**CORRECTED**

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38349
Docket No. MW-37358
07-3-02-3-378

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division
(
(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 (Bannock Paving Company, Inc.) to perform Maintenance of Way work (haul track material, roadbed work, initial crossing and switch panels and related work) at Mile Post 213.75 on Receiving Track No. 10 in Pocatello, Idaho Yards on February 21, 22, 23, 26 and 27, 2001, instead of Roadway 'Equipment Operators R. R. Olsen, M. J. Dunn, G. L. Purkey, Idaho Division Truck Operators D. J. Feige, D. K. Hanson, Idaho Division Sectionmen J. Hernandez, R. J. Warth and Idaho Division Track Forman R. R. Rodriquez (System File J-0152-59/1271615).

2. The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces 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, Claimants R. R. Olsen, M. J. Dunn, G. L. Purkey, Idaho Division Truck Operators D. J. Feige, D. K. Hanson, Idaho Sectionmen J. Hernandez, R. J. Warth and Idaho Division Track Forman R. R. Rodriquez '*** must each much (sic) be allowed at

his applicable rate a proportionate share of the total hours, both straight and overtime hours worked by the contractor doing the work claimed as compensation for loss of work opportunity suffered on February 21, 22, 23, 26 and 27, 2001. Additionally, in an effort to make Claimants whole for all losses suffered, we are also claiming that the Carrier must treat Claimants as employes who rendered service on the days claimed qualifying them for vacation credit days, railroad retirement credits, insurance coverage and any and all other benefits entitlement accrued as if they had preformed (sic) the work claimed.'"

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.

As an initial note, it is well settled by controlling authority that the Board has no power to impose principles of equity or justice. Our responsibility and obligation is to interpret and apply the provisions of the Agreement between the parties as written. Nor are we clothed with any authority to rewrite the Agreement in favor of either side to the dispute, for to do so would deprive them of the bargain struck. With this principle firmly in place, we now review the relevant facts and authority set forth in the record of this case.

The facts of this case reveal that on February 21, 22, 23, 26 and 27, 2001, the Carrier assigned Bannock Paving Company, Inc. of Pocatello, Idaho, to assist Carrier forces in hauling damaged track material, performing roadbed work, installing crossing and switch panels, and making various derailment repairs on Receiving Number 10 Track in the Pocatello, Idaho, Yard at Mile Post 213.75. The number of contract employees together with their hours of work on each day at issue herein are

contained in the on-property record and are not in dispute. It is the Organization's position that the Carrier failed in the first instance to adhere to the requirements of Rule 52 in that it failed to give the General Chairman at least 15 days advance written notice of its plans to contract out the work, indicating the reasons therefore, and failed to meet with the General Chairman had he requested such meeting.

In addressing the Organization's claimed violation of Rule 52, the Carrier contends that the disputed work constituted an emergency repair incidental to a derailment and accordingly, it was not obligated to provide notice to the General Chairman under Rule 52. In the alternative, the Carrier asserts that it did, in fact, supply the Organization with notice pursuant to an equipment services Agreement, such Agreement having been in effect since October 13, 1999 and where notice had been served on the Organization prior to starting the work with Bannock Paving Company.

Rule 52 is the operative provision involved in this matter. It has been the subject of numerous Third Division Awards involving the parties. It provides that the Carrier may contract out maintenance-of-way work "customarily performed by employes covered by this Agreement" under one or more of six specific conditions as follows:

"1. Special skills are not possessed by the Company's employees;

2. Special equipment is not owned by the Company;

3. Special material not possessed by the Company is only available when applied or installed by the supplier;

4. The work in question is such that the Company is not adequately equipped to handle it;

5. Emergency time requirement situations exist which present undertakings not contemplated by the agreement.

6. Work in question is beyond the capacity of the Company's forces."

Where required, the Carrier "shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirement' cases."

In the instant matter, the Carrier asserts that under the facts of this case it was not under any obligation to provide the General Chairman with the foregoing Rule 52 notice because:

* A derailment in the Pocatello Yard gave rise to an emergency which work related to the restoration of the track and roadbed destroyed as part of the derailment made it impractical to provide the General Chairman with the Rule 52 notice;

* Notice was provided to the Organization in or about October 1999 when Bannock forces assisted Carrier forces under an equipment services agreement, and such notice had a continuing effect such that a specific Rule 52 notice was not required in the instant matter, and finally,

* The Organization failed to prove that it "exclusively" performed the disputed work. Absent such proof, the Carrier asserts that a Rule 52 notice is not required.

A review of Third Division Awards reveal that the existence of an "emergency" in a derailment situation requires a case by case analysis. (See, e.g., Third Division Award 37644 where the Board stated "[d]erailments are not 'one-shoe-fits-all,"; See also Award 31036 where the Board determined that the specific facts of that case supported the conclusion that the emergency ceased where the contractor's work forces began to fluctuate "thereby suggesting that the emergency condition did not exist for the entire period in which the work was performed." Further review of Third Division Awards support the conclusion that any claimed emergency must be bona fide where time is of the essence thereby rendering the Carrier's obligation to supply a Rule 52 notice impractical given the exigencies that then exist. (See, e.g. Third Division Award 30868 where the Board stated "the Organization has failed to prove that the 15 day advance notice provision has ever been applied to derailment situations where immediacy of action is required and advance notice is not practical.")

The facts gathered during the on-property discussion of the instant claim demonstrate that the track at issue was impaired for approximately three hours following a derailment followed by what essentially amounted to clean up work that continued for more than four days. Given these undisputed facts, the Board finds that once the track was unimpaired and thereby useable, the emergency ceased to exist. Accordingly, the

clean up work performed by Bannock Paving Company did not meet the time is of the essence criterion for the existence of a bona fide emergency.

Next, in addressing the Carrier's assertion that its October 1999 notice to the Organization regarding work performed by Bannock Paving Company had continuing effect, the Board notes the General Chairman's November 30, 2001 response wherein he stated: "The Carrier has also failed to provide a copy of a notice in connection with this work and at first relied on a notice that was given in 1999 under an equipment service agreement. We are unable to locate any notice, based on the information that you have supplied to this Organization, which has any relevance whatsoever to the work outlined in this claim." The Carrier, citing Third Division Award 37365, contended that the 1999 notice was the subject of a claim involving the operation of graders in the Pocatello Yard. Respectfully, referring the Organization to a Third Division Award falls short of its obligation to supply the 1999 notice itself to the Organization upon the Organization's request. In addition, the Board finds the Carrier's reliance on Third Division Award 37365 is misplaced. The "notice" referred to in Award 37365 while dealing with "as needed" work of grading maintenance and dust control for yard roads at Pocatello, Idaho, asserted the Carrier's claimed lack of equipment. A claimed lack of equipment is not at issue in the instant matter. Further, unlike the instant matter where all Claimants were furloughed, the Claimants in Award 37365 were fully employed. Given these undisputed facts, the Board finds the Carrier's reference to Award 37365 confusing at best, thereby falling short of the type of notice required by Rule 52. Finally, the Board finds that even if the 1999 notice in fact existed, the Carrier failed to demonstrate that the 1999 notice was a continuing one thereby relieving the Carrier of future obligations to supply a Rule 52 notice whenever the services of Bannock Paving Company would be utilized.

Next, in addressing the Carrier's assertion that the Organization failed to demonstrate that it "exclusively" performed the work at issue, it is well established that "exclusivity" is not the proper test in determining whether advance notice is required under Rule 52. Where, as here, the Organization has established that BMWE-represented employees have, at times, performed the disputed work, advance notice under Rule 52 is required, even if Organization forces have not performed the work to the exclusion of other crafts or contractors. (See Third Division Awards 23578, 31804, 32338, 35901 together with all Third Division Award references cited therein.) Indeed, accepting the Carrier's exclusivity claim in the instant matter would have the effect of rendering Rule 6 (providing that Foremen supervise, instruct and assist in work performed under Rule 9), Rule 9 (providing that forces in the Track Subdepartment perform maintenance of roadway and track, such as roadbed and installing panels and that a Sectionman performs work customarily recognized as Sectionman's work), and Rule 10 (providing

that work in connection with the operation, care, maintenance (running repairs) and servicing of roadway equipment (including attachments thereon) are classified as work of roadway equipment operators) a nullity.

Given the foregoing, the Board concludes that under the circumstances here present, the Carrier failed in its obligation to supply a Rule 52 notice to the General Chairman. We therefore sustain Part 2 of the claim based on the proven violation of the notice/consultation obligations set forth in Rule 52 without reaching or deciding the merits and/or defenses the Carrier might have raised had good-faith discussions occurred with the General Chairman as contemplated by Rule 52 and the December 11, 1981 Letter of Understanding. As for the appropriate remedy, we concur with the views eloquently expressed by the Board in Third Division Award 32862 and sustain this claim in its entirety.

## 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 5th day of September 2007.