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

Award No. 43618
Docket No. MW-44632
19-3-NRAB-00003-180082

The Third Division consisted of the regular members and in addition Referee Michael Capone when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division-(IBT Rail Conference
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it allowed outside forces to perform Maintenance of Way work (breakdown and storage of office modular systems) on July 14, 18, 19, 20, 21, 25, 26, 27, 28, August 1, 2, 3 and 4, 2016 and continuing at Amtrak's 30th Street Station in Philadelphia, Pennsylvania (System File NEC-BMWE-SD-5499 AMT).

(2) The Agreement was further violated when the Carrier failed to comply with advance notification and conference provisions in connection with the Carrier's intent to contract out the subject work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Marra, C. Pearson, J. Wasch, J. Gallucio, D. Kaercher, M. Oliveras, J. Cronon, B. Kilgore, K. Eichinger, M. Slivinski, K. Brooks, K. Nugent, R. Miller, S. Brennan, T. Watts, K. Ford and R. Hill shall be allowed an equal share of five hundred forty (540) hours for July 14, 18, 19, 20, 21, 25, 26, 27, 28, August 1, 2, 3 and 4, 2016 and an equal share of all hours worked by the outside forces beginning August 5, 2016 and continuing."

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 August 15, 2016, the Organization filed a claim asserting that the Carrier violated the Scope Rule and Article 1, Bridge Building and Track Departments of the Agreement when it permitted outside contractors to perform work reserved to employees holding seniority in the Maintenance of Way Bridge and Building Department without notifying the General Chairman in advance of its intent to contract out the work to a third party. The Carrier denied the claim on October 12, 2016. The record indicates that the Carrier denied subsequent appeals by the Organization and rendered its final written decision on June 19, 2017. The Organization rejected the Carrier's decision and filed its notice of intent with the Third Division. The claim is now properly before the Board for adjudication.

The following contract language from the Scope Rule is relevant to the resolution of this dispute and in pertinent part, reads as follows:

> **"In the event AMTRAK plans to contract out work within the scope of the schedule agreement, the Director-Labor Relations shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less that (sic) fifteen (15) days prior thereto.**
>
> **If the General Chairman requests a meeting to discuss matters relating to the said contracting transaction, the Director-Labor Relations or his**

> **representative shall promptly meet with him for that purpose. The Director-Labor Relations or his representative and the General Chairman or his representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Director Labor Relations may nevertheless proceed with said contracting, and the General Chairman may file and progress claims in connection therewith."**

The following provision from the Hazardous Building Material Survey & Abatement Plan for Exterior of Building (hereinafter referred to as the "Abatement Plan"), dated January 14, 2013, is relevant to the resolution of this dispute. Paragraph 5.5.2, in pertinent part, reads as follows:

> **"There is no furniture, partitions, or other significant quantities of moveable objects within the project area. However, any miscellaneous items in the area where work will be performed should be removed from the area prior to commencement of the LBP abatement."**

The Organization relies primarily on its argument that the Carrier failed to provide proper notice of its intention to contract out the "breakdown and storage of office modular systems" during its multi-year restoration project of the 30th Street Station. The Organization maintains that the first specific notice it received from the Carrier that contractors were being used to move the office structures was on November 15, 2016, four months after the work was performed. It argues that the record lacks any evidence of advance notice to the General Chairman regarding the Carrier's intent to permit contractors to perform the work. The Organization asserts that the Carrier's Abatement Plan that it received on March 24, 2014 does not constitute proper notice as defined by the Agreement and the historical practice between the parties. It contends that nothing in the Abatement Plan constitutes specific notice of the work the Carrier intended to contract out and that it cannot be expected to surmise from paragraph 5.5.2 that the contractors were performing the breakdown and storage of the office modules.

The Carrier maintains that it provided initial notice to the Organization on October 15, 2012 of its intent to use a contractor for several aspects of the construction project. It claims that the parties met several times after 2013 to discuss the work

being performed related to the window restoration portion of the project, which involved hazardous material abatement. The Carrier asserts that on March 24, 2014 it provided the Organization with the Abatement Plan, which specifically indicates that contractors would remove items in the work area prior to the abatement. The Carrier contends that it provided the Organization with the required advance notice and therefore the Organization had an opportunity to discuss any concerns related to this portion of the project.

The Board finds that the Organization has met its burden of proof that it did not receive advance notice, as required by the relevant section of the Scope Rule, of the Carrier's intention to contract out the dismantling and storage of the modular structures related to the window restoration portion of the construction project. The record does not contain evidence of proper notice or discussions regarding the work in dispute.

The documentary evidence in the record indicates that the Abatement Plan does not constitute proper notice. The historical record of contracting out notices from the Carrier contain specific descriptions of the work intended to be contracted out and are vastly different from paragraph 5.5.2 of the Abatement Plan, which we find to be vague and unspecific. It refers to "miscellaneous items" that "should be removed" without specifying the type of work required and who would remove such items. Further, paragraph 5.5.2 expressly states that "There is no furniture, partitions, or other significant quantities of moveable objects within the project area." which indicates that there was no plan to remove the modular structures. The record establishes that the removal of the office modular systems involved partitions and was work performed over the course of several days.

The Board does not find that paragraph 5.5.2 of the Abatement Plan constitutes proper notice when compared to previous contracting out notices in the record. In addition, the vagueness of the provision cannot be expected to satisfy the Scope Rule requirement of advance notice of a "contracting transaction" and deprived the Organization of the ability to meet and discuss the Carrier's intention to contract out the work as required by the Agreement. It is misleading to use a document, which is purported to constitute proper notice, wherein it states there are no "other significant quantities of moveable objects within the project area" only to later have contractors perform exactly that type of work.

There is ample arbitral authority that supports claims for compensation where the Carrier violates the Agreement when it fails to provide proper notice of its intent to contract out work. In these circumstances previous awards have held that a deterrent must be imposed to prevent flagrant violations of the notice requirements of a scope rule.

However, the Board finds that the record does not satisfactorily contain information from which a proper remedy can be determined. The record indicates that several Claimants were not available to work on days specified in the claim. We find that Claimants who were not available to work on those days shall not be entitled to compensation since they were not performing service for the Carrier.

Further, the record indicates that the hours of work performed by the contractor related to the removal of the modular system may not have been equivalent to a full eight hours per day. As such, we remand to the parties the determination of the actual hours of work performed to dismantle and store the modular structures in dispute. The Carrier shall present its documentation and calculations to the Organization in an effort to confirm the actual hours worked by the contractor in moving the modular system on the dates cited in the claim. The eligible Claimants shall be compensated at their respective straight time rate of pay for their portion of the total hours actually worked by the contractor.

AWARD

Claim sustained in accordance with the Findings.

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 17th day of May 2019.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 43618 – DOCKET MW-44632

(Referee Michael Capone)

The Carrier must vigorously dissent to this Board's findings in the above-referenced matter. The work at hand was a multi-year $52 million façade restoration project. There is no dispute that such a project may be performed by a contractor. The Carrier gave notice of the project and the parties engaged in multiple good faith discussions, including four in-person meetings. The parties reached an understanding on several issues.

The Carrier's notice specifically addressed window restoration (the portion of the work that necessitated moving cubicles), and the parties' discussions focused in on this area, with the Organization negotiating including interior window painting for its members. The Organization was well-aware that the windows needed to be contained, and clearly they needed to be accessed in order to contain them. Even if not absolutely evident based on common sense, the abatement plan provided to the Organization per its request laid this out explicitly.

The Carrier points out that one small part of this $52 million project was lead abatement on the windows and one small and incidental part of that work was the contractor moving objects to gain access to the windows. On a project of this scale, the Carrier cannot be expected to explicitly list out in a notice every small and incidental task. The value of the disputed work was just over .01% of the entire project. By this logic, the Board's findings would require the Carrier to potentially give notice on 10,000 aspects of a project. Such an absurd result should be avoided.

In support of the Carrier's position is Third Division Award 30633. There, the carrier gave notice of a $1+ million building rehabilitation project, and the organization claimed that the installation of metal doors was not part of the notice. The Board found that it was not necessary to specify that small aspect of the work as it was such a major project and doors on a building could be assumed. Similarly, in Third Division Award 25826, the Board found that a notice for "yard expansion" was sufficient to include new walkways as part of a $20 million project. In a similar case, Third Division Award 36852 found: "…the disputed work was incidental to

and an integral part of the overall siding construction project for which the Organization had been given notice and the requisite conference was held. The Organization apparently chose to waive its rights. Nothing in the parties' Agreement was cited that required the Carrier to piecemeal the project and deal with each of the constituent phases of the work as separate individual projects." The same result should apply in the instant dispute as it involves an even larger project and the accessing windows was incidental to the window work.

The Carrier takes issue with the Board characterizing the Carrier's position as the abatement plan constituting notice. To the contrary, notice was not required on such an incidental detail. However, discussions yielded information on this specific task such that the parties could delve even more into it if desired.

Therefore, this Board's decision is erroneous. For these reasons, we dissent.

Sharon Jindal
Katherine N. Novak

Jeanie L. Arnold
Jeanie L. Arnold

May 17, 2019