CORRECTED

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36516
Docket No. MW-35888
03-3-99-3-896

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company [former Southern Pacific
(Transportation Company (Western Lines)]

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned an outside contractor (Herzog Construction Company) to distribute crossties near Indio, California commencing July 21, 1997 and continuing (Carrier's File 1155316 SPW).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intent to contract out said work as required by Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, System Work Equipment Operator D. R. Jarrel shall now be '. . . paid an equal amount to the total man hours worked by the Herzog Construction Company Car Top Material Operator, which will be no less than the three hundred twenty (320) straight time hours, and two hundred forty (240) overtime hours, already identified herein, at the Car Top Material Machine Operators, Class 05A, rate of pay. Compensation for this violation is continuous until the contractor is no longer employed to perform this work and will be in addition to any compensation Claimant may have already received."

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 Claimant established and holds seniority as a System Work Equipment Operator in the System Work Equipment Subdepartment. He was regularly assigned and working as such when this dispute arose.

Beginning on July 21, 1997, the Carrier assigned outside forces to distribute crossties in preparation for installation by Tie Gang 8566. There is no dispute that the Carrier canceled the bulletined position of Car Top Material Handler Rd-4, which had been scheduled to unload the ties for the Tie Gang, and instead utilized the outside forces to perform the work. There is also no dispute that the Carrier failed to advise the General Chairman of its intention to contract out the work.

The instant claim submitted by the Organization on the Claimant's behalf alleged that the work at issue is reserved to BMWE-represented employees by contract, custom and practice. In support thereof, the General Chairman advised the Carrier that outside contractors were used despite the fact that Carrier-owned equipment was readily available and while other Maintenance of Way Machine Operators were engaged in performing identical work at other locations on the Carrier's system. Specifically, the Organization stated in its claim:

> "The Carrier has several tie installation programs working simultaneously. As of the date of the initial handling of this claim, the Carrier had Car Top Material Handling Machines and operators working at several locations, all coming under the jurisdiction of the Southern Pacific Transportation Company (Western Lines) Agreement with the

Brotherhood of Maintenance of Way Employes. Regional Tie Gang 8564, working on the Oregon Division with one (1) Car Top Material Handling machine and operator [Mr. J. E. Baker] assigned the duties of distributing ties in advance of that gang. Working on the San Joaquin Division is the 8566 Regional Tie Gang with the Herzog contractor and one (1) Herzog owned machine assigned the duties of distributing ties for that gang. A Car Top Material Handling machine and operator [Mr. S. F. Overby] assigned the duties of distributing ties in advance of that gang. These machines or one of the other duplicate machines with these or other operators have been unloading ties in front of a variety of Tie Gangs since they were purchased in 1985, prior to 1985 ties were unloaded by a variety of system cranes and burro cranes in the Engineering Department."

The Organization further contended that the Carrier failed to give the General Chairman advance notice of the work. Consequently, the Organization asserted, a full monetary remedy is appropriate for lost work opportunities regardless of whether the Claimant was fully employed.

The Carrier denied the claim, maintaining that the Organization had not satisfied its burden of showing that the work which the contractor performed was reserved exclusively to the Equipment Subdepartment. The Carrier contended that the delivery of track material is work that has been performed by other Departments, as well as by vendors and contractors over the years, and is not scope-covered work. The Carrier further maintained that the Claimant did not suffer any lost work opportunity as a result of the work performed by the contractor.

Cited by the Carrier are decisions concerning the Carrier's ability to contract out work under closely similar circumstances. In Third Division Award 26434, the Carrier notified the General Chairman of its intent to contract with an outside firm to unload and load track material. In denying the claim of the Organization on the merits, the Board concluded that the Organization failed to establish an exclusive systemwide practice of performing such work. Those findings were subsequently adopted in Third Division Award 30217, another case in which the Carrier subcontracted the handling of track material after providing the Organization with notice of its intent.

There are a number of Awards on this property that have reached a different conclusion. Third Division Awards 28590, 28817, 30005 and 30528 have all sustained claims where outside contractors performed the work of loading, unloading and

handling track material. More importantly, however, the cases cited by the Carrier do not resolve the threshold notice issue presented in the instant case. Exclusivity is not the proper test in determining whether advance notice is required under Article IV of the May 17, 1968 National Agreement. See, Third Division Awards 29912, 29979, 30944, 31599, 31777 and 32862. If the Organization has established that BMWE-represented employees have, at times, performed the disputed work, then advance notice is required even if Organization forces have not performed the work to the exclusion of other crafts or contractors.

In this case, the Organization's assertion that the work had routinely been assigned to Carrier forces, and at the time of contracting out, was assigned at other locations to Carrier forces, was never refuted by the Carrier. The Board has often held that material assertions made by one party in the presentation and progression of a dispute that are not refuted or rebutted by the other party during the on-property handling of the dispute must be considered as being correct. That being the case here, we conclude that the Carrier violated Article IV of the May 17, 1968 National Agreement by failing to give the General Chairman advance written notice of its intent to contract out the work at issue.

With respect to the remedy, we find the rationale adopted in Third Division Award 30526 equally applicable to the case at hand:

> "The Carrier also states that the Claimant and others were fully assigned to work on the dates in question. In some circumstances this could make inappropriate the granting of additional pay to the Claimant. Here, however, the Board finds that a sustaining Award is appropriate owing to the lack of advance notice and the concession that the work was at the moment assigned in other locations to Carrier forces."

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 23rd day of April 2003.