Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40921
Docket No. MW-41070
11-3-NRAB-00003-080642

The Third Division consisted of the regular members and in addition Referee William R. Miller 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 (Peterson Construction) to perform Maintenance of Way and Structures Department work (operate crane with pile driver) to drive pile and other bridge work at Mile Post 94.3 on the Mason City Subdivision beginning on May 15, 2007 and continuing (System File S-0701C-360/1480182 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, Claimant D. Kalfas shall now be compensated at his respective straight time rate of pay for all of the hours worked by the outside force in the performance of the aforesaid work beginning May 15, 2007 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.

This claim concerns the utilization of an outside contractor (Peterson Construction) to perform bridge maintenance and repair work operating a crane to drive pile on a bridge renewal project at Mile Post 94.3 near Cambridge, Iowa, on the Mason City Subdivision beginning on May 15, 2007, and continuing. The Organization claims that the work performed by the contractor is contractually reserved to its members and should have been performed by the Claimant, who was available and qualified.

In support of its claim, the Organization relied upon Rule 1(B) of the Agreement, which states in relevant part:

> "B. Employees 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.
>
> By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employees described herein, may be let to contractors and be performed by contractor forces. However, such work may

only be contracted provided that special skills not possessed by the Company's employees, 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.

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." (Emphasis added)

On February 6, 2007, the Carrier sent Service Order No. 36342 to the General Chairman to notify him of its intent to contract for pile driving, removal of old bridge and setting spans on Bridge 94.30, Mason City Subdivision, 2.4 miles south of Cambridge, Iowa. According to the Organization, the General Chairman requested a conference to discuss the matter on February 14, 2007. The Carrier argued that it never received such request, which is why no conference was held. The Carrier objected to the Organization's inclusion of its alleged letter of February 14, 2007, with its Ex-Parte Submission requesting the conference, on the basis that it was "de novo" because it was never set forth on the property. The Organization argued that it was properly before the Board.

On the merits, the Organization contends that the Carrier improperly used an outside contractor to operate a ten ton Link Belt crane to drive pile at the aforementioned location. It argued that the work in dispute has historically been done by covered employees. It maintained that the Claimant was qualified and

should have been called because he is assigned to the System Y-75 Crane that is equipped with a pile driver. It alleged that there were no special skills, special equipment or special material used on the bridge project that could not have been accomplished by its covered employees and the Carrier had two system cranes capable of driving piling and handling the material within 50 miles of the project, and if for some reason those on-track cranes could not have been used, there was no reason that an off-track rental could not have been secured and operated by the Claimant.

Lastly, the Organization argued that the Carrier did not comply with Service Order No. 36342 and Scope Rule 1 when it failed to make a good faith effort to reach an understanding in regards to the project after it requested a meeting to discuss the matter. It alleged that it made a formal request on February 14, 2007, and no meeting was ever held, which according to it, was never denied by the Carrier and on that basis alone the claim should be sustained. It concluded by requesting that the claim be sustained either procedurally or on the merits as presented.

It is the Carrier's position that it used a contractor to operate specialized equipment (110-ton off-track crane) which it did not have readily available to perform the work. It asserted that Manager Campbell stated that this type of crane was needed due to the heavy train traffic in the area and the fact that an on-track crane would have to clear up between each of the 70 trains per day and tie up. It further stated that the cranes mentioned by the Organization were to be used on other projects or were inoperable at the time.

It remained the Carrier's position that a proper notice was sent to the Organization and the Organization did not request a conference to discuss it. It suggested that the Organization is incorrect when it argued before the Board that a conference was requested. It argued there was no on-property handling suggesting that a conference was requested and there was no defect in its notice of intended contracting. It closed by stating that the Organization did not present anything to show that it did not properly contract for the use of specialized equipment that it did not own or have readily available and because of that it requested that the claim remain denied.

Before any of the issues raised by the parties, such as past practice and specialized equipment can be examined, the Board must resolve whether or not the

Organization requested a conference to discuss the Carrier's intention to contract work to an outside contractor.

When the claim came to the Board the respective Ex-Parte Submissions did not contain the same evidence, in particular the Organization's letter of February 14, 2007, from the General Chairman addressed to Labor Relations requesting a conference. The Carrier argued that there is an irreconcilable dispute in facts as to whether or not the letter was sent and because of that it cannot be considered. Review of the Organization's initial claim letter of June 19, 2007, reveals it stated in pertinent part the following:

> "By letter dated February 6, 2007, signed by Mr. David G. Anson the Carrier notified the Brotherhood of its intent to contract bridge work at M.P. 94.30 on the Mason City Subdivision identified as Service Order 36342. In response General Chairman Morrow by a letter dated February 14, 2007 notified Mr. John Steiger the Carrier's notice was procedurally inadequate and/or defective and requested a conference be scheduled and held prior to the work being assigned to and performed by a contractor so the parties could make a good faith attempt to reach an understanding on the contemplated transaction. . . ." (Emphasis added)

In the Carrier's response to the claim it stated that its records indicated that Service Order No. 36342 was sent to the General Chairman, but there was no reference made by it regarding the Organization's assertion that it requested a conference to discuss the matter in a letter dated February 14, 2007. In its appeal letter of October 5, 2007, the Organization again made the same assertion and in the Carrier's denial of December 4, 2007, it did not take exception to that allegation. The Organization wrote a final letter on March 26, 2008, wherein it summarized a meeting of January 30, 2008, between Vice Chairman Waldeier and Manager Labor Relations J. Wayne. In that letter it stated in pertinent part:

> "Vice Chairman Waldeier reiterated the Brotherhood's position that the Carrier violated the current Agreement by failing to meet with the Brotherhood or conference their intent to contract out work that is clearly recognized as duties commonly and historically performed by Maintenance of Way members. Mr. Wayne's only comment was he could not explain the reason Mr. Steiger did not respond to the

> Brotherhood's request made under the Scope of the current Agreement. . . ." (Emphasis added)

After receiving the aforementioned letter the Carrier did not respond, nor did it refute the Organization's assertion. It is a well settled issue within this industry that if one party sets forth a factual argument and it is not refuted by the other, that contention not challenged must be accepted by the Board as fact. See Third Division Awards 11828, 12251, 12363, 15018, as well as First Division Awards 16517, 20288 and 20552 which stand for that proposition, to name just a few. The Carrier never disputed while the claim was being handled on the property that the Organization requested a conference to discuss Service Order No. 36342. Absent any challenge by the Carrier, the Board as the appellate trier of facts, is locked to the record that was produced on the property and in this instance it is determined that the Organization requested a conference and the Carrier did not comply with that request. The other issues raised by the parties are not germane to the resolution of this case and need not be reviewed because there was no requested conference held. It is clear that the Carrier violated the Agreement by failing to meet with the Organization to discuss the Service Order before it ordered the contractor to begin the work.

The Carrier argued that the Claimant suffered no monetary loss and no Rule of the Agreement provides for a penalty payment. The Organization argued that the Claimant is entitled to a monetary request so as to preserve the integrity of the Agreement and be made whole for lost work opportunities. We examined the various cases cited by the parties on the subject of penalties versus damages and are cognizant of the divergent philosophies set forth in those Awards. We agree with that line of Awards which holds that when a claimant lost his rightful opportunity to work he is entitled to monetary compensation. See Third Division Awards 12761, 17059, 18365, 19441, and 19480. In this instance, because there was no meeting held between the parties and the Carrier offered no evidence that the work in question could not have been performed by the Claimant during rescheduled hours of work, we find the Organization's request for a remedy to be persuasive. Additionally, in a similar case involving the same parties to this dispute Third Division Award 35736 ruled in pertinent part as follows:

> "Finally, notwithstanding the Carrier's defense that the Claimants were 'fully employed' on claim dates, their loss of work opportunity coupled with the unmitigated violation of the Carrier's contractual

obligation to notify and confer if timely requested by the General Chairman before contracting out such work warrants a sustaining award by the Board. See Third Division Awards 31752, 31754, 37155, 31756, 31760, and 31777." (Emphasis added)

We find no reason in this instance to abandon or reject the aforementioned rationale. Based upon the record presented we are unable to determine with certainty the number of hours expended by the outside contractor's employee. Therefore, the Board directs the parties to meet and review the Carrier's records so as to determine the appropriate number of straight time hours owed the Claimant in accordance with Part (3) of the claim.

## 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 24th day of March 2011.