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

Award No. 43589
Docket No. MW-42467
19-3-NRAB-00003-180476
NRAB-00003-140074

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 assigned outside forces (Hulcher, Inc.) to perform Maintenance of Way and Structures Department work (operate vacuum truck to clean sand from tracks) at various locations within the Altoona Yard and surrounding area on September 18, 19 and October 1, 2, 3, 4 and 5, 2012 (System File B-1201C-139/1578542).

(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 M. Dobson and M. Kuberra shall now '* each be compensated for an equal share of all man/hours, reportedly one hundred thirty (130) man/hours, that the contractor's forces spent performing their Agreement covered work, at the applicable rate 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 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.**

A conference was requested and held.

On September 18, 19 and October 1, 2, 3, 4, and 5, 2012, the Carrier utilized a contractor (Hulcher, Inc.) to operate a vacuum truck to clean sand from tracks at various locations within the Carrier's Altoona Yard and the surrounding area. The Organization maintained that this work is exclusively reserved to its members and the Carrier failed to comply with the contracting out provisions of the parties' Agreement. In addition, the Organization disputes the Carrier's contention that the vacuum truck is a specialized piece of equipment the Carrier does not own.

The applicable 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:

*** * ***

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 traditionally performed by the Organization's members. The Organization contends that it has met its burden of proof in this matter because the Carrier has not met the notice requirements set forth in Appendix 15 to the parties' Agreement. We agree.

The specific language of the Notice at issue, which states that it covers "various locations on the Railroad's Twin cities Service Unit," and intended to have the contractor provide "fully operated, fueled and maintained equipment to assist Railroad forces in performing work on an as-needed basis" has been rejected in numerous Third Division awards, including 42551, 42552, 42554, and 42556.

The Notice does not even identify the work to be performed, and, as the Board noted in the cited Awards, it provided no time frame during which the work would be performed. If accepted by the Board, it would be tantamount to allowing the Carrier to contract out all of the Organization members' work at any time in the future. It is virtually no notice at all. We agree with the reasoning in those Awards that this cannot be what the parties intended in the subcontracting provisions of their Agreement.

We therefore conclude that the Organization has met its burden of proof. The claim is sustained.

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