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

Award No. 44491
Docket No. MW-44473
21-3-NRAB-00003-170609

The Third Division consisted of the regular members and in addition Referee Meeta A. Bass when award was rendered.

(Brotherhood of Maintenance of Way Employes Division
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 Article XV of the September 26, 1996 National Agreement when it contracted out Maintenance of Way and Structures Department work (brush and tree cutting) along the right of way at Mile Post 189 on the Mason City subdivision and heading southward into the Trenton subdivision beginning on April 1, 2016 and continuing and failed to afford furloughed employes M. Matthew and R. Schember the level of protection which New York Dock provides for a dismissed employe (System File B-16XVC-210/1660851 CNW).

(2) As a consequence of the violation referred to in Part (1) above, Claimants M. Matthew and R. Schember shall each be allowed New York Dock level protection benefits for a dismissed employe beginning on April 1, 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 April 1, 2016, the Carrier hired two (2) employes from outside contractor Utilco Services to perform brush and tree cutting work along the Mason City Subdivision. The Carrier did not recall the Claimants who were in furlough status to perform the work.

The Organization filed a claim against the Carrier alleging a violation of Rule 1C, which is the codification of Article XV of the September 26, 1996 National Agreement. Rule 1C reads:

> **"C. 1. The amount of subcontracting, measured by the ratio of adjusted Engineering Department purchased services (such services reduced by costs not related to contracting) to the total Engineering Department budget for the five (5) year period 1992-1996, shall not be increased without employe protective consequences. In the event that subcontracting increases beyond that level, any employe covered by this Agreement who is furloughed as a direct result of the increased subcontracting shall be provided New York Dock level protection for a dismissed employe, subject to the responsibilities associated with such protection.**
>
> **2. Existing rules concerning subcontracting which are applicable to employes covered by this Agreement shall remain in full effect."**

The Carrier denied the claim. The claim was conferenced on December 7, 2016. The parties were unable to reach an agreement, and the claim is now properly before this Board for resolution.

The issue presented before this Board is whether the Carrier violated Article XV when on April 1, 2016 when the Carrier assigned outside forces to perform the work of brush and tree cutting, which is customarily performed by Maintenance of

Way forces, and did not recall and assign the Claimants who were furloughed to perform such work, and as such must be provided with NYD level protective benefits of a dismissed employe

The Organization contends that the prerequisites necessary for an employe to receive the New York Dock protections under Article XV are that: (1) the subcontracting, as measured by the Article XV formula, has increased over the 1992-1996 base period and (2) the employe must be furloughed as a result of that subcontracting. The Organization asserts there is no dispute that the Carrier exceeded the Article XV contracting ratio for 2016, and the work occurred as claimed. The Organization also contends that the Claimants were furloughed as a direct result of an increase in subcontracting pursuant to the Article XV contracting ratio. The Organization argues that the Claimants were in furlough status because the Carrier contracted out this work instead of assigning the work to the Claimants. The Organization maintains that the Claimants were fully qualified employes were furloughed as a direct result of said increase in subcontracting and as a result, the Claimants are entitled to New York Dock level of protection for a dismissed employe.

The Carrier contends that the language of Article XV provides benefits to those employes who are furloughed as a direct result of increased contracting. The Carrier argues that the Claimants were not furloughed as a direct result of the contracting but rather as a direct result of production gang force reductions. The Carrier argues that there is no correlation between the force reductions of the production gangs and the disputed work herein. The Carrier contends that the Claimants were furloughed prior to the work taking place as a result of production gang force reductions. The Carrier asserts that the Organization never proved that the Claimants were furloughed as a direct result of this contracting event as claimed, and the claim should be denied.

The Board has carefully reviewed and considered the correspondence exchanged by the parties in connection with this dispute during the handling on the property, ex-parte submissions, and arguments. The Organization accurately states that the prerequisites necessary for an employe to receive the New York Dock protections under Article XV are that: (1) the subcontracting, as measured by the Article XV formula, has increased over the 1992-1996 base period and (2) the employe must be furloughed as a result of that subcontracting. The Board finds that the Carrier took no exception to the increased subcontracting over the Article XV ratio. The Board also finds that the Claimants were in furlough status prior to the contracted work beginning. However, whether or not the Claimants were furloughed

is not dispositive of the claim but its affirmative determination continues the contractual analysis of whether the furlough was a direct result of the increased contracting. The language of the parties' Agreement sets a very high causation standard, and the Organization has the burden of proof to establish the direct connection required by the Agreement. After consideration of this record, the Board finds insufficient evidence to support a finding that the furlough was a direct result of the increased contracting which would constitute a violation of Rule 1C.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of July 2021.

LABOR MEMBER'S DISSENT
TO
AWARD 44478, DOCKET MW-44322,
AWARD 44479, DOCKET MW-44323,
AWARD 44480, DOCKET MW-44324,
AWARD 44481, DOCKET MW-44325,
AWARD 44482, DOCKET MW-44326,
AWARD 44483, DOCKET MW-44327,
AWARD 44484, DOCKET MW-44378,
AWARD 44485, DOCKET MW-44398,
AWARD 44486, DOCKET MW-44564,
AWARD 44487, DOCKET MW-44525,
AWARD 44488, DOCKET MW-44526,
AWARD 44489, DOCKET MW-44527,
AWARD 44490, DOCKET MW-44618,
AWARD 44491, DOCKET MW-44473,
AWARD 44492, DOCKET MW-44474

(Referee Meeta Bass)

The Majority erred in its findings in these cases on multiple accounts. First, the Majority incorrectly held employes in their displacement period were not furloughed under the language of Rule 1C. Moreover, the Majority improperly held that the Organization failed to establish that the increase in subcontracting directly led to the Claimants' furloughs.

Initially, the Majority's holding:

> **"Under Article XV, a displaced employe has the right to bump or displace a junior employe within fifteen (15) calendar days of the date their position was abolished, or displaced. These displacement rights are not available to a furloughed employe. Here, the Claimant had been bumped from his position and had the ability to exercise his displacement rights, as evidenced by Exhibit C. The Board finds that the Claimant was not furloughed, and the Organization has failed to establish a violation of rule 1C."**

This holding ignores the language of the Agreement. Specifically, to reach this conclusion, the Majority failed to apply the clear language of Rule 14, which states:

"RULE 14 - <u>RECALL OF FORCES</u>

A. Employees shall provide the Carrier and General Chairman in writing of any change in mailing address and telephone number. Employees shall be notified in seniority order as their services are needed for bulletined positions for which no applications are received and, when so notified, must return to service

> "within ten (10) calendar days unless prevented by illness or excused by proper authority or forfeit their seniority. A letter or telegram, with copy to General Chairman, to the employee at his last address filed shall constitute proper notice.
>
> A furloughed employee notified under this rule must return to service within the 10 calendar days set forth for jobs in his seniority zone or forfeit his seniority. If an employee is called back for a job outside of his seniority zone and declines to return he shall not lose his seniority but shall forfeit the right to return on basis of seniority; that is, thereafter shall be recalled to service only for bulletined positions for which no applications are received in his seniority zone. A furloughed employee however retains the right to bid for bulletined positions anywhere in his seniority district.
>
> * * *
>
> D. Furloughed employees shall be called in seniority order for extra and relief work. First in the applicable zone and second in the applicable seniority district. **Furloughed employees, for purposes of this rule, do not include employees holding displacement rights;** however, this shall not preclude such an employee from exercising seniority over junior employees performing extra work and such exercise of seniority shall not extend or otherwise affect any displacement rights held. Junior employees cannot be displaced during the course of a day's work."

Initially, I must note that the clear language of Rule 14D specifically states employes with displacement rights are not "furloughed". However, the Majority has ignored the qualifying language of Rule 14D, which states "for the purposes of this rule". The logical application of that phrase is that for the purposes of every other rule, the inverse is true. To interpret Rule 14 any other way would be to interpret the contract to give no meaning to the above-quoted Rule 14. If employes holding displacement rights were not furloughed, as the Carrier was able to convince this Board to hold, then the above-quoted phrase is superfluous and has no purpose. Accordingly, the Majority erred when it found that employes holding displacement rights were not furloughed in the application of Rule 1C and essentially eliminated the phrase "for purposes of this rule". Moreover, for multiple decades in this industry, such a decision or position has never been asserted or upheld because the position is unrealistic. In this industry and others, you are actively employed or you are unemployed and even when you are unemployed; and within this industry, you retain the right to exercise your seniority when you are unemployed in accordance with the provisions of the Agreement. Moreover, the language was intended to provide unemployed employes - displaced, furloughed and the like - with work opportunities before contractors. The majority also erred when it held that the Organization was unable to establish that the furloughs were a direct result of the increased subcontracting. This is not an issue of first impression. Specifically, Interpretation No. 3 to Awards 36983 and 36984, held:

"*** The subcontracting increased (pursuant to the adverse inference) and, as conceded by the Carrier in its letters quoted above, the Claimants were furloughed after the subcontractor (Chemetron) began working. Given the increase in subcontracting beyond the specified levels in Article XV found pursuant to the adverse inference, we therefore find that had the Carrier not brought in an outside contractor to perform the welding work, Skogen and Anderson would have been available to perform the work and would not have been subject to furlough while the subcontractor was performing that work. Simply put, had the Carrier not brought in the subcontractor, there would have been more welding work to be performed by the Carrier's employees - here, Skogen and Anderson. Because of the adverse inference which shows that the amount of subcontracting increased beyond the levels specified in Article XV and because the Carrier brought in Chemetron as a subcontractor to perform the work prior to the Claimants being furloughed, we find that the furloughs of Skogen and Anderson were '... a direct result of such increased subcontracting ...' which entitles them to the '... New York Dock level protection for a dismissed employee, subject to the responsibilities associated with such protection' as specified in Article XV."

This decision was subsequently reaffirmed in Award 1 to PLB No. 6594, wherein the Board held:

"Carrier argues, however, that with respect to the issue of whether the Organization has established that Claimant was an employee 'who is furloughed as a direct result of such increased contracting,' the instant case is materially different from the Third Division Awards and requires a different result. **In the cases before the Third Division, the claimants were furloughed after the contacting (sic) began. In the instant case, Claimant was furloughed prior to the contracting. Citing several awards which it maintains support its position, Carrier contends that because Claimant was furloughed before the contracting began, his furlough cannot possibly have been a direct result of the contracting at issue.** Carrier further argues that the equipment used by the contractor was required for the job, that it was not equipment that Carrier had access to and that the contractor required that the equipment be operated by its own employees. Carrier cites several awards which found no Agreement violation from its having contracted such work in prior years and urges that Claimant's furlough could not have been a direct result of the instant contracting because Claimant could not have performed the work that was contracted out.

Before the Third Division, Carrier argued that the claimants could not have been furloughed as a direct result of the subcontracting because the contractor was on the property performing the contracted work long before the claimants were furloughed. Consequently, Carrier argued, the subcontracting and the furloughs were

"not related. The Third Division rejected the argument, reasoning that had the welding work at issue not been contracted out in excess of the amount stated in Article XV, there would have been more work to do and the claimants would not have been furloughed.

Taken together, Carrier's arguments before the Third Division and this Board would mean that a claimant could not establish that his furlough was the direct result of the excessive contracting where it occurred after the contracting began (the argument to the Third Division) or where it occurred before the contracting began (the argument to this Board). **Such a position would render Article XV essentially a dead letter as it would only allow N.Y. Dock protection when the contracting began on the very day that the claimant was furloughed. Such a position is inconsistent with the intent behind Article XV, which was a carefully crafted compromise intended to bring some order to the chaos of the parties' frequent battles and sometimes conflicting awards over subcontracting.**

Carrier argues that because Claimant's job was abolished before the contracting in question, the Organization cannot show that Claimant 'lost his job as a result of the contracting.' We do not agree. As we read Article XV, the words 'is furloughed' as used in Article XV, Section 1, refer to the employee's status, not to the act of abolishing the employee's job. A comparison of this case to awards relied on by Carrier illustrates why this is so. For purposes of illustration, we will refer specifically to Award No. 1 of the Arbitration Board, New York Dock Labor Protective Conditions Imposed by the Interstate Commerce Commission in Finance Docket 29430. That award held that employees who were in furlough status on the date of the consolidation of the Norfolk & Western Railway Company with the Southern Railway Company were not dismissed or displaced employees under the New York Dock II conditions. The Board there held that the consolidation of seniority lists of the two railroads was not a 'transaction,' and that, because the claimants were in furlough status as of the date of the consolidation, they were not displaced or dismissed as a result of the consolidation. The Board reasoned:

> [I]t must be concluded that merely because previously furloughed employees came to be placed on a consolidated seniority roster in connection with the consolidation of operations and services did not automatically entitle them to protective allowances pursuant to the New York Dock conditions. It must be presumed that even had the rosters not been consolidated the Claimants would nonetheless have

> "remained in a furloughed status with respect to work opportunities on their former railroads.
>
> When two railroads are consolidated, the resulting carrier will very likely eliminate positions rendered redundant by the consolidation. Under New York Dock, employees who lose their jobs or are otherwise placed in a worse position with respect to compensation and working conditions are entitled to protection. However, an employee who was furloughed by his former railroad cannot be said to have lost his job because of the consolidation; rather he lost his job due to work-force determinations made under normal, i.e. pre-consolidation, operating circumstances. Presumably, such employees would have continued on furlough status even if the consolidation had not occurred.
>
> **In contrast, in the instant case, if Carrier had not engaged in increased subcontracting and if Claimant could have performed the contracted work, then, in accordance with Interpretation No. 3, had Carrier not contracted out the work, there would have been work for Claimant to perform. Under such circumstances, Claimant's status as furloughed after the contracting is a direct result of the contracting."**

When you read these two (2) Awards together, the Boards held that the timing of the furlough was immaterial. Interpretation No. 3 to Awards 36983 and 36984 held that furloughing members after the work began did not preclude a finding that the furloughs were a "direct result of increase subcontracting." Notwithstanding, the Carrier shifted its argument before PLB No. 6594 and argued that because the employes were furloughed prior to the contracting, the Organization could not prove the causal connection between the contracting and furloughs. Once again, the Board rejected the argument. Both Awards held that had the Carrier not contracted out the work, there would have been work for Claimant to perform. Under such circumstances, Claimant's status as furloughed is a direct result of the contracting. In accordance with these awards, the Majority should have applied the findings of the Boards chaired by Arbitrators Malin and Benn and found that had the Carrier not contracted out the work in the claims herein "… there would have been work for the Claimants to perform. ***" and under such circumstances, the furloughs were a "*** direct result of the contracting."

For these reasons, I must dissent to the Majority's findings.

Respectfully submitted,

Zachary C. Voegel
Labor Member