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

Award No. 42073
Docket No. MW-42188
15-3-NRAB-00003-130138

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division – IBT Rail Conference
(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 (Russell Marine) to perform Maintenance of Way and Structures Department work (remove/replace bridge structure and related work) at Mile Post 7.37 on the Pocatello Subdivision commencing on August 31, 2011 and continuing through October 10, 2011 (System File D-1152U-246/1562796).

(2) The Agreement was further violated when the Carrier allowed Russell Marine to inflate its forces to assist in the performance of the Maintenance of Way and Structures Department work (remove/replace bridge structure components and related work) at Mile Post 7.37 on the Pocatello Subdivision on September 26, 2011 (System File D-1152U-247/1562797).

(3) 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 when it failed to make a good-faith effort to reach an understanding concerning said contracting as required by Rule 52 and the December 11, 1981 Letter of Agreement.

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants P. Armstrong, G. Ball, D. Brokens, T.

Murphy, R. Payne, W. Wallace and K. Hymas shall now each be compensated at their respective and applicable rates of pay for a proportionate share of the total straight time and overtime man-hours worked by the outside forces in the performance of the aforesaid work commencing August 31, 2011 and continuing through October 10, 2011.

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants S. Allen, C. Coombs, T. Newby, J. Paz, T. Santiago and J. Shields shall also each be compensated at their respective and applicable rates of pay for a proportionate share of the total straight time and overtime man-hours worked by the outside forces in the performance of the aforesaid work on September 26, 2011."

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 15-day notice dated June 30, 2011 regarding Service Order No. 49294, the Carrier advised the General Chairman that it intended to contract out specific work to "furnish all labor, supervision, equipment, and materials (except Railroad-furnished materials) to remove and dispose of existing bridges in compliance with all applicable laws and regulations and to construct three (3) bridges per CE drawings 118014, 118081, and 118728" at Mile Posts (MP) 7.38, 84.24 and 91.00 on its Pocatello Subdivision. The notice also describes the physical location of each of

the MP sites where the new bridges would be constructed and lists the Railroad materials to be furnished. The Organization responded by letter dated July 6, 2011, objecting to the contracting, the vagueness of the notice which fails to include the commencement and ending dates and reasons for contracting, requesting specific information to be furnished at a conference to be held prior to any work being assigned to a contractor, asserting that employees have customarily performed this work, and asking under which Agreement Rule the notice was served. The conference was held on July 13, 2011 pursuant to Rule 52(a), wherein the Carrier advised that the work was to be completed by December 31, 2011, no contract had yet been entered into, its forces were fully engaged in other work but would participate in the bridge construction project, and that there was a past practice of it contracting out similar work. The contractor performed this work between August 31 and October 10, 2011.

The instant case consolidates two separate claims, both filed on October 24, 2011, one concerning the contracting of scope-covered work commencing on August 31, 2011, and the other concerning the inflation of the contractor's workforce by an additional nine employees on September 26, 2011 to perform cutover work on the bridge construction project. The claims assert that Rule 8 reserves the work of bridge maintenance and construction to employees who have customarily performed such work, and that the Carrier failed to provide evidence that the reason for the contracting fell within one of the exceptions listed in Rule 52(a) permitting such contracting. The claims also allege that the Carrier is ignoring its obligation under the December 11, 1981 Berge-Hopkins Letter of Understanding (LOU) to reduce the incidence of subcontracting, it failed to explain why it could not schedule its employees to cover this work or hire additional employees to perform it, and notes that there was no employee participation in the project despite what was said at the conference.

In its initial denial on December 14, 2011, the Carrier stated that the Rule 52(a) exception that applied was that it was not adequately equipped to handle the scope of the work involved. It asserted that the Organization did not show that BMWE-represented employees had customarily and historically performed bridge construction work of this type, that it had an established past practice of contracting bridge work which has been recognized by the Board, citing many Third Division Awards including 40815, and arguing that the issue of its ability to contract out this

type of work is stare decisis. The Carrier also took issue with the continued applicability of the LOU, and the Organization's interpretation that it creates an obligation independent of Rule 52. Finally, it contends that the Claimants suffered no monetary loss inasmuch as they were fully employed during the contracting period.

During subsequent appeals and correspondence on the property, the Organization stressed that by asserting manpower issues in every notice and not hiring new employees, the Carrier had not met its obligation to properly staff and prioritize work projects so as to reduce the incidence of contracting and permit its own employees to perform work reserved to them under the Agreement. It noted that the Carrier cannot prove a past practice of contracting merely by listing other instances where similar work was allegedly contracted without showing the individual circumstances for each contract and which Rule 52 exception applied in each case. The Organization also argued that due to its historical performance of this work, proven by six pages of employee statements and pictures, it has an existing right to it under Rule 52(b). It maintained that the good faith obligations set forth in the LOU still applied, positing that it gave the Carrier work Rule flexibility as a benefit of the bargain. Finally, the Organization noted that the Board has accepted that there was a loss of work opportunity regardless of whether the Claimants were fully employed, and that a monetary remedy was appropriate.

During subsequent denials and correspondence on the property, the Carrier made clear its position that proper advance notice was provided, Rule 52(a) exceptions were satisfied, Rule 52(b) prior and existing rights (which did not have to start before 1973) and its mixed practice of contracting bridge work supported its right to contract this work, the LOU was no longer applicable, the Scope Rule is general in nature and does not reserve work to BMWE-represented employees, and the employee statements provided do not establish exclusivity of performance or deny contractor performance of bridge construction work. It also provided the Manager's statement for each claim explaining that the scope of the bridge project within the time parameters was beyond the capacity of its own workforce.

As noted above, the parties' positions were detailed in their correspondence on the property. Suffice it to say that the Organization relies upon the following facts and arguments in support of its claim: (1) the Carrier's vague notice which did

not provide the dates of the work or the reason for the contracting did not meet its notice obligation under Rule 52 or the LOU, citing Third Division Awards 41105, 41102, 41052, 40997, 40965, 26762, 25677, 25103, 24242, and Public Law Board No. 7096, Award 15; (2) the work is scope-covered under the specific unambiguous work reservation language of Rule 8 which encompasses bridge maintenance and repair, relying on Third Division Awards 39301, 28817, 14061; Special Board of Adjustment (Loram Rail Handling case); Special Board of Adjustment (Pre-plated Tie Dispute); (3) the Carrier's failure to engage in a good-faith effort to rectify the issue of shortage of manpower by reassigning employees from other locations or hiring additional employees undermined its Rule 52(a) argument and violated its LOU obligation, which applies on the UP property, citing Third Division Awards 40929, 40923, 29121; (4) the absence of proof of any past practice on the record, arguing that a listing of prior incidents is insufficient without explanation of the circumstances existing in each case, and does not negate the need to prove one of the Rule 52(a) exceptions in subsequent cases, and that reliance on prior Board precedent cannot establish a current practice when the record in the later case contains evidence not previously presented or considered by the Board; (5) Rule 52(b) prior and existing rights refers to rights prior to 1973 when Rule 52 was adopted, citing Third Division Award 28817, and the Carrier's mixed practice defense is primarily tied to this Rule; and (6) a monetary remedy is appropriate to preserve the integrity of the Agreement and make the Claimants whole for the loss of this work opportunity, citing Third Division Awards 41107, 40965, 39139, 38349, 36966, 36964, 36516, 29577, 28817; Public Law Board No. 7096, Awards 14 & 15; Public Law Board No. 7101, Award 9.

The Carrier contends that it provided advance notice of its intent to contract the work associated with bridge construction to the General Chairman with specificity as to the type of work and location and discussed the reasons for the contracting in the conference that was held well before the work commenced, in compliance with its Rule 52(a) obligations, citing Third Division Awards 40960, 40863, 40857, 40758, 40756, 37490, 37332, 33646, 32333; Public Law Board No. 6205, Award 8; Special Board of Adjustment No. 1130, Award 13. It notes that the record contains unrefuted evidence that the Rule 52(a) exception that it was not adequately equipped to handle the work applied in this case, and contends that the Board has recognized its right to contract in these circumstances, citing Third Division Awards 40816 and 40799. The Carrier argues that it has historically

contracted bridge maintenance and construction work, a 90-year practice established through documentation furnished to the Organization in the mid-1990's (and again provided here in 36 pages of entries between June 1, 1918 and October 29, 1987, as well as contract Service Orders from 1996 to the present), which was never disputed by the Organization on the property, and the Board has upheld its right to contract such work under the prior existing rights and practices language of Rule 52(b) of the Agreement, citing Third Division Awards 40376, 39711, 39273, 29782, 29007. It asserts that the doctrine of stare decisis applies. The Carrier asserts that the Organization failed to meet its burden of proving the reservation of bridge maintenance or construction work or to challenge the mixed practice of contracting established by the record. It contends that the LOU was obsolete by the 1984 round of bargaining due, in part, to the Organization's unwillingness to meet its commitment to grant Rule flexibility or productivity improvements, and did not eliminate or place any further limitations on the Carrier's right to contract out this type of work under Rule 52, as recognized by the Board in dealing with the contracting issue, relying on Third Division Awards 40802, 40799, 37854, 33467, 32534, 31281, 28943, 28654. Finally, the Carrier argues that because the Claimants were fully employed, the Agreement does not permit the award of damages or monetary compensation in the absence of a proven loss of earnings, citing Third Division Awards 31652 and 31284.

A careful review of the record convinces the Board that the Carrier met its notice and conferencing obligations under Rule 52(a). This is not a case where the Carrier issued a blanket notice long before the work was performed without any evidentiary link to the specifics of the actual contract, as in Public Law Board No. 7096, Awards 15 & 16 and Third Division Award 40997 relied upon by the Organization. Rather, the nature of the work (removal of existing bridges and construction of three new bridges) and the particular MP locations were sufficiently specific to give the Organization enough information to take a position on whether the work in question should be contracted. See e.g., Third Division Award 32333. The conference was held one and one-half months prior to the commencement of the work by the contractor, distinguishing this case from Public Law Board No. 6205, Awards 6, 8, 10, 12 and Public Law Board No. 7096, Award 1. During the conference, the Carrier asserted the Rule 52(a) exception being relied upon to support the contracting, and discussion took place regarding utilization of the Carrier's own workforce to accomplish the task. Unlike the majority of cases cited

by the Organization finding a violation of Rule 52(a), and sometimes the LOU based upon the absence of any notice, see, e.g. Third Division Award 29121, the Board concludes that the Carrier met its Rule 52(a) notice and conference obligations in this case, and that the Organization failed to establish a lack of good faith on the Carrier's part in violation of the LOU, a finding similar to the cases cited by the Carrier for the proposition that the LOU is no longer applicable. See e.g., Third Division Awards 37854, 33467, 32534, 31281, 28943 and 28654.

With respect to the issue of whether the Carrier violated the Agreement by contracting this bridge removal and construction work, although the cases relied upon by the Organization concerning work reservation provisions in the Agreement do not deal with the type of work in dispute here, there can be no doubt that Rule 8 - Bridge & Building Subdepartment, specifically encompasses the work of "construction, maintenance and repair of . . . bridges . . ," and that the work in question falls within the scope of the Agreement. The Carrier does not really dispute that BMWE-represented employees perform work related to bridge maintenance and construction, or have the ability to do so, and, under such circumstances, the Organization need not show historical or customary performance. See, e.g. Third Division Award 22817. However, this is not a guarantee or reservation of all bridge work to BMWE-represented employees, because Rule 52(a) permits the Carrier to contract out such work if one of the four listed exceptions applies - special skills or equipment, when the Carrier is not adequately equipped to handle the work, or when emergency time requirements create situations beyond the capacity of its own forces - and Rule 52(b) permits the Carrier to contract out in conformance with its prior rights and practices. In this case the Carrier defended its contracting on both grounds.

First, the Carrier explained to the Organization in conference that it needed to have the bridge construction project completed by the end of December 2011, and that it was not adequately equipped to handle the work with only its own employees and equipment. The record contains statements from the Manager supporting this position. It was countered by the Organization's assertion that, at the conference, it offered to have BMWE-represented employees transferred, but was informed that they were needed on the work they were performing; the Organization questioned the Carrier's scheduling practices, as well as its refusal to hire additional employees. The Board has upheld the Carrier's right to contract out work where it is not

adequately equipped to handle the work, as in the present case. See, Third Division Award 40816.

The Carrier also justified its right to contract this bridge work on the basis of its prior and existing rights and practices of contracting similar work under Rule 52(b). It not only relied upon prior Board precedent upholding its practice of contracting similar bridge work (see e.g., Third Division Awards 39711, 39273, 29782, and 28654, but presented documentation during handling on the property establishing that it contracted out this type of work from 1918 to the 1980's without objection, and continued to do so to the present, establishing a mixed practice justifying its entitlement to contract out the work in dispute in the instant case. Under such circumstances, it is unnecessary to address the Organization's contention that sole reliance on prior precedent, without a showing of the individual circumstances in each case, does not satisfy the Carrier's burden of establishing a binding past practice. The Carrier's practice evidence was not refuted by the Organization's employee statements and pictures purporting to show only that they, too, performed this type of work, a position that is not disputed here. The Board does not agree that the Carrier's reliance on a mixed practice of contracting bridge work to support its prior and existing rights argument under Rule 52(b) is akin to it insisting on the Organization establishing exclusivity to prove a violation, a showing that is not required.

Because the Carrier complied with the notice and conferencing requirements of Rule 52(a), and established an exception to the prohibition against contracting scope-covered work found in that provision, as well as its prior and existing right to contract bridge work under Rule 52(b), which has been previously acknowledged by the Board, (see Third Division Awards 39711, 39273, 29782, and 28654) we find that the Organization failed to meet its burden of proving a violation of the Agreement in this case. This finding also applies to the contractor's use of additional forces on September 26, 2011 to accomplish a specific task which was part of the permissible contracting transaction.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of March 2015.