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

Award No. 45229
Docket No. MW-46222
24-3-NRAB-00003-200568

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

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (LG Pike Construction) to perform Maintenance of Way Department work of loading and hauling Carrier owned track panels from the Newton Panel Plant in Newton, Kansas to Hutchinson, Kansas on November 27 and 28, 2018 (System File 2402-SLA8-196/ 14-l 9-0137 BNS).

(2) The Agreement was further violated when the Carrier failed to 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 than fifteen (15) days prior thereto regarding the work referred to in Part (1) above and when it failed to assert good-faith efforts to reach an understanding and reduce the amount of contracting as required by Appendix No. 8 and the December 11, 1981 National Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants T. Reasoner and T. Toot shall now be compensated twenty (20) hours each at their respective rates of pay for all hours worked by the outside forces during the claim period."

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 Organization filed the instant claim on behalf of the Claimants, alleging that the Carrier violated the parties' Agreement by subcontracting out Maintenance of Way ("MOW") Department work of loading and hauling Carrier owned track panels from the Newton Panel Plant in Newton, Kansas to Hutchinson, Kansas on November 27 and 28, 2018.

The Organization maintains this is work that is customarily performed by MOW forces. Further, the Carrier failed to provide proper notice to the General Chairman in advance of its plan to subcontract this work and failed to grant an opportunity to the Organization to discuss the Carrier's plans.

When the Carrier plans to contract out work customarily performed by MOW employees, the Carrier is required to notify the General Chairman in writing of such plans in compliance with Appendix No. 8, Article IV of the May 17, 1968, National Agreement and the amendment and interpretation embodied in the December 11, 1981, National Letter of Agreement which in pertinent part states:

APPENDIX NO. 8

ARTICLE IV - CONTRACTING OUT- NATIONAL AGREEMENT 5/17/68

In the event a carrier plans to contract out work within the scope of the applicable schedule 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.

If the General Chairman, or his representative, requests a meeting to discuss the matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement.

LETTER OF UNDERSTANDING DATED SEPTEMBER 28, 1956

In connection with the application of the above, the Carrier may, without conference with the General Chairman, arrange for the use of equipment of contractors or others and use other than Maintenance of Way employes of the Carrier in the performance of work in emergencies, such as wrecks, washouts, fires, earthquakes, landslides and, similar disasters."

"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.

Notwithstanding any other provision of the December 11, 1981 National Agreement, the parties shall be free to serve notices concerning the matters herein at any time after January 1, 1984. However, such notices shall not become effective before July 1, 1984.

"Please indicate your concurrence by affixing your signature in the space provided below.

Very truly yours,

/s/ Charles I. Hopkins, Jr. Charles I. Hopkins, Jr.

I concur:

/s/ O. M. Berge"

Based on the unique facts of this case, the Board concludes that the notice was deficient in that it failed to identify what specific work was being contracted, when the work would occur, where the work would occur, and who would be doing the work. Further, the overly broad notice impacted the ability of the General Chairman to conference this matter with the Carrier in violation of Appendix No. 8, Article IV of the May 17, 1968, National Agreement and the December 11, 1981, National Letter of

Agreement. To rule otherwise would allow the Carrier to evade its obligations under the parties' Agreement. Lastly, we remand the issue to the parties for a joint check of the Carrier's records to determine the number of hours worked by the contractors over the claimed dates. The Claimants shall be compensated at their respective straight time rate of pay for their portion of the total hours actually worked by the contractors.

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 28th day of March 2024.

Carrier Members' Dissent
To
Third Division Award 45225; Docket 45973
Third Division Award 45226; Docket 46072
Third Division Award 45229; Docket 46222
And
Third Division Award 45233; Docket 46310

(**Referee Melinda Gordon**)

In issuing these decisions, the Board found procedural errors in the Carrier's contracting notices, because the "anticipated work date" did not match the actual work dates. These cited Awards are not only palpably erroneous, but more so, are flagrantly fashioned and contrived by the Board based on ill-defined logic that the Carrier has no choice but to respond in dissent.

The Board has alarmingly raised concern with Carrier's practices pertaining to its use of contractors for various work performed. As stated on record in each of the on-property handling documents in these cases, Appendix 8 of the South Agreement outlines the parameters that the Carrier must follow to contract out work. Appendix 8 reads as follows:

APPENDIX NO. 8
CONTRACTING OUT

In the event a carrier plans to contract out work within the scope of the applicable schedule 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.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

Existing rules with respect to contracting out an individual properties may be retained in their entirety in lieu of this rule by an organization giving

written notice to the carrier involved at any time within 90 days after the date of this agreement.

LETTER OF UNDERSTANDING DATED SEPTEMBER 28, 1996

In connection with the application of the above, the Carrier may, without conference with the General Chairman, arrange for the use of equipment of contractors or others and use other than Maintenance of Way employes of the Carrier in the performance of work in emergencies, such as wrecks, washouts, fires, earthquakes, landslides and, similar disasters.

The amount of subcontracting by the Carrier, 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-year period 1992-1996, will not be increased without employee protective consequences. In the event that subcontracting increases beyond that level, any employee covered by this Agreement who is furloughed as a direct result of such increased subcontracting shall be provided New York Dock level protection for a dismissed employee, subject to the responsibilities associated with such protection. Existing rules concerning contracting out applicable to employees covered by this Agreement will remain in full effect. (Emphasis added)

As seen from the clear, unambiguous text of Appendix 8, when the Carrier exercises its discretion to use contractors, it must simply inform the General Chairman, in writing, of its intent to contract out work in advance, as far as practicable, with at least 15 days' advanced notice. After notice is given, if the General Chairman, or their representative, requests to meet with the Carrier to discuss the prospective contracting transaction, the Carrier is obligated to do so. Simply put, this concludes the requirements of the Carrier to contract out work. But, seeing as how the Board has failed to correctly interpret these parameters, a quick summation of the requirements is notated again, below:

1. **Provide the Organization with minimum 15-day advanced notice, in writing, of its intent to contract work.**

2. **Conference and discuss prospective intent to contract work with the Organization if requested by the Organization.**

In the cited Awards, the Board sustained the claims based on procedural objections raised by the Organization pertaining to the dates in which the contracted work actually took place. The rendered analysis by the Board is not only demonstrably incorrect, showered with misguided assumptions, but also fails to interpret and read the **plain text language provided in Appendix 8.** In these instances, the Carrier followed the parameters of Appendix 8. The Carrier notified the General Chairman, in writing, of its intent to contract work. The notices were subsequently conferenced with the General Chairman or his representative. In various instances, the contracted work commenced **after** the **anticipated** start date provided in the notices; meaning, the Carrier not

only gave a minimum 15-day advanced notice to the Organization, but more so, extended the 15-day advanced notice requirement.

By the Board's standard in these Awards, it flagrantly oversteps its authority by declaring that the Carrier was in procedural violation of the dates of **anticipated work** by work commencing **after** the anticipated start date listed in the notice. Let this notion resonate with the reader; the Board has overstepped its bounds by interjecting and directly inferring that the Carrier has somehow violated the terms of the existing Agreement for commencing contracted work beyond the anticipated start dates, yet utterly fails to identify how the terms of Appendix 8 have been violated. Here, the Board has not only misinterpreted the plain text of the Agreement but has alarmingly attempted to solidify its ill-informed decision into arbitral precedent.

Furthermore, in these Awards, the Board cites that the Carrier has failed to comply with the December 11, 1981, National Letter of Agreement, also known as the "Berge-Hopkins Letter." As stated, numerous times in the on-property handling stages of these claims, the "Berge-Hopkins Letter" does not apply.

The Berge-Hopkins letter established a process back in 1981 to address the Organization's concern that scope-covered work was being contracted out unnecessarily. The first step was to establish a National Committee to address specific instances of contracting out as identified by the Organization. Interestingly, the Organization failed to provide any information to the National Committee, according to Charles Hopkins' testimony before PEB 229. The next step was the Carriers' commitment to "assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable…" This language did not serve to prohibit contracting out or restrict the Carriers' right to contract out work. According to Mr. Hopkins, the author of the Berge-Hopkins letter, that letter was rendered obsolete by subsequent bargaining rounds, specifically 1984 and 1986, and most decidedly by Article XV of the 1996 National Agreement (PEB 229).

Article XV established a contracting ratio for each Carrier based upon the adjusted engineering department purchased services (as reduced by costs not related to contracting) and clearly states that "The amount of subcontracting on a carrier…will not be increased without employee protective consequences…" Article XV is clear that BNSF can contract out work, without penalty, so long as the amount of contracting does not exceed the established contracting ratio. (There are additional tests that must be met that are not relevant to this instant dispute.) In other words, Article XV continued a Carriers' right to contract out work up to the same levels they had been contracting previously, without penalty. Clearly, there is no longer any requirement to reduce contracting because Article XV clearly states otherwise. Yet, despite this clear set of facts, the Board incorrectly cites this as being a mitigating factor as to why the claims at hand were sustained. On balance, while the Board needlessly cited the Berge-Hopkins letter in its Awards, it should be noted that the Berge-Hopkins letter makes no reference to contracting notice requirements for an "actual start date" as opposed to an anticipated start date.

Even more worrisome than the sustainment of these Awards is the fact that the Board has isolated itself, declaring its opinion supreme and superior to that of its predecessors, on the very topic of contracting out work on this property through the channels of Appendix 8.

The issue of contracting work through Appendix 8 in these Awards are, by no means, cases of first impression. There is a long, steeped arbitral precedent set demonstrating the simple terms of Appendix 8 and the Carrier's right to contract out work.

By way of example, in Third Division Award 42518, Referee Wesman agreed with the Carrier's interpretation. This case pertained to contracting work **on this very property.** Interestingly enough, in this case, the Organization contested contracted work to which the Carrier sent notice to the Organization with an anticipated start date of May 1, 2009, but work actually commenced on May 27, 2009. Referee Wesman ultimately denied the Organization's claim in this award, stating, in pertinent part that:

> **The Board carefully reviewed the record in this case. It is certainly not a matter of "first impression"; similar cases have been decided over the years by this and other Boards and the majority of arbitral thinking is well settled on this topic. First, we do not find that the Carrier's notice was defective. It reasonably described the location and the work to be performed. That it was not, apparently, properly disseminated is not the Carrier's failure. (Emphasis added)**

To support this notion, the Carrier also urges the reader to turn to Third Division Award 44594 where Referee Darby held similar logic to Referee Wesman's from Third Division Award 42518. In this instance, again, the Carrier provided the Organization notice **on this very property** with an anticipated start date of July 1, 2016, but work actually commenced on July 18, 2016. Referee Darby ultimately denied the Organization's claim in this award, stating, in pertinent part that:

> **After a thorough review of the record, the Board concludes that the Organization has failed to establish that the Carrier's subcontracting of work contained in the LOI violated the parties' Agreement. The LOI specified in detail the work to be contracted and the reasons therefor. The Carrier met with the Organization to discuss the LOI and made good faith efforts to limit the subcontracting involved. Moreover, the record does not substantiate that any agreements were reached between the parties during conferencing as alleged by the Organization. Such contentions were rebutted by the Carrier and thus this Board has no evidentiary basis to accept the Organization's contentions in this regard. Finally, the Organization failed to rebut the Carrier's evidence showing that it has historically contracted out similar work in the past.**

See also, Third Division Award 42517.

The Carrier urges the reader to recognize that neither of these preceding awards require a start date to be identical to the anticipated start date in the notice given to the Organization.

It is abundantly clear that in each of the Awards administered by this Board, it has failed to enforce the plain language given through Appendix 8 of the Agreement. This is alarming for a myriad of reasons. If the Carrier were bound to adhere to the rendered decisions given through this Board's judgement, it would effectively cripple the Carrier's ability to contract work in order to effectively, sufficiently, and succinctly operate its business in an expedient and efficient manner.

The Carrier's business is a fast-paced, ever-fluctuating environment that requires real-time decisions to ensure the most proficient logistical operations are carried forward to nourish the national supply chain. The Board has been hoodwinked by the Organization into believing the notion that there are more compulsory stipulations mandated in Appendix 8 than there truly are.

By the Board's own judgement, it attempts to effectively cripple the Carrier's ability to do just that and eliminates any flexibility to commence contracted work **after** the anticipated start date given to the Organization in a written notice. In essence, this would eliminate the Carrier's ability to provide the Organization with System Notices and would have to, at every turn, "reset the clock" on providing the Organization with a new notice if the anticipated start date of the contracted work were to change. There are numerous amounts of both valid scenarios and reasonings that contracted work could potentially alter from the anticipated start dates. The Board's judgement effectively suffocates the Carrier's right and ability to do so. The terms of Appendix 8 are quite simple and clear as seen from above. The Carrier is obligated to follow the parameters of the Agreement—no more, no less—which is what it has done in each of these cases.

Additionally, it should be noted that historically speaking, the Organization has largely left the terms of Appendix 8 unchallenged due to its clear language. Not until recent years with changes in Organizational leadership has the body and text of Appendix 8 been challenged. To the Organization's dismay, its current and future leadership should take heed of its predecessors' knowledge on the topic—meaning, it would behoove them to accept the fact that Appendix 8 is clear and unambiguous. The text is simple, precise, and what the framers negotiated upon its adoption.

Adding to the fact that the Organization has historically left the terms of Appendix 8 unchallenged, is the simple reality that Contracting Notices and System Notices have been disbursed on-property for decades. Carrier's practice of distributing System Notices spans decades. System Notices are distributed to the Organization once a year and describe, in detail, various contracting work programs that will transpire across the Carrier's system in the subsequent year. Notably, the System Notice includes locations of where work is expected to transpire, but also **anticipated start dates**, not exact, of when work is expected to commence.

A prime example, ipso facto, is that since 2008, a total of approximately **337** System Notices have been distributed to the Organization, yet the Organization had not challenged the validity of these System Notices under Appendix 8 until recent years.

Year	System Notices Issued
2008	22
2009	22
2010	23
2011	19
2012	23
2013	21
2014	20
2015	20
2016	21
2017	20
2018	20
2019	22
2020	23
2021	20
2022	21
2023	20
Total	**337**

Stated again, the current Organization's predecessors, in early years, knew the limitations and simplicity defined in Appendix 8.

Furthermore, it is also supported and warned through arbitral precedent, that dangerous, ineffective, and incorrect arbitral precedent should not necessarily be followed. In Third Division Award 10063, Referee Daly stated, in part, that:

> **…precedent is not gospel—and relying entirely only on precedent can result in compounding mistakes and perpetuating error.**

To rely on the Board's faulty analysis in the Awards in these cases would most certainly be a dangerous precedent that would most certainly compound mistakes.

Through these Awards, the Carrier is quite concerned with what type of precedent and practice this would establish in the future. More troublesome is that through the Board's faulty logic they have either decided to overstep its bounds by attempting to implement precedent that is not supported by any clear terms of the existing Agreement through its failure and ignorance of analysis or has decided to intervene and enact a level of judicial activism that is unprecedented, unwarranted, unsupported, and unwelcome through the existing terms of the Railway Labor Act.

May it be abundantly clear, that the Board's Awards have the potential to enact spoken and unspoken, surreptitious, forceful, and rippling effects throughout not only the Carrier's property, but other Industry Carriers. The rendered judgements in these Awards are isolated from any supported Agreement language, but also stray from past arbitral precedent set. In each of these cases, the Carrier followed the terms of the Agreement. These Awards should serve as caution and prime example of the dangers and Awesome authority the Board is bestowed with. Its judgement

must be precise and accurate, for the misuse or misinterpretation may have primordial, spiraling effects that may not be able to be rectified. In short, the Board must avoid the Siren call to dispense unsupported language and analysis that are not confined to the specific texts of Appendix 8. The Carrier will continue, as it has historically done, to follow the terms of the existing Agreement to pursue contracting work.

For the foregoing reasons, we vigorously dissent.

Joe R. Heenan
General Director Labor Relations
Carrier Member

James C. Rhodes
Director Labor Relations
Carrier Member