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

Award No. 43592
Docket No. MW-42522
19-3-NRAB-00003-140155

The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad 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 track switches) at various locations within the Hoffman Avenue Yard on November 21, 2012 (System File B-1201C-161/1577807 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 A. Stenen and E. Wirtz shall now '* each be compensated for an equal share of fourteen (4) 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 October 10, 2012, the Carrier sent the Organization a Notice of its intent to contract out work as follows:

"LOCATION:	**Various locations on the Twin Cities Service Unit**
SPECIFIC WORK:	**Providing fully fueled, operated and maintained Vac truck(s) for cleanup of spills, debris or other materials commencing November 1, 2012 thru December 31, 2013."**

The parties convened a conference on October 23, 2012, but the matter remained unresolved. In the on-property correspondence, the Organization asserted that the Notice failed to provide any contractually valid basis for the contracting, nor did the Carrier do so at the conference.

On November 21, 2012, the Carrier utilized a contractor, Hulcher, Inc., to operate a Vacuum Truck in the Carrier's Hoffman Avenue Yard. The Organization contends that the contractor used two machine operators to perform the work. The Carrier does not dispute that the work was performed as alleged by the Organization.

The Organization maintained that the Carrier subcontracted work exclusively reserved to its members and the failed to comply with the contracting out provisions of the parties' Agreement. The Organization contends that the Carrier maintains in its inventory the type of equipment utilized by the contractor to perform this work, and the Claimants were available and qualified to perform the work had it been assigned to them.

The Board is persuaded that the work involved is traditionally performed by the Organization's members. 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, and demonstrated that the Hulcher Vacuum Truck was a specialized piece of equipment the Carrier did not own, thus satisfying one of the listed exceptions.

The record includes statements from several Carrier Managers stating that the contractor possessed equipment the Carrier did not own, and/or that the Claimants were not qualified to operate the equipment. However, it is clear that this information was not provided until after the instant claim was filed.

The Board finds that 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

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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."

Contrary to the Carrier's assertions, the Board is persuaded that the work involved is that which is traditionally performed by employees represented by the Organization. We thus turn to the sufficiency of the Notice. The Organization contends that the Board should not consider the Carrier's argument that its actions fell within

the exception to Rule 1.B because the Carrier has not met the preliminary requirement that its notice comply with the contract, including Rule 1.B and Appendix 15. We agree.

The plain language of Appendix 15 requires that the Notice set forth the reasons underlying the Carrier's intent to subcontract the work at issue. No reasons are set forth in the Notice, and it is apparent from the on-property record that the Organization challenged the Notice's sufficiency on this basis. It is also 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 reason until after the instant claim was filed, at which point Carrier managers informed the Organization that the work required equipment the Carrier did not own and/or that the employees were not qualified to perform the work. 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. See Third Division Awards 41044, 42419. We sustain the claim on that basis.

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