**CORRECTED**

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40346
Docket No. MW-40518
10-3-NRAB-00003-080374

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
( IBT Rail Conference
PARTIES TO DISPUTE: (
(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 to perform Maintenance of Way & Structures Department work (install box culvert) in the vicinity of Mile Post 5.3 on the Withrow Subdivision on August 21, 22, 23 and 24, 2006 (System File C-06-080-059/8-00228-132).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman an advance written notice of its intent to contract out said work and failed to enter good-faith discussion to reduce the use of contractors and increase the use of Maintenance of Way forces as required by Rule 1 and Appendix O.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Thomsen, J. Rodman, M. Wikstrom, A. Meixner, K. Christensen, Z. Ponzer and L. Kirckof shall now each be compensated for forty (40) hours at their respective 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.

This claim protests the Carrier's subcontracting of the installation of a new concrete box culvert on the Withrow Subdivision in August 2006 without advance written notice to the Organization. Internal emails reveal that in January 2006, the Labor Relations Department was instructed to issue contracting notices to the General Chairman for two projects to be completed that year - PAYN 2.23 - bridge replacement, and WITH 5.35 - install new concrete box pedestrian crossing (in the 3rd quarter of the year). These instructions explain the intent to use the the Carrier's sole source contractor to provide equipment and expertise not possessed by the Carrier and that Carrier forces would work in conjunction with the contractor on the culvert installation aspects of the project. Subsequent internal emails in mid-February indicate that there had been no response from the General Chairman. There is no evidence that such a notice was actually sent to the Organization, and the Organization denies receiving notice of the WITH 5.35 project. No subcontracting conference was held. It appears from the record that 13 employees were on site assisting in the completion of track work and the box culvert installation during the week in question.

Throughout the processing of the claim on the property, the Organization asserted that Carrier forces have installed identical or substantially similar culverts at other locations with Carrier owned or rented equipment. The Carrier questioned the validity of the claim based on the lack of proof of contracting, hours, and identity of work, evidence showing that employees have traditionally, historically, or customarily performed this work, and the fact that the Claimants were fully employed. It provided a summary of five examples of its use of a contractor for similar work (installation of concrete box culverts) in 2000 and 2001, indicating that BMWE-represented employees worked on site with the contractor for each of these replacement projects and that there is no information on claims filed by the Organization related to that work, in support of its contention that there is a past practice on this property indicating the Organization's acquiescence in the use of contractors to perform this type of work without notice. Later in the processing of the claim the Carrier asserted that no notice was required.

The Organization argues that this is fundamental B&B Sub-department work reserved by Agreement to BMWE-represented employees who have customarily, historically and traditionally performed it, and that notice was required (as acknowledged by internal emails) and not given, in violation of Rule 1, a fact that negates all other arguments posited by the Carrier, citing Third Division Awards 29547, 31386, 32704, 32777, 32861, 32863, 33480, 34052, 35571, 36527, 36571, 37001, and 37476. It notes that the evidence of practice submitted by the Carrier does not indicate if notice was given, conference held, or agreement reached with respect to those projects, so that no acquiescence can be shown. The Organization asserts that the above cases support the finding that the Carrier is a repeat offender with respect to its failure to give proper notice of subcontracting in violation of Rule 1, and that a monetary remedy is appropriate despite the Carrier's full employment defense.

The Carrier contends that the Organization failed to sustain its burden of proof of a violation in this case. It contends that there is absolutely no probative evidence that employees traditionally performed this type of work, and that assertions by the General Chairman are insufficient to meet the initial burden of establishing that the work is scope-covered, especially in light of its repeated denials of this fact and its evidence to the contrary, citing Third Division Awards 30815, 31889, 32351, 33478, 33516, 36425, 38014, 39708, and 39882. The Carrier asserts that the past practice in the record shows that it performed this type of work using contractors without providing notice to the Organization without objection over the years, and that such acquiescence and the fact that the Claimants were fully employed must defeat this excessive claim.

A careful review of the record convinces the Board that, while the Scope Rule is general in nature and the installation of box culverts is not specifically reserved to employees by Agreement, there is evidence in the record - aside from statements made by the General Chairman - that shows that BMWE-represented employees are involved in installation of box culvert work of similar magnitude, distinguishing this case from Third Division Awards 32351, 36425, 38014, 38086, and 39882. In fact, the Carrier's own summary of its past practice, and its admission that 13 BMWE-represented employees worked with the contractor in this case, in part, helping with the installation of the box culvert, establishes, at least, that there is a mixed practice of using contractors and BMWE-represented employees to perform this work. In such a case, where the work is arguably scope-covered, Rule 1(c) requires that advance notice and an opportunity for discussion be provided. See Third Division Award 37001. There is no evidence that notice was provided to the General Chairman covering this work, despite the internal direction in January that it should be, an admission by the Carrier that, at the very least, the Organization was entitled to notice of its intention to contract

out the WITH-5.35 project in issue, as well as evidence that such contracting, in fact, took place as planned.

The Board is unable to accept the Carrier's contention that its evidence establishes a past practice of contracting this work without notice, and proves the Organization's acquiescence to this practice, as was found in Third Division Award 33516. As noted above, the evidence does show a mixed practice with respect to contracting box culvert installation work, and that there was no record of any claims filed by the Organization with respect to these prior instances of contracting. However, as noted by the Organization, this summary does not establish that the Carrier failed to serve appropriate notice in each of these instances of contracting. More than an assertion of that fact is necessary to prove acquiescence, especially where the Carrier's internal correspondence indicates its understanding that notice is appropriate in this type of case.

Thus, although the Organization itself did not provide specific evidence from BMWE-represented employees of their historically performing installation of box culvert work, because the record contains sufficient evidence to establish a mixed practice and arguable scope-coverage, we conclude that the Carrier violated Rule 1 and Appendix O by its apparently inadvertent failure to serve written notice of its intention to contract the work in issue and an opportunity for good faith discussion with the Organization prior to the contracting. The absence of notice in this case distinguishes it from many of those relied upon by the Carrier including Third Division Awards 36425, 36697, 39708, and 39882; Public Law Board No. 2960, Award 149. This finding is based solely on the Carrier's notice violation.

With respect to the appropriate remedy, the Organization argues that the Carrier has been found to be a repeated violator of the notice requirements of Appendix O, citing numerous Awards involving this Carrier, albeit on a different property. However, in Third Division Award 35571 on this property, the Carrier was ordered to pay a monetary remedy to fully employed Claimants based upon "the persistent and apparently willful nature of [its] recidivist violation of the notice requirements of Appendix O." This conclusion is premised upon a long line of cases where the Carrier ignored its notice obligations based upon its assertion that such obligation was only required for work "exclusively" reserved to the Organization by Agreement, a position clearly and consistently rejected by the Board, but continually put forward by the Carrier despite the Board's clear admonition. The underlying rationale of these Awards is not applicable in this case. The record shows that the Carrier's failure to serve notice was inadvertent, that it understood its obligation and

directed that it be complied with, and that it never asserted its right not to serve notice based upon the exclusivity defense repeatedly rejected by the Board.

That being said, the fact that the Claimants were fully employed does not mean that a good faith conference held pursuant to proper notice could not have resulted in additional work hours on the project for BMWE-represented employees, especially since the Carrier clearly intended to utilize its employees alongside the contractor from the start and did so. Because the Carrier consistently asserted that the claim was excessive, and the record is unclear as to the number of hours worked by the contractor on the claim dates installing the culvert box, as well as the number of hours and work performed by employees on the project and the Claimants on those dates, we find it appropriate to send the matter back to the parties for resolution of a monetary sum based upon a joint check of the Carrier's records to determine the hours worked by the contractor, the availability of additional employees including the Claimants to perform the disputed work on those dates, as well as the ratio of employees to contractor on this and the other five examples of contracting this type of work contained in the record.

## 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 1st day of March 2010.