Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42889
Docket No. MW-43760
18-3-NRAB-00003-160569

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (remove the hydraulic cylinder from the book of a log truck) on May 14, 2015 (Carrier's File MW-15-37 STR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an advance notice of its intent to contract out said work as required by Article 3.1.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Connor and D. McCaw must each be allowed sixteen (16) hours' straight time at the work equipment repairman rate of twenty-five dollars and fifty-four cents ($25.54)."

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 Claimants have seniority in the Maintenance of Way Department. On May 14, 2015, the Carrier subcontracted the removal of a hydraulic cylinder from the boom of a log truck. The Claimants were available and qualified and have done the work in the past. The Carrier failed to give advance notice of the subcontracting to the General Chairman as contractually required. Therefore, a timely claim was filed.

The Organization avers that the subcontracting violated the contract. While the work was done on equipment mounted on a vehicle, it was not vehicle work outside of the scope of the contract. The subcontracted work has been done in the past by Work Equipment Repairmen and therefore by virtue of contract and past practice belongs to these Repairmen. Moreover, the Carrier violated the contract by not notifying the General Chairman that work within the scope of the Agreement was going to be contracted to outside forces. The Organization was thus deprived of the opportunity to retain the disputed work. The Carrier's claim of a supporting past practice is unavailing. Relevant contract provisions are unambiguous so that past practice is irrelevant. Moreover, the Carrier has not shown that the elements of a past practice existed. The Carrier's affirmative defenses fail for lack of proof. While the Carrier contends that the disputed work is not craft specific, the Organization's claim is not about craft jurisdiction but about giving bargaining unit work within the scope of Agreement to outside forces. The contention based on the absence of past claims fails since the Carrier has not established a past practice of subcontracting the disputed work with the Organization's agreement or at least acquiescence. The Carrier cannot successfully claim a lack of qualified personnel and the presence of time constraints. The Carrier did not attempt to assign employees to the work and did not consult with the organization to see if work could be done by its own employees.

The Carrier contends that the Organization has not met its burden of proof and has erroneously referred to two different log trucks in one fact pattern. Truck 1998 was brought to the Carrier's shop with a blown hydraulic cylinder at a time when truck 1992 was being repaired. Although the Carrier initially expected to repair truck 1998 after truck 1992 was repaired, it was decided to send the 1998 log

truck for third-party repair to reduce turn-around time. The Organization does not have contractual ownership of the disputed work even if represented employees have done the work in the past. There is a past-practice of contracting out the work. The Organization's argument in claim MW-15-38 invalidates the instant claim because that claim involved the Little Red Tie Inserter/Extractor, which is track machinery as opposed to a log truck, which is a multipurpose vehicle. The eight log trucks within the system are used not only by the Track Department but also by the Signal Department, which uses other boom trucks as well. Log trucks may be used to assist with bridge work and to haul waste material. Fifty (50) percent of the time these trucks are used for highway work. Article 5.3(i) has never given represented employees the right to perform repairs on Carrier vehicles and has never distinguished between a vehicle and an accessory component. Also, represented employees have never had the contractual right to repair particular accessories/components of vehicles. Work Equipment Employees repair "tools, machinery and equipment," but not vehicles. The Organization set forth a new argument in this claim—namely, that every component of a vehicle must be analyzed to determine if it is equipment/machinery as opposed to a vehicle. Article 5.3(i) imposes no such absurd requirement. A component of a vehicle needing repair is still part of a vehicle and not the province of Work Equipment Employees. Neither Article 1 nor Article 3 is relevant herein. Job bulletins do not change contract language. The Claimants did not suffer economic loss and are not due damages.

The Board finds it unnecessary to address the questions of whether the work on the hydraulic cylinder is equipment or vehicle repair and, if vehicle repair, whether or not a Log Truck is exclusive to those represented by the Organization. In the on-property correspondence, the Organization states that the disputed subcontracted work on the 1998 Log Truck had been performed by Organization-represented Work Equipment Employees on the 1992 Log Truck. The Carrier responded when it denied the claim that "The Carrier has permitted BMWE employees to perform repairs on vehicles when it has been feasible and convenient to do so, but the BMWE does not own the work."

Whether the hydraulic cylinder is classified as equipment or vehicle and whether or not work on hydraulic cylinders has routinely been contracted out, the record establishes that at least with regard to the 1992 Log Truck, the work has been done by Work Equipment Repairmen represented by the Organization. Moreover, exclusivity of work on the vehicle and/or hydraulic cylinder on the

vehicle is not the test. See Third Division Award 40320. Because Work Equipment Repairmen have done the disputed work, it falls within the scope of the Agreement regardless of whether it is viewed as work exclusive to the Organization. The Notice Requirement in Article 3.1 is applicable. See Third Division Award 32344. The Notice Requirement may be bypassed in case of an emergency, but the Carrier has not claimed that an emergency existed.

The Carrier's claim of an established past practice of contracting out the work is unpersuasive. Article 3.1 language is unambiguous. The establishment of a past practice that would take precedence over unambiguous contract language, in essence an unwritten revision of such language, would require an exceedingly strong showing by the Carrier of clarity, consistency and mutuality to establish such a practice. The Board finds no such showing. The absence of notice requires that the claim be sustained. See Third Division Awards 37950, 40549 and 32878.

In Third Division Award 40677 the Board wrote, "The Carrier violated the agreement and denied the Claimants the opportunity to perform the work. Compensation is appropriate to preserve and protect the integrity of the Agreement." That was a case in which the Claimants were employed when the subcontracting occurred. See also Third Division Awards 40765, 40774 and 40921. This Board adopts the same approach.

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 10th day of January 2018.

CARRIER MEMBERS' DISSENT
to
THIRD DIVISION AWARD 42889 - DOCKET NO. MW-43760

(Referee I.B. Helburn)

Aside from stating that Work Equipment Repairmen had performed the disputed work on one occasion in the past, the Organization's original claim was premised on the allegation that the Carrier violated Article 1.1., Article 3.1 and Article 5.3 of the parties' agreement.

Article 1.1 states: "*The rules contained herein shall govern the hours of service, working conditions, and rates of pay of Engineering and Mechanical Department employees represented by the Brotherhood of Maintenance of Way Employes (BMWE) who are working on Tracks, Bridges and Buildings, Work Equipment, or Welding Plant.*" (**Carrier's Exhibit A, p.1**) The Carrier explained, "*…Article 1 is a general rule of construction that simply outlines the fact that employees represented by the Organization are covered under the scope of the ST/BMWE Agreement. It does not specifically detail the type of work that may be performed by the various classes of employees that are covered under the ST/BMWE Agreement. This article is irrelevant to the instant dispute.*" (**Carrier's Exhibit E, p.3**) The Organization did not subsequently refute the foregoing.

Article 3.1, as cited by the Organization, states: "*In the event the Company plans to contract out work within the scope of the Agreement, except in emergencies, the Company will notify the General Chairman involved, 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.*" (**Carrier's Exhibit A, p.1**) The Carrier explained that "*…Article 3 applies to contracting out work that is covered under the scope of the ST/BMWE Agreement. That article is not relevant in matters where the work being claimed is not covered under the ST/BMWE Agreement, such as in the instant dispute.*" (**Carrier's Exhibit E, p.3**)

As for Article 5.3, which is the specified place where the Organization claimed that the contractual right to the disputed work can be found, it states: "*Work Equipment Sub-Department 1. Work Equipment Repairmen: Repair tools, machinery, and equipment.*" (**Carrier's Exhibit E, p.20**) In support of its position relative to Article 5.3, the Organization advanced the tenuous theory that the Log Truck's components, namely the hydraulic cylinder on the boom, should be considered to be an actual tool or piece of machinery, which places that component of the truck within Article 5.3. In contrast, the Carrier demonstrated in detail (at **Carrier Exhibit E, pp.1-22**) that the Carrier's Log Truck does not fit at all within the meaning or intent of Article 5.3. The summation of the Carrier's position was that the log truck is a vehicle, not "*…tools, machinery, and equipment*" that maintenance of way employees use to perform their scope of work maintaining the tracks, as contemplated by Article 5.3. Furthermore, the Carrier

specifically pointed out that, "*To conclude that the afore quoted language of Article 5.3(1) imposes an obligation to analyze each and every component or part of a vehicle in order to determine if it should qualify as equipment/machinery versus a vehicle, is an absurd application of the ST/BMWE Agreement language*." (**Carrier's Exhibit E, p.3**)

Even though contractual ownership of the disputed work based on an application of Article 5.3 constituted the central contractual issue in this dispute, this Board intentionally refrained from any application of Article 5.3 to the facts of the case. Without determining whether the work does or does not fall within the language of Article 5.3, the Board concluded that the disputed work "*falls within the scope of the Agreement*" merely "*Because Work Equipment Repairmen have done the disputed work*" on the 1992 log truck on the one noted prior occasion. The Board's reasoning does not constitute a proper review of the minor dispute that was handled on the property, given that the specific portions of the parties' agreement that were alleged to have supported the claim were not even analyzed or addressed by the Board. Moreover, the Organization did not argue on the record that the contract language upon which it relied was unambiguous. Therefore, it was improper for the Board to base the Award, in part, on such an argument.

The Board further erred by opining that "exclusivity" is not the applicable test to use in this dispute. "Exclusivity" most certainly was the applicable test to use in this dispute. The Organization's position on the property was that, pursuant to Article 3, the Carrier was contractually required to provide notice to the Organization that the Carrier planned on contracting out scope of work, which it claimed it owned under Article 5.3 (and Article 1.1.) of the parties' agreement. The Organization had the burden to establish that Article 5.3 (and Article 1.1.) of the agreement supported its claim that it owns the work, so as to therefore require the Carrier to comply with Article 3. The disputed work is not contained anywhere in the parties' agreement, let alone Article 5.3 (or Article 1.1.), which this Board did not even apply to the case. Consequently, the Carrier had the right to assign the work to someone other than maintenance of way employees and the Carrier was not required to put the Organization on notice (under Article 3) that it was going to do so. Article 3 was not violated because it was not applicable.

In this Award, the Board holds that the Carrier's argument of a past practice of contracting out the work in question "*is unpersuasive*", chiefly because "*The establishment of a past practice that would take precedence over* ***unambiguous contract language****, in essence an unwritten revision of such language, would require an exceedingly strong showing by the Carrier of clarity, consistency and mutuality to establish such a practice.*" (Emphasis added here.) The "*unambiguous contract language*" to which the Board refers, is not Article 5.3 (or even Article 1.1), but is instead Article 3.1. Article 3.1 in no way confers the work in question (or any work) upon the Organization. The Organization did not even allege that Article 3.1 confers work upon its membership. Article 3.1 does not come into play unless and until the work at issue is determined to be contained within the scope of

the agreement. Article 5.3 (and/or Article 1.1) is where the contractual ownership of the work would be found, according to the Organization's own claim handled on the property. But the Board did not apply said articles to the facts of the case. Furthermore, the fact that the Carrier addressed the Organization's past practice argument with its own past practice argument, did not consequently shift the burden to the Carrier to present an "*exceedingly strong showing by the Carrier of clarity, consistency and mutuality to establish such a practice*", in order to defeat the claim. The Organization had the burden of proving its claim that it owned the work at issue, based on an application of the three (3) specific portions of the parties' agreement to which it cited. The Organization failed to carry that burden.

As for the Board's reliance on Third Division Award 40320 from another property, that case is clearly distinguishable from the instant dispute. In Third Division Award 40320, that Carrier actually sent a contracting out notice to the Organization explaining its reasons for needing a contractor to perform the work at issue. That Carrier further asserted that it had given proper advance notice to the Organization prior to the contracting event. In its holding, the Board stated in pertinent part that, "*Whether the Carrier had proper reasons for contracting out is a matter that should have been discussed with the General Chairman under the clear language of Rule 1 of the Agreement.*" The Board added in relevant part that, "*The Carrier failed to demonstrate that it complied with the foregoing contractual requirements in good faith. Holding a conference at the same time the contracted work is nearing completion renders the conference obligation meaningless. Such actions by the Carrier preclude any good faith attempt to reach an understanding concerning the contracting.*" In essence, that Carrier issued notice to the Organization, but the Board found that the notice procedures were not properly followed, despite the Carrier's protestations to the contrary. In contrast, the Carrier did not send out a contracting notice (pursuant to Article 3) at the outset of the instant dispute, because the Organization had no contractual right to the disputed work. And since Article 3 was not applicable, it was improper for the Board to rely on Article 3 in fashioning this Award. Third Division Award 40320 is simply not relevant to the instant dispute due to the significant divergent facts contained in the two cases.

In conclusion, this Award does not properly address the parties' assertions with respect to Article 1.1 or Article 5.3, nor does it properly apply Article 3 to the facts of the case. Accordingly, this Award should be viewed has having zero effect on future application of those cited articles of the parties' agreement and should not be relied on in the future to confer contractual rights to the Organization that do not exist anywhere within the scope of the agreement.

It is for the foregoing reasons that the Carrier does not concur with the Board's opinion and must dissent from this Award.

Anthony Lomanto
Carrier Member

Matthew R. Holt
Carrier Member

January 10, 2018