Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41056
Docket No. MW-41172
11-3-NRAB-00003-100014

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Rick Franklin Corporation) to perform Maintenance of Way and Structures Department work (operate excavator to remove debris, place rip rap, clear culvert and ditch) along the right of way in the vicinity of Mile Post 251.5 on the Ayer Subdivision on October 7, 8 and 9, 2008 (System File D-0852U-227/1512926).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance written notice of its intention to contract out said work or make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52 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. Ehrhard shall now be compensated for twenty-four (24) hours at his respective straight time rate of pay and for nine (9) hours at his respective time and one-half rate 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.

This claim concerns the use of an outside contractor to perform ditching, culvert cleaning and placement of rip rap. On September 10, 2008, the Carrier sent the Organization a notice advising of its intent to contract out the following work stating, in pertinent part:

> ". . . Location: Ayer Subdivision at approximately MP 251.25 (Matthews, Washington)
>
> Specific Work: assist local forces by providing fully operated and maintained hy-rail excavator to perform ditching, culvert cleaning and placement of rip rap."

Pursuant to the Organization's request, a conference was held on September 30, 2008, but no mutual understanding was reached between the parties. The Carrier subsequently stated that it would proceed with the work being performed by a contractor. The record further reveals that the parties made the same respective arguments that they made in several other cases regarding the vitality and applicability of the December 11, 1981 Letter of Understanding and whether 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 regurgitate the parties' respective arguments and the Board's reasoning, but instead refers the parties to Third Division Awards 40922, 40923, 40929, 40930, 41048 and 41055 wherein the Board ruled in favor of the Organization with regard to those questions.

It is the position of the Organization that the disputed work was exclusive to its members and that no exception in Rule 52 existed in this instance. In its initial claim letter of October 29, 2008, it further argued: "The equipment utilized was a rubber tired excavator and is recognized as similar to the equipment listed in Appendix "Y" and normally assigned to employees holding seniority in [the] Roadway Equipment

Subdepartment. In fact, the Claimant has operated this same equipment in the past on a lease basis with RFC." With respect to the Carrier's argument that the Claimant was not available on the claim dates because he was on vacation, the Organization argued that the Carrier's notice was filed on September 10, 2008, and if the Carrier had chosen not to go forward with the contracting out, it could have done the work sooner and the Claimant and/or the Carrier could have readjusted his vacation to allow him the opportunity to do the job. It concluded by requesting that the claim be sustained as presented.

It is the Carrier's position that after serving the aforementioned notice, it contracted with Rick Franklin Corporation to provide specialized equipment to perform ditching, culvert cleaning and the placement of rip rap. It argued that in order to do the work, a hy-rail excavator was required. The Carrier noted that it does not own such equipment, nor do any of its employees have the qualifications or abilities to operate such equipment. Furthermore, it was a mixed bag of BMWE-represented employees and contractors performing this type of work. It further argued that the Claimant was not available for the disputed work because he was on paid vacation. Therefore, he suffered no loss of compensation. It closed by asking that the claim remain denied.

In resolution of a very similar case concerning right- of- way cleaning and the removal of debris between the same parties to this dispute, Third Division Award 37315 held, in pertinent part, as follows:

> "After careful review, the Board finds that, while there is no unanimity of opinion, it is clear that the vast majority of Awards on this property have recognized that the work at issue is reserved to the Organization by rule and practice. See Third Division Awards 28817, 29561, 30005, 30528, 31037, 31042, 31044, 31045 and 32327."

The Board reaffirms the aforementioned reasoning and logic and finds it applicable to the instant case. Having determined that Third Division Award 37315 is on point with the present dispute and that the work is reserved to BMWE-represented employees, the Board next turns to the question of whether the alleged use of specialized equipment in this instance meets one of the exceptions set forth in Rule 52(a) for allowing outside contractors to perform covered work. On the property the Carrier offered a statement from Manager of Track Maintenance (MTM) M. Rubino which stated, in part:

> ". . . Had to use hy-rail excavator which is a specialized piece of equipment to do the ditching because there is no road access into this location. Water was coming down onto the track from an apple orchard and there was a chance the track could wash out."

If that was the extent of the discussion between the parties the Board would concur with the Carrier's position that it had met one of the exceptions listed in Rule 52(a) but that was not the case. An August 10, 2009 rebuttal statement from Vice Chairman Scoville, who had worked at the location of the claim for 27 years before becoming a full time representative, took exception to Rubino's statement. Scoville stated the following:

> ". . . There is an embankment to the east of the tracks but there is private access to the right of way at various nearby locations. MTM Rubino's statement in this regard is somewhat misleading. While there is no through right of way road, access at given points can be made through private lands as has been done in the past.
>
> That notwithstanding, the local manager before Mr. Rubino had employees under his charge build a steel ramp to load the equipment assigned to the Claimant in the instant claim onto a flat car and transport it to any inaccessible areas on his district. It is my understanding that this ramp and an available flat car was staged at Hooper WA and could have been transported to the location of this work. In any event, I believe that the work performed by the contracted excavator could have been accomplished utilizing the Ohio Crane which was staged only a few miles away at Matthews WA. The utilization of the contracted excavator was not one of necessity, rather convenience. Further, Claimant has experience operating the contractor equipment when the local manager leased it from Rick Franklin to perform ditching on the Spokane Sub." (Emphasis added)

The Organization also offered a February 17, 2009 statement from the Claimant, which was consistent with Scoville's statement that he had the qualifications to perform the work and the work site was accessible without the necessity of using any specialized equipment.

After receiving the aforementioned statements, the Carrier did not respond. Stated differently, it did not refute the Organization's assertions. 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, the unchallenged contention must be accepted by the Board as fact. See Third Division Awards 11828, 12251, 12363 and 15018, as well as First Division Awards 16517, 20288 and 20522, all of which stand for that proposition, to name just a few. It is clear that the Carrier failed to show that it was necessary to use the specialized equipment (hy-rail excavator) on the claim dates, or that the Claimant was not qualified to operate the machine. Consequently, the Agreement was violated.

The Carrier also argued that even if the Agreement was violated the Claimant suffered no loss because he was on vacation on the claim dates and was not available to work. A close reading of the record reveals that the Carrier's notice was dated September 10, 2008, but the work in question was not started until four weeks later on October 7, 2008, which reveals that the work was not urgent and the Carrier had ample opportunity to schedule the work to be performed by the Claimant or other BMWE-represented employees. Therefore, the Board finds and holds that Part (3) of the claim must be sustained.

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 23rd day of August 2011.