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

Award No. 43584
Docket No. MW-42416
19-3-NRAB-00003-180471
NRAB-00003-140014

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 Carrier violated the Agreement when it assigned outside forces (Hulcher Services Inc.) to perform Maintenance of Way Track Department work (repair/prevent track washouts and debris over the track structure) near Mile Post 42.25 on the Montgomery Subdivision beginning on June 16, 2012 and continuing through June 28, 2012 (System File B-1201C-121/1575253 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 R. O'Neil, S. Campbell, E. Nelson, C. Gronewold, J. Grunewald, A. Haupt, S. Pettis, B. Bass, T. Fogarty, D. Witt, T. Flatua, A. Hartman, B. Daniels, J. Popp, D. Clough, R. Melhiem, E. Portner, E. Esser and D. Isaacson shall now '… each be compensated for the lost opportunity to work, All man/hours of

> **straight time, overtime and double time, divided equally per claimant at "'the appropriate rate that the contractor's employees performed Maintenance of Way Work.' (Emphasis in original)."**

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 January 17, 2011, the Carrier sent the Organization a 15-day notice of its intent to contract out work as follows:

Location:	**Various locations on the Railroad's Twin cities Service Unit**
Specific Work:	**Providing fully operated, fueled and maintained equipment to assist Railroad forces in performing work on an as-needed basis.**

The parties thereafter held a conference, but there is no evidence that they discussed the specific matters at issue here.

The instant claim asserts that beginning on or about June 16, 2012 and continuing through June 28, 2012, more than one and one-half years after the Carrier issued the purported Notice, the Carrier assigned outside forces (Hulcher Services Inc.) to perform Maintenance of Way and Structures Department work of repairing a washed out track area, and associated duties, near Mile Post 42.25 on the Montgomery Subdivision. The Organization maintains that, pursuant to Rule 1--Scope of the parties' Agreement, this work was reserved exclusively to its members. The Organization

contends that two contractor employees worked 12 hours on April 17, 2012 and 14.5 hours on April 18, 2012.

The Carrier asserts, however, that it possesses the right, under Rule 1.B of the parties' Agreement, to nevertheless utilize outside forces when proper advance notice is given and where at least one of the five listed exceptions of Rule 1(B) is present. The Carrier maintains that it provided the Organization proper, advance written notice, although such notice was not required because it was faced with an emergency situation. The Carrier states that the track at the location at issue had been compromised due to washouts and falling embankments, which directly affected the movement of traffic and impeded its ability to provide service to its customers. It states that it did not possess the equipment necessary to restore the tracks.

The governing Agreement provisions are as follows:

"Rule 1—SCOPE

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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…

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 instated 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 . . . (See Appendix '15 ')

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APPENDIX '15'
December 11, 1981

*** * ***

Dear Mr. Berge:

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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.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. 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."

The Board is persuaded that the work involved is that which is traditionally performed by employees represented by the Organization. It is apparent that the Notice issued on January 17, 2011 falls far short of the contractual requirements, see Third Division awards 42542, 42548, 42551, 42552, 42554, and 42556. Thus, the question is whether the Carrier has established the existence of an emergency which excused it from the notice requirement.

The Carrier primarily asserts that it was faced with an emergency because it did not possess the specialized equipment necessary for it to remedy the situation and/or was not adequately equipped to handle the work, in the shortest time possible. However, such conditions do not, in and of themselves, establish the existence of an emergency. Rather, they are among the contractual exceptions that allow the Carrier to subcontract, but only if it has first provided a proper Notice.

Since we conclude that there was no such Notice, the Carrier can prevail only if it has established the existence of an emergency. As the Organization states, an emergency arises as the result of unanticipated circumstances which require an immediate response, and the fact that work needs to be performed does not establish the existence of an emergency. The Carrier does not describe any particular event which suddenly created the washout situation; from the record, it appears to have been a condition that developed over time. In addition, although the Carrier generally states that it needed to restore the track to service to avoid service disruption, there is no evidence, such as a shutdown or slow order, of an actual service disruption. 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. The Carrier has violated the Agreement as alleged.

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. The Carrier maintains that Claimants Esser and Hartman even worked on this project.

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