Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40802
Docket No. MW-39163
10-3-NRAB-00003-050628
(05-3-628)

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 Division - IBT Rail Conference
(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 (Belger Cartage) to perform Maintenance of Way and Structures Department work (operate crane with pile driver) to drive pile at Mile Post 122.59 on the Geneva Subdivision beginning on October 7 and continuing through October 28, 2004, instead of Machine Operators D. Kalfas and M. Hubble (System File 3KB-6870T/1411223 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance 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 and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Kalfas and M. Hubble shall now each be compensated for one hundred thirty (130) 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.

The following facts are effectively undisputed in the on-property record. The Carrier provided notice by letter dated July 13, 2004, of its intent to hire a contractor to furnish and operate an off-track crane to drive twelve 14-inch by 60-foot steel H-pilings. Pile driving could be done only in five-hour blocks of track time. The closest sidings in either direction from the work site were more than one mile away. This distance would require approximately one hour to move an on-track crane into position from the siding to begin work and then another hour to move back from the work site into the siding to permit train traffic to resume. The use of an on-track crane would effectively leave only approximately three hours out of each five-hour block of track time to accomplish the pile driving work.

The work area had dual mainline tracks to accommodate approximately 70 trains per day. The Carrier used one of its owned on-track cranes to perform pile driving in addition to the work done by the contractor. The two Claimants worked the same hours as the contractor. This blocked the usage of one of the mainline tracks while the Carrier's crane performed pile driving. The Carrier did not own any such off-track cranes. The off-track crane provided by the contractor did not need to be moved for train traffic. It could remain in its off-track position and be useful for the full block of track time.

The Carrier's notice was duly received and the parties engaged in a conference on July 20, 2004. When no understanding was reached about the project, the Carrier proceeded with the contracting. The contracted work began on October 7 and continued through October 28, 2004.

Turning to the merits, it is clear that Scope Rule 1(B) forms the core of the dispute. 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.
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> In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his

representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith.

Nothing herein contained shall be construed as restricting the right of the Company to have work customarily performed by employes included within the scope of this Agreement performed by contract in emergencies that affect movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible."

Among other assertions, the Organization alleged that the Carrier's action violated an obligation to avoid contracting work by means of leasing equipment and having it operated by Carrier forces. The Carrier denied that the Agreement imposed such an obligation upon it.

Our careful review of the so-called Berge-Hopkins December 11, 1981 Letter of Understanding shows that it speaks in general terms. However, the second paragraph of Scope Rule 1(B) recognizes five specific situations in which the Carrier is permitted to contract out work otherwise reserved to scope-covered employees in non-emergency circumstances. One of those exceptions permits the contracting of work when the Carrier does not own specialized equipment. The equipment ownership exception does not require the Carrier to try to lease equipment for operation by its forces. It is undisputed that the Carrier did not own any off-track cranes. In addition, there is no proven contention that Carrier forces were qualified to operate such crane equipment.

The clash between the general language of the December 11, 1981 Letter of Understanding and the specific language of Scope Rule 1(B) requires an interpretation by the Board. Traditionally, such conflicts are resolved in favor of

the specific terminology. Accordingly, we find that the specific language of Scope Rule 1 prevails over the general language of the Berge-Hopkins December 11, 1981 Letter of Understanding that may be in conflict.

Given the state of the record, we must find that a violation of the Agreement has not been proven. The claim, therefore, must be denied.

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 40802, DOCKET MW-39163
(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 40802 should be treated like the anomalous outlier that it is and afforded no precedential value.

THE NEW ISSUE

At Page 5 of Award 40802, the Majority held as follows:

> **"The clash between the general language of the December 11, 1981 Letter of Understanding and the specific language of Scope Rule 1(B) requires an interpretation by the Board. Traditionally, such conflicts are resolved in favor of the specific terminology. Accordingly, we find that the specific language of Scope Rule 1 prevails over the general language of the Berge-Hopkins December 11, 1981 Letter of Understanding that may be in conflict."** (Emphasis in bold added) (Award 40802 at Pages 4-5)

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 40802. 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 40802 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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> **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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> * * *
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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

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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.

Majority in Award 40802 to determine, *sua sponte*, some 29 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 40802 and we are simply stunned not only that the Referee did so, but doubly stunned that he did so *sua sponte*.

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 Award 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 29 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 40802 to posit such a conflict *sua sponte* some 29 years after the fact.

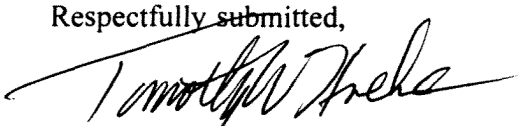
CONFLICT WITH LOGIC AND REASON

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 40802 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 40802 is based upon new argument that the Majority injected into this case *sua sponte*. For that reason alone, Award 40802 should not be afforded any precedential value. But beyond that procedural point, Award 40802 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 29 year history of the Berge/Hopkins Letter. For all of these reasons, I vigorously and emphatically dissent.

Respectfully submitted,



Timothy W. Kreke
Labor Member