Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40923
Docket No. MW-41072
11-3-NRAB-00003-090122

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 (Robinson Construction) to perform Maintenance of Way work (operate loader and trackhoe for fill removal, grading, back filling and associated duties) in connection with the installation of a culvert under the track at Mile Post 383 on the Caliente Subdivision on August 21, 22 and 23, 2007 and continuing (System File D-0752U-219/1487556).

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 and failed to make a good-faith attempt to reach and understanding concerning said contracting as required by Rule 52(a).

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants N. Blanco, P. Cardinal, T. Murray and J. Robertson shall now each be compensated at their respective and applicable rates of pay for an equal and proportionate share of the total straight time and overtime man-hours expended by the outside forces in the performance of the aforesaid work beginning August 21, 22 and 23, 2007."

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 utilization of an outside contractor (Robinson Construction) using four employees operating a loader and trackhoe to assist Carrier Steel Erection forces with the installation of a culvert under the main line track at Mile Post 383 on the Caliente Subdivision, Moapa, Nevada. The Organization asserted that the contracted forces worked ten hours on August 21 and 22, 2007, and three hours on August 23 for a total of 92 man hours.

It is the position of the Organization that the work in dispute has customarily and traditionally been assigned to and performed by the employees in Group 3, B&B Carpenters, of the Bridge and Building Sub-department as it is specifically designated as being work of this Group and Sub-department under Rules 4 and 8 of the Agreement and is protected by the Scope Rule that is specific in nature. It further argued the Carrier violated Rule 52 - Contracting and the good faith obligations under the December 11, 1981 Berge/Hopkins Letter of Understanding. Lastly, it argued that no notice was served on the Organization concerning the work and on that basis alone the claim should be sustained. It concluded by requesting that the claim be sustained either procedurally or on the merits as presented.

It is the Carrier's position that the Organization failed to meet its burden of proving any contractual violation when the Carrier contracted work which was not reserved to the Organization's members by custom, practice, or tradition. It argued that the Scope Rule is general in nature and does not grant specific work or activities including the work grieved in this instance. It further argued that the December 11, 1981 Letter of Understanding commonly referred to as the

Berge/Hopkins Letter is solely dependent upon the applicability of the Subcontracting Rule - it did not create a separate new contracting Rule, nor did it supersede the past practice exception. According to it, the Letter of Understanding re-affirmed the notice requirement and encouraged the parties to resolve at the local level the parties' differences over contracting. It further suggested that the Agreement contained a reciprocal obligation that the Organization committed to, but never followed up on by working with Carriers to "explore ways of achieving more efficient and economic utilization of the work force." It argued because the Organization failed to satisfy its reciprocal obligation that destroyed mutual consideration and absent mutual consideration the status of the contract was lost. Lastly, it argued that the Claimants were fully employed on the dates of the claim and suffered no monetary loss. It closed by asking that the claim remain denied.

In support of its claim, the Organization relied upon Rule 52 - Contracting of the Agreement which states, in pertinent part, the following:

> "(a) By agreement between the Company and the General Chairman, work customarily performed by employees covered under this Agreement may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it will notify the General Chairman of the Organization 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, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company will promptly meet with him for that purpose. Said Company and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting but

if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.

(b) Nothing contained in this rule will affect prior and existing rights and practices of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

* * *

(d) Nothing contained in this rule shall impair the Company's right to assign work not customarily performed by employees covered by this Agreement to outside contractors."

The December 11, 1981 Letter of Understanding states in relevant part:

"Dear Mr. Berge:

* * *

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interest of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reason therefore."

The first question at issue is whether or not the vitality of the December 11, 1981 Letter of Understanding (Berge/Hopkins Letter) has expired because expectations by one party or the other may or may not have been realized. There was lengthy dissertation on the subject by the parties which set forth their respective positions. That record indicates that this argument has arisen on several occasions over the life of that Agreement sometimes boiling over into contentious debate. As that debate was waged, Neutrals continued to accept the fact that the Agreement was viable. As an example, Award 13 of Public Law Board No. 7100, involving the same parties to this dispute, issued a decision on March 4, 2009, without dissent by the Carrier, that the December 11, 1981 Letter of Understanding had been violated by the Carrier. Other Awards such as Third Division Awards 29121, 30066, 31015, 36292, 38349 and Award 6 of Public Law Board No. 7099 have also determined that the Agreement applies to this Carrier and on that basis the Board is not persuaded that the December 11, 1981 Letter of Understanding has lost its applicability.

We will reiterate the previous determination of Third Division Award 40922 that the Carrier erred when it again argued the Organization cannot prove "exclusivity" to the work in dispute. That argument is not applicable in this instance because the Organization is not required to prove exclusive reservation of scope-covered work when the dispute involves the assignment of work to outside contractors. The proper application of the exclusivity test is to those internal disputes over the assignment of work between different classes and crafts of the Carrier's own workforce and not to disputes involving outside forces. See Third Division Awards 30944 and 32862, as well as Award 1 of Public Law Board No. 7096.

The extensive record in this case raises a likely probability that the work in dispute was customarily performed by Carrier forces such as the Claimants which would necessitate the serving of a notice. In Third Division Award 30066, the Board ruled:

> "Rule 52, the parties' Rule dealing with contracting of work, has been the subject of numerous Awards of this Board. Two of the more recent Awards, Third Division Awards 28943 and 29121, provide a sufficiently thorough discussion of the history and operation of the notice requirements under Rule 52 that further elaboration will not be provided here. Suffice to say, however, the

precedent establishes that the advance notice and meeting requirements are invoked whenever any contracting is done, whether the work is 'customarily performed' by the employees or not. See also, for example, Third Division Awards 28443, 28558, 28619 and 28622." (Emphasis added)

Because no notice was served on the Organization we will not delve into any other issues regarding whether or not the Carrier had a justifiable reason for using outside forces as they are not germane to the resolution of this matter. The determination in this case is based upon the fact that the Carrier failed to serve a required notice on the Organization of its intent to contract the disputed work; thus it violated Rule 52.

The Carrier argued that the Claimants suffered no monetary loss and no Rule of the Agreement provides for a penalty payment whereas the Organization argued that the Claimant is entitled to a monetary request so as to preserve the integrity of the Agreement and be made whole for lost work opportunities. We examined the various cases cited by the parties on the subject of penalties versus damages and are cognizant of the divergent philosophies set forth in those Awards. We agree with that line of Awards which holds that when a Claimant lost his rightful opportunity to work he is entitled to monetary compensation. See Third Division Awards 12761, 17059, 18365, 19441, and 19480. In view of the fact that no notice was served and no meeting was held between the parties and the Carrier offered no evidence that the work in question could not have been performed by the Claimants during rescheduled hours of work, we find the Organization's request for a remedy to be persuasive. On the property, the Organization argued that the work performed by the four employees of Robinson Construction totaled 92 man hours. Based upon the record presented we are unable to determine with certainty that the Organization's request is consistent with the number of hours expended by the outside contractor's employees. Therefore, the Board directs the parties to meet and review the Carrier's records to determine the number of hours worked by the outside forces, after which the Claimants are to be paid at the proportionate straight time and overtime rates for the number of hours those employees worked, not to exceed 23 hours per Claimant.

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 24th day of March 2011.