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

Award No. 42076
Docket No. MW-42191
15-3-NRAB-00003-130141

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 (Koch Construction and Reilly Construction) to perform Maintenance of Way work (dirt work and form grade) in the Council Bluffs Yard beginning on September 26, 2011 and continuing through October 7, 2011 (System File G-1152U-92/1563251).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out the aforesaid work and failed to make a good-faith attempt to reach an understanding and 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 Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Diaz, R. Schrek, P. Gibson, L. Scott, M. Brinkman, D. Overly, K. Gute, R. Jensen, R. Haner, R. Winter, J. Mumm, D. Cunard and M. Long shall now each be compensated for eighty (80) hours at their respective straight time rates of pay."

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 January 31, 2011, the Carrier advised the General Chairman of its intention to contract out the work of providing equipment support (including but not limited to backhoes, excavators and trucks) "on an as needed basis" to help Carrier forces in the performance of their duties at various locations on the Council Bluff Service Unit. The Organization responded by letter dated February 2, 2011 objecting to the contracting, the vagueness of the notice which allegedly failed 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 BMWE-represented employees have customarily performed this work, and asking under which Agreement Rule the notice was served. The conference was held on February 15, 2011 pursuant to Rule 52, at which time the Carrier advised the Organization that there was a past practice of it contracting out similar type work to supplement its forces when needed. By letter dated March 23, 2011, the Organization confirmed the conference regarding Service Order No. CAL01311, objecting to the blanket notice involving multiple anticipated transactions but no real defined work that could form the basis of discussions and agreement.

The instant claim was filed on November 17, 2011, and protests the Carrier's use of six dump trucks, three backhoes and three bulldozers, all with operators, working 80 hours each near the Council Bluffs Yard between September 26 and October 7, 2011. The claim asserts that Rule 9 reserves the work of construction

and maintenance of roadway and track to BMWE-represented employees, Roadway Equipment Operators and Truck Drivers have customarily performed such work, and 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, noting that the Carrier maintains this type of equipment in the Omaha area or could have rented it. The claim also alleges that the Carrier's vague and blanket notice months earlier in January did not satisfy its obligations pursuant to Rule 52 and the December 11, 1981 Berge-Hopkins Letter of Understanding (LOU) for prior written advance notice for this contracting transaction. It asserts a loss of work opportunity supporting a monetary remedy.

In its initial denial on February 3, 2012, the Carrier stated that the Organization did not show that the work was reserved to BMWE-represented employees by Agreement or customary and historical performance, that it had a strong mixed practice of contracting grading work as well as the use of operated equipment, which permits it to subcontract this work under the prior and existing rights and practices language of Rule 52(b) – a right recognized by the Board – citing many Third Division Awards including 37365 and 40863, and arguing that the issue of its ability to contract out this type of work is stare decisis. The Carrier took issue with the relevance and continued applicability of the LOU, and the Organization's interpretation that it creates an obligation independent of Rule 52. Finally, the Carrier contends that the Claimants suffered no monetary loss inasmuch as they were fully employed on the contracting dates.

During subsequent appeals and correspondence on the property, the Organization stressed the generic and blanket nature of the notice which involved multiple unknown transactions and did not contain the reason for the contacting, that this work is reserved to BMWE-represented employees under Rule 9, that the Carrier had the necessary equipment in the area and failed to support its contention that any of the exceptions listed in Rule 52(a) existed, noting that lack of good planning by the Carrier is not a valid excuse. It maintained that there was a loss of work opportunity and that a monetary remedy was appropriate, and provided a statement from one of the Claimants concerning the extent of the work performed by the contractors and the fact that the Carrier had two or three dump trucks in the vicinity and a loader nearby that sat idle.

In its subsequent denials and correspondence, the Carrier made clear its position that proper advance notice was provided, Rule 52(b) prior and existing rights as established by its mixed practice of contracting new construction grading work supported its right to contract this work (referencing documents supporting its practice back to 1918 previously furnished to the Organization in 1995-6), and that stare decisis should be determinative in denying this claim. The Carrier also included a statement from the Manager who was on site stating that he was unable to provide BMWE-represented employees doing new construction with the amount of equipment needed to perform the work because they only had one dump truck and backhoe being used elsewhere in the Council Bluffs area, and no bulldozer, and had to contract this work because they were not adequately equipped to handle it with the manpower and equipment available at the time, a valid exception under Rule 52(a). The Carrier also relies upon the Manager's statement that the contractor worked only four days with two dump trucks, one excavator and one bulldozer, noting that the Claimant who provided contrary information did not even work in the area during the claim period. It stressed that the Claimants did not suffer any monetary loss as a result of the contracting in question.

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 generic and blanket notice which did not provide the dates of the work, make reference to any specific transaction, or mention any 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 9 which includes construction and maintenance of roadway and track, relying on Third Division Awards 14061, 28817, 29916, 37315, 39301; Public Law Board No. 7096, Awards 1 and 12; 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 reduce the incidence of contracting violated its LOU obligation, which applies on the UP property, citing Third Division Awards 29121, 40923, 40929; (4) the Carrier's mixed practice defense is irrelevant and insufficient to support a Rule 52(b) prior and existing rights defense without additional proof, especially where BMWE-represented employees have customarily and historically performed this work; (5) there is no

irreconcilable dispute of fact and no basis to discount Claimant Schrek's account, especially when the Carrier failed to provide requested documentation concerning the scope and extent of the work performed; 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 the provision of equipment and operators to help prepare the Council Bluff Yard area for BMWE-represented employees to perform new track construction was encompassed within its January 31, 2011 advance notice, which has been found to adequately define the work and location so as to enable good-faith discussion, and a conference was held well before the work commenced, in compliance with its Rule 52(a) obligations, citing Third Division Awards 40863, 40857, 40758, 40756,37490, 37332, 33646 and 32333. It argues that it has a well-established mixed practice of contracting grading work and using operated equipment, a practice established through documentation furnished to the Organization in the mid-1990's (and again referenced), which was never disputed 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 40863, 40399, 37365, 37332, 32629, 32310, 30193, 27011, 27010;; Public Law Board No. 5546, Awards 15 & 16; Public Law Board No. 6302, Award 130. It asserts that the doctrine of stare decisis applies. The Carrier contends that the Organization failed to meet its burden of proving the reservation of this type of work or to challenge the mixed practice of contracting established by the record. It also contends that there is an irreconcilable dispute of fact concerning the contracting, which undermines the Organization's ability to meet its burden of proof. The Carrier contends that the LOU does not apply on this property and did not eliminate or place any further limitations on its 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 and 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. It stresses that the evidence shows that the claim itself is excessive.

A careful review of the record convinces the Board that the Carrier met its notice and conferencing obligations under Rule 52(a). Notices that have similar or greater breadth and scope, with less particularity, have been found to be sufficient by the Board on this property. See e.g., Third Division Awards 40863, 40857, 40756 and 37365. The Organization's reliance on cases concerning other properties or other Agreements does not alter this precedent. See e.g., Third Division Awards 41105, 41102, 40997, 26762, 25677 and 24242. We find that the notice gave the Organization sufficient information to take a position as to why the specified contracting should not take place. Apparently, it did so in correspondence regarding the notice and during the conference held prior to the commencement of the disputed 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. While the notice itself does not particularize a Rule 52(a) exception, the type of work described - to provide specific equipment support on an as needed basis to the Carrier's forces in the performance of their duties - implies that the contracts would occur if its own forces were not adequately equipped to handle the work by themselves – a recognized Rule 52(a) exception – which was further particularized by the Manager in response to the filing of this claim. During the conference, the Carrier asserted that due to its extensive mixed practice on the property, the prior and existing rights and practices language of Rule 52(b) applied. 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 – we conclude that the Carrier met its Rule 52(a) notice and conference obligations in the instant case, and that the Organization failed to establish a lack of good faith on the Carrier's part in violation of the LOU. See e.g., Third Division Awards 28943, 28654, 31281, 32534, 33467, and 37854.

With respect to the issue of whether the Carrier violated the Agreement by contracting this new construction preparatory grading work, there is no dispute that Rule 9, Track Subdepartment, mentions construction and maintenance of roadway and track, and that the work in question falls within the scope of the parties' Agreement. The Carrier does not dispute that BMWE-represented employees perform this type of work, and the notice indicates that the contracted equipment will be utilized to support the Carrier's forces in the performance of their duties. Under such circumstances, the Organization need not show historical or customary performance. See e.g., Third Division Award 22817. However, this is

not a reservation or guarantee of all track construction and maintenance work to 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 relied upon both grounds.

First, during its on-property correspondence, the Carrier included a statement from the Manager contending that he could not provide BMWE-represented employees doing construction work with the amount of equipment necessary to perform the work, listing the limited equipment available to him and the fact it was in use elsewhere, and specifying that the contracting of two dump trucks, one excavator and one bulldozer with operators was necessary because the Carrier was not adequately equipped to handle the job. Even though the record contains a dispute between Claimant Schrek's account of the amount of equipment and time used during this contracting transaction and that of the Manager, the Organization did not adequately rebut the asserted reason for the contracting, which falls within the Rule 52(a) exceptions permitting contracting.

Additionally, the Carrier consistently justified its right to contract the provision of equipment for new construction grading 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 work – see e.g., Public Law Board No. 6302, Award 130; Public Law Board No. 5546, Awards 15 & 16; Third Division Awards 40863, 40399, 37365, 32629, 32310, 30193, 28622, 27011 and 27010, but also made specific reference to documentation previously furnished to the Organization establishing that it contracted out this type of work during the period of 1918-1987 on various districts throughout its property without objection, establishing a mixed practice justifying its entitlement to contract out the work in dispute herein. The Board has held that once the Carrier establishes a mixed practice of contracting out similar work, it is entitled to rely on Rule 52(b) to justify its present similar contracting transaction. See Third Division Awards 30063 and 33646.

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 grading work and the use of operated equipment under Rule 52(b), which has been previously acknowledged by the Board – see Third Division Awards 37365 and 40863 – we find that the Organization failed to meet its burden of proving a violation of the Agreement.

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.