Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40997
Docket No. MW-40915
11-3-NRAB-00003-090190

The Third Division consisted of the regular members and in addition Referee Sherwood Malamud when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 (Herzog) to perform Maintenance of Way and Structures Department work (clean right of way ditches) between Mile Posts 111 and 123 and continuing on the Clinton Subdivision on October 24, 25, 26, 29, 30, 31, November 1, 2, 2007 and continuing (System File R-0701C-320/1491445 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance 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 G. Mathies shall now be compensated at his respective and applicable rates of pay for all of the hours worked by the outside force in the performance of the aforesaid work beginning on October 24, 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.

The factual underpinnings of this case are identical to those described in Third Division Award 40996. The time period at issue in this case continues where the claim resolved by Award 40996 ends. The claim set forth in Award 40996 ends on October 23; the instant claim begins on October 24, 2007. Both relate to work by the same contractor (Herzog) and its use of the same equipment as it moved east along the Clinton Subdivision. The same documents serve as the evidentiary record in both cases, i.e., the March 2, 2007 notice, the March 6, 2007 Organization letter requesting information and the March 14, 2007 conference. G. Mathies is the Claimant in both cases. He was fully employed during the period of October 24 through November 2, as well.

The Organization in its argument at the Referee Hearing and in its Submission to the Board places a different emphasis on the arguments that it presents here. The Organization argues in both cases that the Carrier's failure to provide the information requested in its March 6, 2007 letter that it wrote in response to the Carrier's March 2, 2007 notice demonstrates bad faith. In both cases, the record does not contain or refer to the actual contract entered into by the Carrier and Herzog. The Carrier issued the notice before the execution of a contract. The reference in the notice to the contractor(s)' performance of work on an "as needed" basis supports a finding that in March 2007, the Carrier may not know what ditch cleaning may be required in October 2007. The failure to provide the requested information is not evidence of bad faith.

In this case, during the Organization's argument at the Referee Hearing, it asserted that there is no proof that specialized equipment was actually used to clean the ditches during the eight-day period between October 24 and November 2, 2007. The Organization did not make this argument during the on-property handling of this case. Consequently, the Board will not address that argument in this Award. See Third Division Award 34060.

The only evidentiary difference between the two cases is the dates. It follows that the analysis and outcome must be the same as in Award 40996. There is no evidentiary link between this notice and the work performed in October – November 2007. Further, the Carrier failed to meet its burden of proof in establishing its affirmative defense by indicating the reason why it used specialized equipment. As for remedy, the Claimant was fully employed. There is no showing of a loss. Consequently, a monetary award is not ordered.

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 20th day of July 2011.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 40996 - DOCKET MW-40881

and

THIRD DIVISION AWARD 40997 – DOCKET MW-40915

(Referee Sherwood Malamud)

The Majority's conclusions with respect to the involved contracting notices failed to recognize and respect the precedent set by past arbitrators. We anticipate that the Majority's ill-advised action will create further turmoil and unwittingly add fuel to BMWE's burning desire to alter the nature of the contracting notices that have been historically provided on Union Pacific Railroad Company property. Consequently, we are compelled to register our vigorous dissent so that future readers of these Awards will recognize the injustice which the Majority sanctioned. It goes without saying that no future decision makers should be tempted to reach similar unwarranted conclusions with regard to the adequacy of such a notice.

The basis for the Majority's decision to declare the contracting notices in these cases improper came about as a result of the Majority reviewing the definition of the term "transaction" in the "Online Merriam-Webster Dictionary." This publication does not and has never interpreted the Carrier's rights and practices under the parties' Collective Bargaining Agreement. Given the Majority's apparent confusion, a far better place to have searched for enlightenment would have been prior arbitral precedent and on-property practices. Had the Board undertaken such a review it would have concluded that its ill-advised interpretation was in direct conflict with the prior arbitral precedent and the practice on this Carrier's property.

Not only have such general notices been historically used by the Carrier, they have previously been found to satisfy the requirements set forth in the parties' Agreement. Recently rendered Third Division Awards 40756, 40758, 40761, 40810 and 40812 are but a few examples. These Awards addressed the same issues under facts similar to those before the Board in the instant cases. For the Majority to ignore them creates further unrest which goes against the purpose of the Railway Labor Act. Award 40810 (Wallin) outlined the principle as follows:

> "Although the Organization alleged the Carrier failed to serve notice and refused to respond to the General Chairman's request for a conference, later correspondence from the Organization nullifies these contentions. The record establishes that the Carrier did service (sic) notice by Service Order No. 36327 dated March 2, 2007. The parties did engage in a conference on the notice on March 14, 2007. Accordingly, on the record before the Board, we must reject the portion of the Organization's claim that alleges a violation of the applicable notice requirements.
>
> Turning to the merits of the claim, we do not find the record to establish that the ditching work in question was unusually difficult or peculiar in any manner whatsoever. The notice merely describes the work as follows:
>
> > 'Specific Work: providing all supervision, labor and equipment necessary for the operation of a ditch cleaner to perform grading and sloping of drainage area near track structures on an "as needed" basis.'
>
> The remainder of the record does not amplify the character of the ditching work beyond the description set forth in the notice."

Thus, it is clear that prior precedent has established the legitimacy of the Carrier's general notices. Because that prior precedent was not palpably erroneous, it should have been followed by the Board in adjudicating the instant claims. Nothing in the present records gives any rationale to deviate from the previous Awards which should have been respected as authoritative on the practice, if not stare decisis. The parties have never used "Merriam-Webster" as a tool to interpret the Agreement in the past and there is no Agreement support for its use.

One of the oft-stated purposes of arbitration is to provide consistency in the workplace so as to promote harmonious labor/management relations. To ignore and/or cast aside arbitral precedent which has clearly and unmistakably recognized the long-standing practice of providing general notices on this property does a dis-service to the process and the parties to these disputes. Without a doubt, the Majority's determinations that the notices were not proper are palpably erroneous

and cannot be considered as precedent in any future cases. Because they clearly create unwarranted chaos, we must render this vigorous dissent.

Brant Hanquist
Brant Hanquist

Michael C. Lesnik
Michael C. Lesnik

July 20, 2011