Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40932
Docket No. MW-41116
11-3-NRAB-00003-090479

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
( IBT Rail Conference
PARTIES TO DISPUTE: (
(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 outside forces (J. G. Scott and Sons) to perform Maintenance of Way and Structures Department work (remove/install road crossings and track panels and related work) on the Nogales Sub-division from Mile Post 1043.1 to Mile Post 1049.9 on April 10, 2008 through May 9, 2008 (Carrier's File 1505339 SPW).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice of its intent to contract out the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces in accordance with the provisions of Rule 59, Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants G. Nelson, J. Escobar, R. Hernandez, A. Diaz and E. Quijada shall now each be compensated for one hundred seventy-six (176) hours at their respective straight

time rates of pay and for one hundred eighty-four (184) hours at their respective time and one-half 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 facts indicate that the Carrier served three 15-day notices (August 15, August 28 and September 21, 2007) concerning the same work. The Organization requested discussion of the first notice in its letter of August 24, 2007. Subsequently on September 25, 2007, the parties met and the Carrier clarified that the August 15 notice had been withdrawn, the August 28 notice was invalid because it had been e-mailed and it was prepared to discuss the notice of September 21. The September 21, 2007, notice advised the Organization of the Carrier's intent to solicit bids for providing equipment support, including, but not limited to backhoes, excavators, trucks, etc., on an as needed basis to assist Maintenance of Way forces in the performance of their duties including, but not limited to road crossing repairs and/or replacement. It also stated that road crossing repairs might include application of asphalt on the named subdivisions. At the conclusion of the conference with neither side conceding to the other, the Carrier confirmed in a letter of the same date that it would contract out the disputed work.

Subsequently, arising out of the September 21, 2007, notice, work began on April 10 and continued through May 9, 2008, when the Carrier contracted J. G. Scott and Sons to remove/install road crossings and track panels and related work on the Nogales Sub-division from Mile Post 1043.1 to Mile Post 1049.9.

A review of the record evidence indicates that the parties made the same respective arguments that they made in several other cases regarding the applicability of the December 11, 1981 Letter of Understanding and whether or not the Organization was required to prove exclusive reservation of scope-covered work when the dispute involves the assignment of work to outside contractors. For the sake of brevity, the Board will not discuss those issues, but instead refers the parties to Third Division Awards 40922, 40923, 40929 and 40930 wherein the Board ruled on behalf of the Organization.

It is the Organization's position that the work has customarily, traditionally and historically been assigned to and performed by Track Sub-department employees, including the Claimants who were fully qualified and available to perform the work in dispute. In addition, it argued in its appeal letter of September 3, 2008, as follows:

> "Among the rules under this Agreement is the Letter of Agreement dated May 3, 1985 (MofW 2-64 MofW 188-58) regarding grade crossing maintenance. Within that Letter of Agreement the BMWE agreed that effective May 6, 1985, the Organization would waive the notice requirement under this particular Agreement with regard to incidences of the contracting out of paving work and in return, the Carrier agreed that it would assign the Carrier's Maintenance of Way forces to perform any track work in connection with grade crossings."

It further contended that the record substantiates that the Carrier served three different notices inadequately describing the work to be performed and actually had the contractor begin to do the work before any meeting of the parties and the contractor was only removed after threat of adverse action by the Organization prior to the third notice. According, to the Organization the actual meeting was perfunctory in nature as shown by the fact that at the end of the meeting the Carrier gave the Organization a pre-prepared letter of the same date stating that it would proceed with the work despite the parties' differences. It concluded by requesting that the claim be sustained as presented.

It is the Carrier's position that it has a strong mixed practice of contracting out the disputed work of assisting BMWE forces in the performance of their duties including, but not limited to road crossing repairs and/or replacement. It stated

that it properly served a 15-day notice after which a conference was held. It argued that the Scope Rule is general in nature and the Organization cannot prove system-wide exclusivity and nothing is contained in the Agreement that prohibits its prior and existing rights to contract out the disputed work. According to the Carrier, the same and/or similar work has consistently been done by outsiders as well as BMWE-represented employees and unless the Organization can prove that the work has never been contracted out or it has historically and consistently taken exception to the Carrier contracting such work, the Carrier is allowed to continue to contract for such services, which was the case in this instance. To bolster its position the Carrier offered a letter dated May 14, 1999, from its General Director of Labor Relations to the General Chairman wherein it stated in pertinent part:

> "Three boxes recently shipped to your office, . . . are a record of the Carrier's past practice of subcontracting across the territory of the former Southern Pacific Western Lines (SPWL).
>
> The record of subcontracting is divided by subject. Even though there are 30 files, divided into 24 subject areas, categorized by the type of work contracted in the past:
>
> * * *
>
> [Letter then listed 30 files, divided by 24 subjects]
>
> * * *
>
> The letter and files above will be referred to in the future by the Carrier for establishment of a practice across the SPWL. This is not to be construed as the total practice of the Carrier relative to subcontracting."

The Carrier closed by asking that the claim remain denied.

Review of the evidence does not persuade the Board that the notice of September 21, 2007, was procedurally defective or inadequate in accordance with the provisions of Rule 59, Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding. Therefore, the claim will be resolved on its merits.

The May 3, 1985 Letter of Understanding relied upon by the Organization states, in pertinent part, the following:

> "In conversation with you on April 1 and May 3, 1985 the subject of rehabilitation of street crossings by contractor forces on the Southern Pacific Transportation Company (Western Lines) was discussed.
>
> The present procedure now requires a 15-day advance notice as required under the May 17, 1968 National Agreement, advising the Brotherhood of Maintenance of Way Employes that the Company intends to contract out for the paving or repaving of a street crossing(s) with a commitment from the Company that any involved track work would be performed by Maintenance of Way employes.
>
> This procedure generates a generous quantity of repetitious paper work; therefore, it is agreed to by the parties that effective May 6, 1985, the paving or repaving of street crossings by contractor employees may be performed without the written notification procedure provided for in the May 17, 1968 National Agreement (15 day advance notice) with the understanding that Company Maintenance of Way forces will perform any related track work in connection with the street crossings." (Emphasis added)

The Organization asserted that the Agreement recopied above specifically covered the disputed work of this claim. It argued the parties agreed that beginning May 6, 1985, any related track work in connection with street crossings absent the paving or repaving would be done by BMWE-represented employees. On the other hand, the Carrier asserted that the work had a mixed practice of handling and as proof of such, it relied upon its aforementioned letter of May 14, 1999.

The Organization's argument that the May 3, 1985 Letter of Understanding between the parties specifically assigned the work in dispute to its members is compelling for a number of reasons. That statement was made in its appeal letter of September 3, 2008, and it was not addressed by the Carrier or refuted. 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. Furthermore, when the Carrier's May 14, 1999, letter is closely examined, the Organization's argument becomes stronger because that letter reveals that of the 30 files divided into 24 different subject areas, categorized by the type of work which had allegedly been subcontracted in the past there were no items concerning the "removing/installing road crossings and track panels and its associated work." Within that letter the reference to the subject area most closely related to the claim was that of three files concerning paving, but in view of the fact that the paving portion of the work done by the outside contractor is not in dispute, the letter is of no assistance, in this instance, to the Carrier. The unsupported past practice assertion by the Carrier was challenged by the Organization and effectively countered during handling on the property. It is clear that the Organization met its burden of proof that the Agreement was violated when the specific work outlined in Part (2) of the claim was performed by the outside contractor.

The Carrier argued that the Claimants suffered no monetary loss and no Rule of the Agreement provides for a penalty payment whereas the Organization argued that the Claimants are entitled to the monetary request so as to preserve the integrity of the Agreement and be made whole for lost work opportunities. We have 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. Because the specific work under Part 2 of the claim was assigned to the craft and there was no proof offered that it could not have been performed by the Claimants during rescheduled hours of work, we find the Organization's request for a remedy to be persuasive. A portion of the work done by the outside contractor involved paving and/or repaving and those hours appear to have been included in the Organization's remedy which would be inappropriate as they were not part of the contested work. Additionally, it is unclear as to whether or not any of the hours spent by the outside contractor may have been devoted to work not associated with road crossing related work. The September 21, 2007 notice was not limited to road crossing work, therefore, inclusion of any hours not involving road crossing work would be inappropriate within the remedy as that work was not contested in this instance. Based upon the record presented we are unable to determine with certainty the number of hours expended by the outside contractor's employees. Therefore, the Board finds and holds that the parties are directed to meet and review the Carrier's records so as to

determine the appropriate number of straight and overtime hours owed the Claimants, minus all time spent by the contractor paving and/or repaving and any time devoted to non road crossing work.

## AWARD

Claim sustained in accordance with the Findings.

## 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.