Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40800
Docket No. MW-39039
10-3-NRAB-00003-050463
(05-3-463)

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago
(& North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (E-80 Plus Constructors) to perform Maintenance of Way and Structures Department work (bridge bearing repairs, concrete retaining wall repairs and extending wing walls) at the bridge at Mile Post 32.51 near Wheatland, Iowa beginning on June 22, 2004 and continuing, instead of Seniority District B-4 employes L. Fisher, R. Hicks, B. Bucklin, W. Kress, R. Schoon, B. Wickham and D. Broich (System File 2RM-9585B/1407144 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants L. Fisher, R. Hicks, B. Bucklin, W. Kress, R. Schoon, B. Wickham and D. Broich shall now each be

compensated at their applicable rates of pay for an equal proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning June 22, 2004 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.

Although the wording of the Statement of Claim suggests routine bridge maintenance, the record establishes that the core focus of the dispute was the use of two crack repair technologies, i.e., epoxy injection to fill small, hairline-type cracks nd pressure grouting to fill cracks and voids exceeding one-half inch.

It is undisputed that the Carrier provided notice of its intent to contract out the overall project work involving eight concrete and/or stone bridges by letter dated May 18, 2004. A conference was held on May 18. Correspondence following the conference notes that the Carrier's intention to contract the work was based on the lack of skills and equipment to perform the crack filling. In addition, it is undisputed that the Carrier's forces were fully employed on other projects throughout the construction season and the work needed to be completed before the end of the season.

The Organization's alleged that the Carrier did not make a good-faith attempt to reach an understanding concerning the notice. It cited the so-called

Berge-Hopkins December 11, 1981 Letter of Understanding (LOU) in support of this allegation.

The LOU expresses a general assurance that carriers will make good faith efforts to reduce subcontracting and to use employees ". . . to the extent practicable, including the procurement of rental equipment. . . ." for operation by the employees. Other than the rental equipment reference, the letter provides no standards for determining where the line of practicality is to be drawn or, in other words, what is "practicable." It is, therefore, a general statement of aspiration without meaningful guidance.

It is well settled that specific provisions in an agreement must prevail over other general provisions when an interpretation is required in arbitration to resolve a conflict between them. The parties' Agreement contains a relatively specific Scope Rule 1 (B). It reads, in pertinent part, as follows:

> "Employes included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common carrier service on the operating property. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.
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> By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractor's forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or unless work is such that the Company is not adequately equipped to handle the work; or,

time requirements must be met which are beyond the capabilities of Company forces to meet."

The foregoing excerpt from the Scope Rule reveals that it provides five specific exceptions to the prohibition on contracting out work identified in its first paragraph. Significantly, it grants an exception when specialized equipment is not owned by the Carrier. There is no requirement that the Carrier seek to rent equipment before it may avail itself of the exception.

It is undisputed in the record that the Carrier did not own any epoxy injection equipment or any pressure grouting equipment. Moreover, it is further undisputed that the Carrier's employees had never performed epoxy injection. While they likely could have acquired such skills in time, they did not possess the skills to do epoxy injection at the time of the Carrier's notice and its subsequent decision to contract out the work.

In light of the foregoing considerations, we are compelled to find that the Carrier did not violate the general guidelines of the LOU because the specific terms of Scope Rule 1(B) override it. The record does not establish any other basis for the Organization's allegation in Section (2) of its Statement of Claim. As a result, this portion of the claim must be denied.

The lengthy record before the Board contains many assertions and rebuttals by both parties. It also contains some evidence that is relevant to the issues before us and some that is not. In addition, we have noted some material in the parties' Submissions that was not exchanged during the development of the record on the property. We excluded such material, as we must, from our analysis of the record.

As previously noted, Scope Rule 1(B) establishes five situations in which the Carrier is entitled to contract out work that may otherwise be reserved to its employees. Our review of the relevant evidence establishes that the work in question required special skills not possessed by BMWE-represented employees and special equipment not owned by the Carrier. Given the existence of these factors, Scope Rule 1 permitted the Carrier to contract out the work as it did. Because the disputed work formed the core of the project in controversy, we find no language in

Scope Rule 1 that required the Carrier to piecemeal the project. Accordingly, the claim must also be denied on its merits.

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 15th day of December 2010.

LABOR MEMBER'S DISSENT
TO
AWARD 40800, DOCKET MW-39039
(Referee Wallin)

INTRODUCTION

In this case, the Majority committed a cardinal sin. It did not simply consider a new argument never advanced during the handling on the property, but instead went one step further and raised a new argument *sua sponte*. Then, to add insult to injury, the Referee answered the contract interpretation question he posited for the Carrier in a manner that was: (1) in conflict with well-reasoned precedent on this property; (2) in conflict with the Referee's own prior awards; (3) in conflict with the plain language and bargaining history of local Rule 1B and the national December 11, 1981 Berge/Hopkins Letter of Agreement; and (4) in conflict with fundamental logic. The result is an award that is not only at odds with nearly 30 years of local and national precedent, but also without any reasonable foundation. Inasmuch as the precedential value of awards is directly related to the quality of reasoning in the awards, Award 40800 should be treated like the anomalous outlier that it is and afforded no precedential value.

THE NEW ISSUE

At Pages 2 through 4 of Award 40800, the Majority held as follows:

> "The Organization's (sic) alleged that the Carrier did not make a good-faith attempt to reach an understanding concerning the notice. It cited the so-called Berge-Hopkins December 11, 1981 Letter of Understanding (LOU) in support of this allegation.
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> The LOU expresses a general assurance that carriers will make good faith efforts to reduce subcontracting and to use employees '. . . to the extent practicable, including the procurement of rental equipment. . . .' for operation by the employees. Other than the rental equipment reference, the letter provides no standards for determining where the line of practicality is to be drawn or, in other words, what is 'practicable.' It is, therefore, a general statement of aspiration without meaningful guidance.
>
> It is well settled that specific provisions in an agreement must prevail over other general provisions when an interpretation is required in arbitration to resolve a conflict between them. The parties' Agreement contains a relatively specific Scope Rule 1 (B). It reads, in pertinent part, as follows:
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> * * *
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> **In light of the foregoing considerations, we are compelled to find that the Carrier did not violate the general guidelines of the LOU because the specific terms of Scope Rule 1(B) override it.** The record does not establish any other basis for the Organization's allegation in Section (2) of its Statement of Claim. As a result, this portion of the claim must be denied." (Emphasis in bold added)

The first and most fundamental problem with this assertion is that the Carrier did not at any time during the handling of this case on the property argue that there was a conflict between Rule 1B of the local agreement and the national December 11, 1981 Berge/Hopkins Letter. The Carrier did raise the argument that the Berge/Hopkins Letter was no longer in effect (a truly frivolous argument that has been rejected in dozens of awards), but it never asserted a conflict between the local and national rules and it never, not once, asserted that local Rule 1B was specific while the Berge/Hopkins Letter was general. Instead, the Majority for the first time in the history of the dispute posited a conflict between local Rule 1B and the national Berge/Hopkins Letter and then resolved the purported conflict by applying the specific versus general principle, a position never taken by the Carrier during the handling on the property (or even in its submission). Thus, the Majority didn't simply violate the

procedural prohibition on the introduction of new issues, it went a step further, a big step, when it acted as an advocate for the Carrier and raised the new issue *sua sponte*. In addition to the obvious violation of the Board's rules and procedures, this was grossly unfair to the Organization. Indeed, the Organization was unable to respond to this new issue even during oral argument because there was no indication that this issue was being considered until it appeared in Award 40800. Moreover, if the issue had been raised on the property and the Organization had been afforded a fair chance to respond, it would have been able to handily demonstrate that there was no conflict between Rule 1B in the local agreement and the national Berge/Hopkins Letter, as we shall demonstrate below.

CONFLICT WITH PRECEDENT ON THE PROPERTY

Award 40800 is hardly the first time a Section 3 panel has been required to interpret the relationship of Rule 1B in the local C&NW Agreement and the national Berge/Hopkins Letter. To the contrary, in a contracting out dispute that arose in 1984 on the former C&NW property, the Carrier asserted "... it had right to subcontract the work in question in accordance with the provisions of Rule 1, as it does not possess the special material and equipment required to perform this work on the scale involved in the instant case." That dispute was submitted to Public Law Board (PLB) 2960 and decided by Award No. 136, which held:

> "With respect to the lack of expertise, the lack of equipment and lack of special material we are left with only assertion on the part of the Carrier. More than assertion is needed to establish such a defense. **This is particularly true with respect to the lack of equipment. The December 11, 1981 letter of understanding committs (sic) the Carrier to make a good faith effort to obtain rental equipment in the event they lacked certain equipment. There is no showing that such a good faith effort was expended in this case.** ***" (Emphasis in bold added) (Award 136 at Pages 4-5)

It is transparently clear that the Carrier never argued that there was a conflict between local C&NW Rule 1 and the national Berge/Hopkins Letter and the Board did not find any such conflict. Rather, the Board clearly read the special equipment exception in the local rule and the subsequent national rule requiring good-faith efforts to lease equipment to be in perfect harmony. There was no dissent filed in connection with Award No. 136 of PLB 2960.[1/]

Three years later in 1987, another contracting dispute arose on the C&NW property which required the interpretation and application of local Rule 1B and the national Berge/Hopkins Letter. In that case, the Carrier once again defended its actions by asserting it did not have the necessary equipment as contemplated by Rule 1B. In Award 153 of SBA 2960, Arbitrator Vernon ruled as follows:

> "When confronted with the claim, the Carrier defended its action of hiring Lytrel because the Carrier did not have the necessary equipment to perform the work. The problem with this defense is bi-fold. First, the Carrier never explained why this equipment was necessary. ***
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> * * *

[1/] It's worth noting that the Neutral Member of PLB 2960, a long standing C&NW-BMWE Board, was Mr. Gil Vernon, a former Carrier Member of the NRAB and current President of the National Academy of Arbitrators. Apparently, Mr. Vernon did not see any conflict in local C&NW Rule 1 and the national Berge/Hopkins Letter. And, judging from the text of Award 136 and the absence of a dissent, it is clear that the C&NW did not perceive any such conflict either.

> **"The second, and more problematic aspect of the Carrier's case is – even assuming that their equipment was not adequate – that they have not demonstrated that they made a good faith effort to procure the necessary equipment on a rental basis. This obligation is set forth in the December 11, 1981 letter of understanding between the National Railway Labor Conference and the B.M.W.E. International President. *****
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> **In view of the fact that the Carrier did not demonstrate the requisite good faith consideration to utilizing rental equipment, the claim must be sustained."** (Emphasis in bold added) (Award 153 at Pages 2-3)

There was no dissent filed to Award No. 153. Therefore, it is crystal clear that at the time the national December 11, 1981 Letter of Agreement was negotiated and integrated in the local C&NW Agreement, neither the Carrier, the Organization or the Neutral Member of PLB 2960 (the standing Board the parties established to resolve contract interpretation disputes arising under the C&NW Agreement) believed that there was any conflict between the Berge/Hopkins Letter and Rule 1B. To the contrary, those provisions were read in harmony, with the national rule modifying the local rule just as all national rules modify the local rules on related subjects. Indeed, that is the purpose of national multi-employer bargaining in the railroad industry. Thus, it was nothing short of an egregious error for the Majority in Award 40800 to determine, *sua sponte*, some 30 years after the fact, that there was a conflict between C&NW local Rule 1B and the national Berge/Hopkins Letter.

CONFLICT WITH THE REFEREE'S PRIOR AWARDS

In addition to being in conflict with well-reasoned awards on the C&NW property, the Majority's decision is in conflict with prior awards rendered by this Referee. In Award 35337, this Referee set forth the analytical framework for integrating the national December 11, 1981 Berge/Hopkins Letter and existing local rules which permit contracting out under certain circumstances:

> "Where, as here, the Organization demonstrates Scope coverage, the burden of proof shifts to the Carrier to establish the source and nature of any existing rights to contract out work. This record contains no such evidence.
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> **Even if, for the sake of discussion, the Carrier had existing rights, it failed to take into account the impact of the December 11, 1981 Letter of Agreement. While reaffirming the intent of Article IV of the 1968 National Agreement, the letter provided, in pertinent part, as follows:**
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> > **'The carriers assure [the Organization] 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.'**
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> **The December 11, 1981 Letter of Agreement refined Article IV and created new Carrier commitments that limited existing rights, if any, to contract out Scope covered work. See, for example, Third Division Awards 26072 and 29158. Read together with Article IV, the Letter of Agreement requires the undertaking of good-faith efforts to use Carrier forces and equipment, or rent such equipment, before resorting to previously existing rights to contract out Scope covered work. The lack of such good-faith efforts, therefore, undermines the validity of an otherwise permissible contracting arrangement. As with**

> "**existing rights, the burden of proof shifts to the Carrier to demonstrate that it has undertaken such good-faith efforts.**" (Emphasis in bold added) (Award 35337 at Pages 5-6)

It is transparently clear from Award 35337 that this Referee understood the integration of the national December 11, 1981 Letter and equipment exception rules in existing local agreements in precisely the same way that Referee Vernon understood them on the C&NW property. That is, this Referee expressly stipulated that the December 11, 1981 Letter of Agreement, "... **created new Carrier commitments that limited existing rights, if any, to contract out Scope covered work.** ***" (Emphasis in bold added), and that, "*** **the Letter of Agreement requires the undertaking of good-faith efforts to use Carrier forces and equipment, or rent such equipment, before resorting to previously existing rights to contract out Scope covered work.** ***" There was simply no basis for concluding otherwise in Award 40800 and we are simply stunned not only that the Referee did so, but doubly stunned that he did so *sua sponte*.

In addition to positing the general versus specific issue *sua sponte*, the Referee also gratuitously characterized the Berge/Hopkins letter as "*** a general statement of aspiration without meaningful guidance." (Award at P.3). This characterization, also raised *sua sponte,* is not only in conflict with the plain language of the Berge/Hopkins letter, but runs directly contrary to the Referee's prior findings in Award 29912 where he held:

> "**The Organization argues, in essence, that the December 11, 1981 Letter of Agreement represents a changed commitment on the part of the participating carriers in that they gave assurances, as of that date, that they would assert good faith efforts to reduce the incidences of contracting out work and increase the use of employee forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees. <u>That is, indeed, what one paragraph of the Letter of Agreement says</u>.**
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> The Organization argues that the Carrier acted in bad faith here when it took no effort whatsoever to use its own employees on the disputed work. **Our review of the record fails to reveal any evidence that Carrier sought to avoid contracting the disputed work and use its employees instead. It provides no indication that Carrier undertook the requisite good faith efforts to which it was committed.**
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> * * *
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> On the record before us, however, we are persuaded that circumstances exist which make a damage award appropriate. In addition to the Scope Rule violation found, **it is clear that the Carrier did not undertake the required good faith efforts to perform the work with its own forces. Refusing to award damages would, in practical effect, condone the combination of Carrier's violation and its lack of good faith efforts.** Accordingly, Carrier is directed to determine the number of hours worked by contractor personnel on the portions of the project targeted by the Claim and to compensate each Claimant for an amount equal to the proportionate shares of the total hours expended on the disputed work." (Emphasis in bold and underscoring added) (Award 29912 at Pages 4-5)

It simply can not be disputed that in Award 29912 this Referee held that the Berge/Hopkins Letter enshrined express contractual obligations to make good-faith efforts to reduce subcontracting and provided a monetary remedy when the carrier failed to present evidence that it "... undertook the requisite good faith efforts to which it was committed." There is simply no logical way to square this finding with his gratuitous characterization, some 30 years after the fact, that the Berge/Hopkins letter was merely "aspirational". Moreover, Award 40800 not only contradicts prior awards by the Referee, but conflicts with dozens of other awards which have sustained contracting claims based on the failure of carriers to comply with their good-faith obligations pursuant to the Berge/Hopkins Letter (e.g., *see* Third Division Awards 26072, 26770, 29121, 29158, 30944, 35957 and Award 33 of PLB No. 6204).

CONFLICT WITH THE CLEAR LANGUAGE AND BARGAINING HISTORY

Rule 1B was negotiated by BMWE Vice President O. M. Berge in the local C&NW Agreement effective August 1, 1974. Some seven (7) years later, that same O. M. Berge, who had been elected President of BMWE in the interim, negotiated the December 11, 1981 National Agreement, including the December 11, 1981 Berge/Hopkins Letter. By its plain terms and the fundamental principle of national bargaining, the Berge/Hopkins Letter modified the existing rights to contract in the local rules of all Carriers party to the 1981 National Agreement, just as this Referee correctly explained in Awards 29912 and 35337. The Carriers' obligation to lease equipment, enshrined in the Berge/Hopkins Letter, contains no exception for "special equipment". Consequently, there is no conflict between local Rule 1B and the Berge/Hopkins Letter that would require resolution by the application of the special versus general language principle. Indeed, in the 30 year history of the Berge/Hopkins Letter, not a single Carrier in the nation has asserted that there is a conflict between existing rights in local agreements that permit contracting out that requires special equipment and the new restrictions on those rights in the Berge/Hopkins Letter. Consequently, there was simply no rational basis for the Majority in Award 40800 to posit such a conflict *sua sponte* some 30 years after the fact.

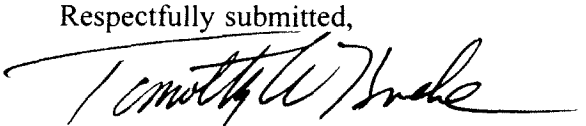
CONFLICT WITH LOGIC AND REASON

There are no agreements that permit contracting simply because the Carrier does not own the equipment routinely used by the BMWE craft. Indeed, such an exception would render the agreement meaningless because the Carrier could eliminate the craft by simply selling its equipment or allowing its inventory to expire through attrition *(See* Awards 6905, 10229, 19657, 20090 and 20372). Instead, whether by practice or rule, existing local agreements with equipment exceptions permit contracting when the Carrier does not own "special equipment" [e.g. C&NW Rule 1B, UP Rule 52, BN Rule 55 and Soo Line Rule 1(c)]. Consequently, under the Majority's *sua sponte* theory in Award 40800 that the Berge/Hopkins Letter does not apply when special equipment is involved, the result would be that the obligation to lease equipment set forth in the Berge/Hopkins Letter has virtually no application and is essentially a meaningless clause. That is simply not a logical or reasonable conclusion.

SUMMARY

The Majority's finding in Award 40800 is based upon new argument that the Majority injected into this case *sua sponte*. For that reason alone, Award 40800 should not be afforded any precedential value. But beyond that procedural point, Award 40800 is not simply wrong, but profoundly wrong. It is in conflict with: (1) well reasoned precedent on this property; (2) the Referee's prior awards; (3) the plain language of Rule 1B and the Berge/Hopkins Letter; (4) the fundamental principle of national bargaining; and (5) logic and reason. And, as if that weren't enough, the theory the Majority manufactured from whole cloth (i.e., that there is a conflict between the Berge/Hopkins Letter on the one hand, and existing local rules which permit contracting that requires special equipment on the other) is a theory that has never - not once - been advocated by any carrier in the 30 year history of the Berge/Hopkins Letter. For all of these reasons, I vigorously and emphatically dissent.

Respectfully submitted,



Timothy W. Kreke
Labor Member