Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40967
Docket No. MW-41034
11-3-NRAB-00003-090381

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 (KRW) to perform Maintenance of Way and Structures Department work (right of way ditching) in the vicinity of Mile Post 22.50 on the Omaha Subdivision beginning on January 21, 2008 and continuing (System File J-0852U-251/1500457).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance notice of its intent to contract out the aforesaid 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 J. Mumm, K. Gute, J. Culbertson and D. Evers shall now each be compensated at their respective and applicable rates of pay for an equal and proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning January 21, 2008 and continuing."

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.

By letter dated May 1, 2007, the Carrier advised the General Chairman that it intended to contract out work to ". . . provide equipment support, including but not limited to, backhoes, excavators, trucks, on an as-needed basis for Maintenance of Way forces in the performance of their duties . . ." at various locations on the Council Bluffs Service Unit. The Organization responded by letter dated May 3, 2007, objecting to the contracting, the vagueness of the notice and lack of dates or reasons for contracting, and requesting specific information to be furnished at a conference to be held prior to any work being assigned to a contractor. The holding of a conference was confirmed on June 12, 2007.

The instant claim was filed on February 22, 2008, asserting that four contractor employees performed ditching work using a crawler hoe, loader and truck, work which has been customarily performed by BMWE-represented employees and is reserved to them under Rules 9 and 10, using recognized maintenance-of-way equipment commencing on January 21, 2008. It contended that no prior notice was given and none of the exceptions listed in Rule 52 applied.

By letter dated April 17, 2008, the Carrier denied using contractor forces on the claim date, stating that it could not locate any information to substantiate this work, that the Organization had not alleged a verifiable fact situation or provided proof of the alleged contracting. It also asserted that the Organization failed to show that the disputed work was reserved to the Claimants or exclusively performed by BMWE-represented employees.

In its June 16, 2008, appeal, the Organization noted that the information came from eyewitnesses, providing two employee statements concerning the work performed by this contractor's employees in that vicinity on many occasions including specific dates in March and April 2008, and questioned why the Carrier did not check its various billing records to confirm payment to the named contractor during the claim period. It asserted that the work performed was construction and maintenance of roadway and track reserved specifically to employees under Rule 9, and work in connection with the operation of equipment listed in Appendix Y, which is specifically within the job responsibilities of the Roadway Equipment Sub-department under Rule 10. The Organization stated that BMWE-represented employees historically performed this work, it need not establish exclusivity, and the fact that there may have been a mixed practice on the property does not justify the contracting under Rule 52, which requires the showing of one of the specific exceptions which were not present in this case, citing Third Division Award 29916. The Organization contended that there was no notice regarding the specific ditching work performed by the contractor herein, and that the Carrier failed to meet its obligation to engage in good faith discussion and to comply with its commitment to reduce the incidents of subcontracting set forth in the December 11, 1981 Letter of Understanding, which is still valid, citing Third Division Award 29121. Finally, the Organization rejected the Carrier's full employment defense to the appropriateness of a monetary remedy for this lost work opportunity, relying on Third Division Awards 28817 and 29531, as well as Public Law Board No. 6304, Award 33.

The Carrier's August 13, 2008 denial states that it is entitled to contract out this work under Rule 52(b) in the absence of the Organization showing exclusivity of performance or the lack of a past practice on the property. The Carrier provided an email from the Manager of Special Projects indicating that the work was contracted due to a natural spring which began eroding the sub-grade in that location in late Winter presenting a safety risk to train crews, coupled with a lack of applicable equipment to repair the problem which required immediate action, noting that the contractor worked only during normal working hours when employees were present and was under the supervision of the Carrier's employees. The Carrier argued that this was an "emergency" situation giving it broader latitude, citing Third Division Award 20527, and also averred that the December 11, 1981, Berge/Hopkins Letter of Understanding did not create any separate rights or supersede the Rule 52 past practice exception, and was not valid because the Organization never lived up to its reciprocal commitments that were conditions

precedent to such understanding. Finally, the Carrier asserted that the Claimants had no loss of earnings associated with this contracting and were not entitled to monetary compensation. In its Submission the Carrier asserts that there is precedent for its contracting out excavation work of this type, relying on Third Division Award 33420 and Public Law Board No. 6205, Awards 12 and 14.

The parties' positions were detailed in their correspondence on the property as set forth above. A careful review of the record convinces the Board that the notice pointed to by the Carrier in this case related to the use of equipment to back up maintenance-of-way forces on an as needed basis on the Council Bluffs Service Unit, and did not specify any type of work, including the ditching protested in this claim, or any time period. While broad notices have been found to satisfy the requirements of Rule 52(a) in the past (see Third Division Awards 30063, 30185 and 32333) they normally outline the nature of the work. The fact that the Carrier did not focus upon the adequacy of its notice on the property, first contesting the fact of the contracting itself, and then belatedly asserting that it occurred but was due to an "emergency" situation of undetermined duration, highlights the apparent defects in the sufficiency of the notice and conference held more than seven months prior to the commencement of work. Thus, we conclude that the Carrier's blanket notice did not meet its obligations under Rule 52(a) with respect to the disputed work herein. See Third Division Award 29121.

A reading of Rules 9 and 10 confirm that the operation of the type of equipment utilized by the Carrier employees in this case falls within the scope of the Agreement and is specifically reserved to the Roadway Equipment Sub-department. While that fact does not prohibit the Carrier from contracting where it establishes one of the listed exceptions contained in Rule 52(a) or prior and existing rights as a result of an established past practice of contracting the work at issue, our review of the record convinces us that the Carrier has not proven either of these bases for contracting in this case. Its reliance on Third Division Award 33420, as well as Public Law Board No. 6205, Awards 12 and 14 to show a past practice is insufficient, because those cases deal with excavating and asphalt/concrete work or a major construction project that was not required to be piecemealed in the context of a specific notice relating to that type of work. In this case no type of work was mentioned in the notice, and it was the use of the same type of machinery customarily operated by BMWE-represented employees "on an as needed basis" to support maintenance-of-way forces in the performance of their duties that was conferenced, not ditching work. Additionally, the Carrier did not support its

defense of an "emergency" situation with any facts showing why its own forces could not have been assigned to deal with the eroding natural spring, that there was a lack of proper equipment available, or that such equipment could not have been leased for use by qualified employee Operators.

Under all of these circumstances, we conclude that the Carrier violated Rule 52(a) by contracting the ditching work in dispute in this case without adequate prior notice. Because the Organization did not establish the dates upon which such work was performed, we remand the case to the parties to determine the number of hours the contractor employees operated the listed equipment in the vicinity of Mile Post 22.5 on the Omaha Subdivision performing ditching work. The Claimants shall be compensated for the lost work opportunity by payment of a proportionate share of the hours established at their respective rates of pay. See Public Law Board No. 7096, Award 14.

## 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 14th day of April 2011.