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

Award No. 43747
Docket No. MW-44956
19-3-NRAB-00003-180435

The Third Division consisted of the regular members and in addition Referee Richard K. Hanft when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
(
(Norfolk Southern Railway Company
(former Norfolk and Western Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Hepco) to perform Maintenance of Way and Structures Department work (yard track cleanup) at various locations within the Conway Yard on December 17, 28 and 29, 2015 and January 5 and 7, 2016 (Carrier's File MW-PITT-16-15-LM-078 NWR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notice of its intent to contract out said work as required by Appendix 'F'.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants W. Burton, J. Ervin and G. Beightley shall now each be compensated for forty-one (41) hours at the applicable straight time rates 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.

The instant dispute before the Board consists of two separate but intertwined subparts to the Claim that Carrier violated its Agreement with the Organization: First, that Carrier subcontracted work that the Organization alleges has been 'historically, customarily and regularly' assigned to and performed by the Track Sub-department of the Maintenance of Way and Structures Department employees to an outside Contractor (Hepaco) on December 17, 18 and 29, 2015 and on January 5 and 7, 2016 in violation of Rules 1, 2, 3 and 8 of the current collective bargaining agreement; and, also that Carrier failed to notify the General Chairman of its intent to contract out work within the Scope of the Agreement as required by Appendix "F" of the May 17, 1968 National Agreement and the interpretations and amendments thereto embodied in the December 11, 1981 National Letter of Agreement.

The Carrier's highest designated officer responded to the Organization's Claim by stating that: The work of cleaning up spilled lading was not work that is exclusively reserved to the BMWED craft; that the urgency of the situation required immediate action to address a serious safety concern that was not possible with the use of the Carrier's vacuum truck because it was not operable at the time; that no notice to the General Chairman was required under Appendix "F"; and, that there is no basis for any monetary remedy to the Claimants.

In this matter, because the Organization alleges the violations of its Agreement with the Carrier, it bears the burdens of proof and persuasion. The Board finds that the Organization has met those burdens and the instant Claim must therefore be sustained for the following reasons:

Addressing the first prong of the Claim relative to Carrier contracting work that the Organization avers has 'historically, customarily and regularly' been assigned to and performed by the Track Sub-department of the Maintenance of Way and

Structures Department employees, the record reveals that less than a month prior to an outside contractor being brought into the yard to suction up spilled lading with a vacuum truck the Carrier abolished a long-standing yard cleaner position and moved one of the two yard cleaners that had been stationed in the Conway Yard for a long, long time to another location. The remaining vacuum truck that was left stationed in Conway yard had been, the record indicates, inoperable for the better part of a year. The Organization submits that after the contractors performed yard cleanup for five (5) days over a three week period in December 2015 and January 2016, shedding light on the urgency of the situation, the Carrier's vacuum truck was repaired and used again by Maintenance of Way employees to resume yard cleaning.

Thus, Carriers arguments that the work was not contractually protected work that has been customarily, historically and traditionally performed by Maintenance of Way Employees or that the Brotherhood of Maintenance of Way Employees did not have a historical right to the work is without merit. Moreover, Carrier's argument that it lacked the equipment to perform the necessary work fails on two (2) counts: First, a month prior to contracting with Hepaco to perform the cleanup, Carrier had two (2) yard cleaners stationed at Conway Yard. It was Carrier's decision to transfer the only operable yard cleaner to another location and to abolish the yard cleaner position. Second, the December 11, 1981 letter From Charles I. Hopkins to O. M. Berge ("Hopkins/Berge Letter") provides for "procurement of rental equipment and operation thereof by Carrier employees." Carrier here could have brought the yard cleaner that it sent away from the Conway Yard back for this urgent clean up, could have repaired the inoperable yard cleaner prior to sending the other operable machine away or could have rented a vacuum truck for Maintenance of Way Employee use as assured in the Hopkins/Berge Letter. Carrier chose instead to contract the work to an outside contractor without conferring with the General Chairman in violation of the agreement.

Carrier's choice to contract the work to an outside contractor rather than utilizing Track Sub-department of the Maintenance of Way and Structures Department employees as it had in the past brings us to the second prong of the Organization's Claim. Appendix "F" of the May 17, 1968 National Agreement and the interpretation and amendments thereto embodied in the December 11, 1981 National Letter of Agreement provides, with mandatory language, in Article IV – Contracting Out:

> **"In the event a carrier plans to contract work within the scope of the applicable agreement, the carrier shall notify the General Chairman of the Organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto…"**

Here Carrier blatantly ignored Appendix "F". While the Carrier asserts that notice and discussion was not required in this instance because the work being contracted out was not Scope-protected work, the Board's foregoing decision that it was indeed contractually protected work obviates a sustaining award.

Finally, the Carrier avers that because there was no lost work opportunity and that Claimants were fully engaged in their regular assignments and were in fact working some overtime that the Organization failed to substantiate a basis for the requested monetary compensation.

Legions of Awards have established that whether or not the named Claimants were fully engaged does not suffice as a defense to awarding of monetary damages as a remedy when it is proven that Carrier violates the Agreement by contracting Scope-protected work belonging to Maintenance of Way and Structures Department employees.

In Third Division Award 30970, the Board found that "to reward the blatant disregard of the Rule 2 notice requirements which this record demonstrates with impunity would render that Agreement provision a nullity." Here too, Carrier blatantly disregarded its obligation to notify and confer with the General Chairman.

Third Division Award 27485 states, "Innumerable Awards have held that – absent emergency or total unavailability of qualified employees – where there is a contractual violation, a monetary remedy is appropriate."

Third Division Awards 27485 and 30970 are ample precedent for sustaining these Claims for monetary Damages.

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 16th day of July 2019.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 43747 - DOCKET MW-44956

(Referee Hanft)

Although we as the Carrier Members must respect the majority's conclusions in the award, we write in dissent to the majority's reference in the award to the so called "Berge -Hopkins Letter" dated December 11, 1981.

The December 11, 1981 Berge -Hopkins Letter has no force or effect on this Carrier. The applicable July 1, 1986 Schedule Agreement, as amended, makes no reference to and did not incorporate the December 11, 1981 Berge -Hopkins Letter in whole or in part. Moreover, Rule 59 (p) of the Agreement states in clear and unambiguous terms that "The rules contained herein constitute the sole agreement ... governing rules, working conditions and rates of pay."

The May 6, 1999 Implementing Agreement by which this Carrier applied the July 1, 1986 Agreement to the former Conrail agreement territory contained a "Section 10 - Printing Agreement" whereby the Carrier agreed to make available the July 1, 1986 Schedule Agreement book along with all other applicable side letters and national agreement provisions. This was accomplished by reprinting the July 1, 1986 Schedule Agreement book with all those applicable provisions included.

The BMWED concurred in all of the information that was provided in the reprinted agreement. In fact, the BMWED provided some of the information that was included in the updated agreement book. The December 11, 1981 Berge – Hopkins Letter was not included in this additional material that the parties, again, deemed to be the sum total of the agreement.

While some other Carriers have chosen to adopt some language from the December 11, 1981 Berge -Hopkins Letter in their schedule agreements, no such adoption of any aspect of the December 11, 1981 Berge -Hopkins Letter occurred on NS. There are no arbitration awards post May 9, 1999 that purport to apply any language from the December 11, 1981 Letter to NS. The mention of the December 11, 1981 Berge -Hopkins letter was inappropriate and should have no precedential value in any future case alleging its applicability to this property. To the extent that

the majority relied, in part, on language from a document that is not a part of the Carrier's schedule agreement and is inapplicable on this Carrier, we respectfully dissent.

Scott Michael Goodspeed

Scott Michael Goodspeed

Jeanie L. Arnold

Jeanie L. Arnold

September 4, 2019