Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35775
Docket No. MW-34435
01-3-98-3-52

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line 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 (Osmose) to perform bridge repair work on Bridge 57.72 on the Paynesville Subdivision on July 29, 1996 and continuing (System File R1.098/8-00075-007).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out said work as required by Rule 1.

(3) The claim as presented by Vice Chairman R. D. Iwen on October 23, 1996 to Manager-Engineering Maintenance E. E. Howard concerning the work cited in Part (1) above, shall be allowed as presented because said claim was not disallowed by Manager-Engineering Maintenance E. E. Howard in accordance with Rule 21-1(a).

(4) As a consequence of the violations referred to in Parts (1), (2) and/or (3) above, Messrs. R. D. Iwen, G. D. Day, J. M. Engebrigsten and A. D. Launderville shall each be compensated for five hundred fifty-eight (558) hours' pay at their respective straight time rates and two hundred forty-nine (249) hours' pay at their respective time and one-half rates with proper credits for benefit and vacation purposes."

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.

According to the text of the claim, the Carrier contracted for the repair of one of its steel bridges on the Paynesville Subdivision. The work consisted of the removal and replacement of steel flanges, cross braces, gusset plates, hook bolts and related repairs. It is undisputed that the Carrier did not provide the General Chairman with the requisite advance written notice of its plans to contract the work.

The Organization raised a procedural contention which, in its view, calls for allowing the claim as presented per Rule 21- 1 (a). This contention was made because the initial denial of the claim was issued by a Carrier Official other than one of the Officials authorized to receive claims.

This foregoing procedural contention is not new to these parties or the Board. The Board addressed the same issue in Third Division Award 27590 and rejected the Organization's position. The rationale expressed in that Award is still sound. By its explicit terms, Rule 21-1(a) does not require the Carrier's response to be made by the same Official that received the claim. Accordingly, we, too, reject the Organization's procedural objection.

Important material facts are established in this record because they were not refuted by the other party. In both of its initial replies on the property, the Carrier asserted that the work performed by the contractor was of a specialized nature requiring specific tools and equipment not possessed by the Carrier. The Organization never directly challenged this assertion. As a result, the record does not provide details about why the work was specialized and what tools and equipment were needed. Although the Carrier provided an explanation in its Submission, it constitutes new information which we are not free to consider.

The Carrier also asserted that the same contractor had performed nearly identical work on two other bridges in 1995 without objection by the Organization. The Organization apparently ignored this assertion.

The Organization waited until the last piece of on-property correspondence to assert that the work was the same type of work that the Claimants and other scope-covered employees had previously performed. The Organization listed four examples. It is noted, however, that three of the four took place in 1997, the year after the instant

claim arose. They do not, therefore, constitute proof of previous historical, customary or traditional performance of the work. The remaining example was a one-day project that occurred some four months prior to the claim dates. Nonetheless, the Carrier did not take exception to this assertion although it had more than two months to do so before the on-property record closed.

Subparagraph 1(c) of the Scope Rule suggests that the Carrier may contract out work requiring special skills its forces do not possess and/or special equipment it does not own.

Given the state of the record, we are confronted by an irreconcilable conflict of material fact. Distilled to its essence, the Organization's position is that the work is no different than what the employees have previously performed. On the other hand, however, we have the unrefuted fact that the work was specialized and required tools and equipment that the Carrier did not own. It is well settled that we lack the ability to resolve such factual disputes. Accordingly, we have no choice but to dismiss this portion of the claim.

There remains for consideration the alleged Notice violation. While subparagraph 1(c) of the Scope Rule suggests that specialty work may properly be contracted, the provision is quite clear that notice must still be provided to the General Chairman. Once again, however, we have the unrefuted fact that virtually the same work was contracted to the same contractor twice in the previous year without any objection whatsoever by the Organization. This evidence entitles the Carrier to assume the Organization has waived its right to notice until such time as the Organization clearly informs the Carrier otherwise. The record herein contains no such advisory by the Organization to the Carrier prior to the instant dispute. On this unique record, therefore, we do not find the Carrier's actions to have constituted a Notice violation regarding the instant claim. By this Award, however, the Carrier is put on notice that the Organization does demand its right to notice under subparagraph 1(c) of the Scope Rule for future similar bridge repair work.

Because of our determination on the merits of this claim, we do not reach the other issues raised by the parties.

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 24th day of October, 2001.