity of Mile Post 12, Yard 2 in the Proviso Yard on May 7 and 8, 2012 (System File J-1201C-358/1573860 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 aforesaid work or make a good faith attempt to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 1 and Appendix '15'.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants R. Delgado, H. Fraction, D. Johnson and A. Martinez shall now each be compensated at their respective straight time and overtime rates for an equal and proportionate share of all man-hours worked by the outside forces performing the above-

described work beginning on May 7, 2012 through and including May 8, 2012."

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 instant matter arises out of the Carrier's decision to utilize the services of a contractor, Snelton Construction, to remove track panels and grade track at approximately Milepost 12, Yard 2, in the Carrier's Proviso Yard. The Organization contends that this work is reserved to Maintenance of Way employees, and that the Carrier violated the parties' Agreement when it failed to assign this work to them. The Organization adds that the Carrier further violated the Agreement when it failed to provide the Organization the Agreement-required Notice of its intent to subcontract the work.

The Carrier maintains that it was faced with an emergency situation caused by a derailment, and therefore could, consistent with the Agreement, take whatever steps were necessary to best resolve it.

While there is no dispute that the Carrier suffered a derailment, it occurred in a yard rather than on main line track. There are over 100 tracks in this yard, and the Carrier has not demonstrated how this particular derailment had an immediate impact on its operations. There is no evidence here of a shutdown or slow order, such as

generally occurs on main track derailments, which interrupted service to customers. While we do not dispute the Carrier's need to restore the track to full operation so that it could continue to build train consists in a timely manner, the record does not establish that this situation qualified as the type of emergency which excused it from complying with its obligations under the Agreement. It has violated the Agreement as alleged.

This raises the question of the appropriate 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 AWARD 43580 and 43584

(Referee Jacalyn J. Zimmerman)

The Carrier can respect the Majority's conclusion to the merits of the case. However, it takes exception to the remedy awarded. 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.

Without a doubt, 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

Jeanie L. Arnold

Jeanie L. Arnold

March 27, 2019