Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41773
Docket No. MW-41494
13-3-NRAB-00003-110071

The Third Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Division -
(IBT Rail Conference
(
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul & 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 (Kraemer Construction) to perform Maintenance of Way Engineering Services Crane Subdepartment work (operate track-hoe/excavator type crane) in connection with shifting track in the vicinity of Mile Post 100.3 on the Watertown Subdivision on April 7 and 9, 2008 (System File C-06-08-C080-01/8-00228-150 CMP).

(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 said work as required by Rule 1 and failed to enter good-faith discussion to reduce the use of contractors and increase the use of Maintenance of Way forces as set forth in Appendix I.

(3) The claim as presented by General Chairman M. S. Wimmer on May 21, 2008 to Engineering Services Manager T. G. Hughes shall be allowed as presented because said claim was not disallowed in accordance with Rule 47(1)(a).

(4) As a consequence of the violation referred to in Parts (1) and/or (2) and/or (3) above, Claimant K. Kruser shall now be compensated '. . . for a total of twelve (12) hours for all time at the applicable straight time rate of pay, benefits and work opportunities lost for April 7 and 9, 2008, as a result of the Carrier assigning recognized and

contractually approved maintenance of way work, to be performed by outside contractor, Kraemer Construction, and its employee who possesses absolutely no seniority or other contractual rights under the Schedule of Rules Agreement, Form 2625, as amended."

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.

There is no dispute that by letter dated March 23, 2006, the Carrier advised the General Chairman of its intent to subcontract the disputed work in question in accordance with Paragraph 2 of the Scope Rule and related amendments and interpretations thereto embodied in Appendix I of the Controlling Agreement. There is no dispute that by letter dated March 27, 2006, the General Chairman advised the Carrier that the Organization objected to its intent to assign the disputed work to outside forces and formally requested a conference to discuss the proposed contracting transaction. A conference was convened on April 3, 2006, during which the Carrier did not change its position with regard to contracting out the disputed work. As a result, the Organization alleged that the Carrier was not willing to engage in meaningful, good-faith discussions regarding either why it was necessary to contract out any of the disputed work – which it asserted was vaguely described in the March 23, 2006 notice – or why its forces could not be utilized to perform the work. During the conference, the Carrier notified the General Chairman that it was considering rescheduling the work in question, specifically the bridge construction project so that said bridge project could be performed in conjunction with a planned track project on the Watertown Subdivision. By corrected letter dated June 2, 2006, the General Chairman acknowledged that a conference had been held and once again objected to contracting out the disputed work, stating the following:

> "This will confirm that should the work move forward in 2006, and should BMWED learn that the reasons enunciated within the Carrier's notice are found to be insufficient for contracting of this work or should MOW forces not be utilized for this work, BMWED reserves all rights to file claims against this subcontracting. In the event that claims are not filed, such will not be considered as our acquiescence and will be without prejudice to our position."

By letter dated November 29, 2007, the Carrier notified the General Chairman that the bridge construction project had never commenced due to unexpected difficulties in obtaining the necessary permits for construction and, as a result of that delay, the project was further delayed to coincide with planned track blocks. However, the Carrier informed the General Chairman that the reasons for contracting out the work in question remained the same and was then commencing. Because the Carrier posited that the Organization did not respond to its notice of November 29, 2007 requesting a conference, on April 7 and 9, 2008, the Carrier assigned outside forces to shift the No. 1 and No. 2 Main Tracks in conjunction with bridge and track construction projects using a trackhoe/excavator-type crane with operator. In accordance with its June 2, 2006 letter, apprising the Carrier that "should MOW forces not be utilized for this work, BMWED reserves all rights to file claims against this subcontracting," the Organization filed the subject claim on May 21, 2008 by Certified Mail, which was received by the Carrier on May 23, 2008. The Organization alleges that the Carrier failed to respond to its May 21, 2008 initial claim within the time period stipulated in the Agreement and, as a result, the General Chairman authored a second letter dated September 12, 2008, wherein he notified the Carrier that the Organization was appealing the initial claim and asserted that the subject claim should be allowed on the basis alone that Engineering Services Manager T. G. Hughes failed to timely respond to the claim, thereby committing default pursuant to the applicable terms set forth in Rule 47, Time Limit – Claims Or Grievances, which relevant section reads, in pertinent part as follows:

> "Rule 47(1)(a)
>
> Should any such claim or grievance be disallowed, the Carrier shall within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. <u>If not so notified, the claim or grievance shall be allowed as presented</u>."

The Carrier responded to the Organization's allegation that it did not timely respond to the May 21, 2008 initial claim by presenting a letter dated June 8, 2008, wherein it denied the claim and informed the Organization that it sent this letter to the General Chairman via the U. S. Postal Service (USPS) and electronically transmitted this letter by fax.

The record evidence reflects that a claims conference was held on October 30, 2009 and according to the Organization, the default issue was a major point of discussion between the Parties. In a follow-up letter dated April 7, 2010, the General Chairman asserted the following based on the discussion that occurred at the October 30, 2009 conference regarding the default allegation:

> ". . . The Organization reiterated that the Carrier was in default at the initial claim level and asked the Carrier to provide proof of transmission of Mr. Hughes' denial, and Mr. Kluska could not produce such documentation.
>
> The Organization has clearly set forth throughout the on-property handling of this dispute the fact that our office did not receive a response from Mr. Hughes in the mail. In regard to the Carrier's assertion that Mr. Hughes also sent such response via fax, please find enclosed a copy of the 'ACTIVITY REPORT' for BMWED's fax for the period of June 3 through 10, 2008 showing transmittals (TX) and receptions (RX). As you can see, no fax was received from Mr. Hughes' office on June 6, 2008 or any other day between June 3 and 10, 2008."

The record evidence reflects that the only proof that the Carrier provided in support of its position that it placed its June 6, 2008 letter denying the subject claim in the U. S. Postal Service is an email dated October 4, 2010 from Shelley R. Daberitz, who is identified in the record before the Board as a Clerk and directed to a Danny J. Wong, (title not identified), that she mailed the denial letter for Claimant Kruser on June 6, 2008.

The Organization cites prior Awards in support of its position that the subject claim should be sustained by the Board based on the Carrier's default in timely responding to the claim and that it is unnecessary to reach a decision based on the merits of the claim. The Carrier, on the other hand, stated in the email cited above that Daberitz's declaration that she mailed the denial response to the Organization on behalf of Claimant Kruser should suffice as proof that it responded to the initial claim filing in a

timely manner pursuant to its obligation as set forth in Rule 47(1)(a) referenced elsewhere above.

The Board respectfully does not concur with the Carrier's position that the email from Clerk Daberitz sent to Danny J. Wong serves as sufficient proof that the Carrier timely responded to the initial filing of the subject claim. That finding coupled with the concrete proof brought forth by the Organization of its fax records that, without doubt, refutes the Carrier's position that it also faxed its June 6, 2008 denial letter to the Organization in addition to mailing the letter sent by regular U. S. Mail without a return receipt proving that it made such a mailing, clearly establishes the validity of our conclusion that for some unknown reason, said denial letter was neither mailed nor faxed to the Organization. That being the case, the Board concurs with the Organization's position that the Carrier failed to comply with Rule 47(1)(a) to timely respond to the subject claim. The Board, therefore, is constrained to adhere to the bottom line obligation set forth in Rule 47(1)(a), which provides that the claim is to be allowed as presented, and that it renders it unnecessary for the Board to delve into the merits 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 25th day of November 2013.