Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38990
Docket No. MW-37343
08-3-NRAB-00003-020369
(02-3-369)

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (formerly The Atchison,
(Topeka and Santa Fe 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 (E 80 Plus Constructors) to perform Maintenance of Way and Structures work (bridge repair) on Pier No. 4 of a bridge located at Mile Post 98.72 on the Texas Division in the vicinity of Henrietta, Texas beginning February 20 and continuing through February 23, 2001 [System File F-01-90C/13-1-0016(MW) ATS]

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 Appendix No. 8 (Article IV of the May 17, 1968 National Agreement).

3. As a consequence of the violation referred to in Parts (1) and/or (2) above, Foreman B. R. McKinny and Carpenter/Mechanics W. J. Chelf, B. E. Hale, F. Rodriguez and P. H. Smith shall each 'be compensated an equal and proportionate share of all straight time and overtime hours worked by the five (5) E 80 Constructors employees performing this claimed work of

repairing the bridge at MP 98.72, commencing February 20 and continuing until February 23, 2001.'"

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.

On or about January 30, 2001, the bridge inspector on the Wichita Falls Subdivision discovered a crack in the bearing block supporting the steel span at Pier No. 4 of the bridge located at Mile Post 98.72 in the vicinity of Henrietta, Texas. On or about February 12, 2001, a subsequent inspection resulted in a ten mph speed restriction being placed on the bridge. On or about February 14, 2001, the Carrier used B&B forces to raise the bridge and place a steel shim on the damaged pier. As a result of this temporary repair, the speed restriction was raised to 25 mph. Subsequently, without written notice to the General Chairman, the Carrier hired an outside contractor to effectuate further and more significant repairs to the Pier at Mile Post 98.72. In its on-property appeal, the Organization maintained as follows:

"Commencing on February 20, 2001, and continuing until February 23, 2001, the Carrier contracted with E 80 Constructors to perform the work of removing, repairing and replacing bridge components, consisting of breaking up cement, removing cement, forming and pouring polymer cement on pier #4 of a bridge located at MP 98.72 on the Texas Division in the vicinity of Henrietta, Texas."

The Carrier responded with a two-fold argument in which it contended:

- Investigation into the alleged violation finds emergency work was performed to Bridge 98.72 as a slow order had been placed to protect from catastrophic failure of the bridge. Due to the urgency of the repairs to be done also did not allow time for the fifteen 15-day notice to the contracting out of such work;

- Work consisted of pinning and epoxy injection of the bridge pier and is considered work not customarily performed by Maintenance of Way and is consistent with Carrier policy of contracting out emergency work.

Appendix No. 8 (Article IV of the May 17, 1968 National Agreement) obligates the Carrier to provide timely written notice to the General Chairman when it plans to contract work "[w]ithin the scope of the applicable schedule agreement." It is well established arbitration precedent that the Organization bears the burden to make a prima facie showing that the work at issue was arguably scope covered in order to trigger the Appendix No. 8 notice provision. (See Third Division Award 36515.) In meeting this burden, the Organization is obligated to provide some specifics establishing that BMWE-represented employees have actually done the disputed work in the past or were otherwise entitled to perform it. (See Third Division Award 36515, as well the Awards cited therein). Establishing that the disputed work is scope covered is most important where, as here, it is well established that epoxy injection projects are not, nor have they ever been work "customarily" performed by BMWE-represented employees. (See Third Division Awards 32603 and 38092, as well as Public Law Board No. 6538, Award 4.) In its attempt to meet this burden, the Organization provided statements from two of the Claimants. The first letter disputes the existence of an emergency, and provides no details with regard to epoxy injection work having ever been performed by the Claimant. The second letter provides some detail regarding the temporary repair to the Pier, and noted further:

> "Our Supervisor met us at the Bridge and we had discussed with him ways we could repair the pier. We knew we could do the job since we had just finished a similar project on Bridge 87.89."

The second Claimant, like the first, failed to provide any detail regarding epoxy injection work having been performed by him on the "similar project" noted above. While the Claimants are no doubt capable of performing ordinary concrete bridge repair work, the foregoing statements provide no detail relative to their capability and/or prior experience to perform epoxy injection work. Accordingly, we find that the Organization failed to meet its threshold burden of demonstrating that the work at issue is scope covered. Under these circumstances the Board concludes that Appendix No. 8 was not violated when the Carrier proceeded to contract out the work at issue without providing advance notice to the General Chairman.

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 27th day of March 2008.

LABOR MEMBER'S DISSENT
TO
AWARD 38990, DOCKET MW-37343
(Referee Campagna)

A strong dissent is required because the reasoning of the Majority is both misguided and flawed. An award which is misguided and flawed is obviously erroneous and of no value as precedent. It is crystal clear that the Majority ignored the prior awards involving the parties hereto and especially Award **28722** involving these parties and a bridge repair project. There can be no question but that the Majority blatantly neglected to consider the Carrier's admitted failure to notify the General Chairman. Contrary to the Majority's conclusions, this Board's prior awards involving these parties have clearly required that the Carrier notify with the General Chairman prior to such a contracting transaction. Because no notice/conference was held between the Carrier and the General Chairman prior to the subject work being performed by an outside contractor, Award **38990** is palpably erroneous, ignores the clear and unambiguous language of Article IV agreed to by the parties and **STANDS ALONE**.

Apparently, the Majority did not bother to read or understand the prior awards to reach its anomalous findings, but cavalierly paid them specious homage because on-property Awards **19440, 24484, 24884, 25007 and 28722 ALL** found that the Carrier had violated the notice/conference requirements of the parties' Agreement. However, the Majority's misguided pronouncements did not stop with its negligent oversight of the Carrier's failure to confer with the General Chairman. In this case, the Carrier assigned its B&B employes to perform repairs to the bridge which increased the speed from 10 MPH to 25 MPH. Hence, the alleged emergency situation was remedied by the Carrier's employes. Because the Carrier initially assigned its B&B forces to perform repair work on the bridge, it should have been impossible to allege that bridge repair work was not Scope covered. During the panel discussion on this case we cited Award 31977 wherein the carrier in that case initially assigned its own B&B employes to perform repairs on a bridge then pulled them off the job and contracted out the rest of the repair work to an outsider without issuing the required notice. Thereafter the Carrier alleged in that case, as the Carrier did in this case, that such work was not Scope covered and therefore notice was not required. The Board held in Award 31977 that:

> "Carrier planned to contract out completion of the work which Gang 1002 members were performing prior to reassigning them to other work. Nothing in this record explains or mitigates the patent violation of the 15-day minimum notification requirement of Article IV. Carrier's notification of August 1, 1989 was

> "followed the next day by a conference request by the General Chairman. Less than 10 days later, Carrier subcontracted the work and 14 days later the subcontractor began performing the disputed work. This failure of good faith compliance with the notice and discussion provisions of Article IV requires a sustaining award."

The Majority clearly erred here when it failed to sustain this case for the Carrier's lack of notice.

The Majority compounded its error when it found that:

> "*** Establishing that the disputed work is scope covered is most important where, as here, it is well established that epoxy injection projects are not, nor have they ever been work 'customarily' performed by BMWE-represented employees. (See Third Division Awards 32603 and 38092, as well as Public Law Board No. 6538, Award 4.)"

To credit such a "past practice" would be a serious error. The referenced past practice relied by the Majority to deny this case puts the cart before the horse. The issue of whether epoxy injection work is work that could be performed by the Claimants should have been addressed at a conference pursuant to a notice. The Majority's "cart before the horse" reasoning here sets the notice and conference provisions on its head. This Board has consistently held that the Organization need only show that the work is arguably within the Scope of the Agreement in order to get notified of the Carrier's intent to contract out the work. The Carrier's own actions of assigning the Claimants to perform repairs to the bridge to upgrade the speed thereon from 10 MPH to 25 MPH prior to contracting out the work should have been sufficient to activate the notice/conference provisions of the Agreement. Hence, Award **38990** does nothing but violence to the resolution of <u>any</u> contracting out of work dispute and the fundamental purpose for which Article IV was negotiated.

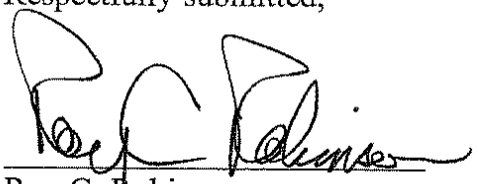
The important point, which the Majority in its headlong rush to deny a valid claim missed, was that ***any*** "reason", valid or otherwise, should have been discussed in conference with the General Chairman in good faith ***before*** the contracting transaction. Article IV expressly requires this. To proffer "reasons" *after the fact* is meaningless. Simply stated, Award **38990** is ***poorly reasoned*** and **<u>worthless</u>**.

However, the number of disputes decided in the aforementioned line of precedent on this property, **ALL** of which found "notice/conference" violations, the Carrier's actions in this case were a <u>deliberate</u> evasion of its ***known*** contractual obligations. Such flagrant, repeated violations

inescapably evidence **BAD FAITH** and insofar as the Majority's decision ignored the fundamental prerequisite of good faith, it is **PALPABLY ERRONEOUS**.

In view of the foregoing, it is obvious that the findings of the Majority are misguided, flawed and of no value.

Respectfully submitted,



Roy C. Robinson
Labor Member