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

Award No. 42077
Docket No. MW-42193
15-3-NRAB-00003-130143

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
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(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 (Ames Construction) to perform Maintenance of Way and Structures Department work (staging material and site preparation, remove sheet pile, drive bridge pile, install caps, assemble new bridge structure and related work) at Mile Post 94.26 on the Kansas Subdivision commencing on October 4, 2011 and continuing through October 31, 2011 (System File D-1152U-249/1562993).

(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 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 National Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants M. Coan, R. Frenzen, K. Galliardt, M. Hoppes, K. Johnson, J. Snell, J. Barber, L. Brumbaugh, R. Creek, J. Novotny and J. Small shall now be compensated for one hundred sixty (160) hours at their respective straight time rates of pay and for one hundred eighty-two (182) hours at their respective overtime 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.

In its September 7, 2011 15-day notice, the Carrier advised the General Chairman of its intention to contract out the following in reference to Service Order No. 49930:

> **"Location: Bridge 94.26 on the Railroad's Kansas Subdivision, near Emmett, Kansas Specific Work: perform emergency work to replace a bridge destroyed by a derailment on September 5, 2011. Contractor to furnish all labor, supervision, equipment, surveying, and layout to construct a 309' bridge (six 30' precast concrete box spans, one 69' steel beam span, and another two 30' precast concrete box spans). Railroad to furnish bridge materials and rip rap. Contractor to work 24 hours per day, seven days per week until bridge is back in service."**

The Organization responded by letter dated September 12, 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 BMWE-represented employees have customarily performed this work, and asking under which Agreement Rule the notice was served. The conference was held on September 27, 2011 pursuant to Rule 52 at which time the Carrier advised the Organization that it considered this to

be "emergency" work. By letter dated October 3, 2011, the Organization confirmed the conference regarding Service Order No. 49930, objecting to the fact that the work commenced on September 12 (the same date it received the notice), was almost complete at the time of the conference (indicating that the contract must have been let prior to the notice), covered work reserved to BMWE-represented employees and customarily performed by them (including emergency work), and that such work could have been delegated to them by proper rescheduling or supplementation of forces.

The instant claim, which was filed on November 3, 2011, protests the Carrier's use of contractor forces and equipment on a 24/7 basis for 12 hour days commencing October 4, 2011 for the construction of a second structure dedicated to future expansion of capacity at MP 94. The claim asserts that Rule 8 reserves the work of construction and maintenance of bridges to B&B Sub department 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 claim also alleges that the Carrier's September 7 notice concerned replacement of the original bridge structure, and did not encompass a second structure, which was a separate project, and for which no notice was provided and no conference held, in violation of the Carrier's 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 December 22, 2011, the Carrier explained that during the September 27 conference the Organization was advised that the Carrier was faced with an emergency situation due to the September 5 derailment that decimated the bridge, and that the first structure was contracted under the emergency exception to Rule 52(a) not requiring notice, whereas the notice served applied to the second structure, which the Carrier's forces were not able to handle because they were fully occupied on important projects elsewhere, thereby falling under a different Rule 52(a) exception. The Carrier also stated that the Organization failed to show that the work was reserved to BMWE-represented employees by Agreement or customary and historical performance, that it had a lengthy mixed practice of contracting bridge construction and repair work, which

permits it to subcontract this type of 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 38953, 39274, and 40815, as well as Public Law Board No. 5546, Award 17, 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 and worked substantial overtime.

During subsequent correspondence on the property, the Organization stressed that what is disputed in this claim is not the work to replace the original structure, which the Carrier asserted constituted an "emergency" and which was the subject of a different claim, but rather the work of constructing a second bridge structure after the replacement bridge was placed back in service on September 20, and which commenced on October 4 after service was restored. It reaffirmed that this was not the work encompassed within the original notice, and could not be considered an emergency, and submitted documentation concerning the extent of the contracted work. The Organization stated that there was a loss of work opportunity because the Carrier could have deferred other work assigned to BMWE-represented employees to this project, if it was truly an emergency, as it has done on other occasions.

In its subsequent 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 bridge construction work supported its right to contract the work in question (including examples of prior examples that were previously furnished to the Organization), and that stare decisis should be determinative in denying this claim. The Carrier also included two statements from Managers, one noting that the bridge was contracted out "due to [the] large amount of bridge work that need[ed] to be done this year . . . with unusual weather in some areas and [an] unprecedented number of bridge repairs," and the other explaining what occurred as follows:

> **"The bridge in question was constructed in response to a derailment that totally destroyed the existing main line bridge. To restore**

> **traffic the railroad installed pipes and filled over the original alignment, with trains running on the original alignment it was decided to construct a bridge adjacent to the main line location that was done on a 24/7 basis to reduce the risk of the temporary pipe and fill washing out in a storm. The track was relined to the offset alignment and the bridge was constructed on the original alignment. This bridge was built with the purpose of restoring main line traffic in the most timely manner."**

The Carrier stressed that no monetary remedy was appropriate in this case, and, in any event, the requested remedy was excessive.

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 notice did not cover the work in question or mention any reason for the contracting, and the Carrier did not meet its notice and conferencing obligations pursuant to Rule 52 or the LOU, citing Third Division Awards 29472, 40964, 41052 and 41054; (2) the work is scope-covered under the specific unambiguous work reservation language of Rule 8 which includes maintenance and repair of bridges, relying on Third Division Awards 14061, 28817, 29916, 37315 and 39301,as well as Public Law Board No. 7096, Award 15; Special Board of Adjustment (Loram Rail Handling case); Special Board of Adjustment (Pre-plated Tie Dispute), and BMWE- represented employees have customarily performed this work; (3) the Carrier failed to support its "emergency" defense with respect to work occurring after the track was in service, and the Carrier had sufficient time to rearrange the Claimants' schedules so as to permit the performance of this work; (4) 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 and 40929; (5) the Carrier's mixed practice defense is irrelevant and insufficient to support a Rule 52(b) prior and existing rights defense; 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 40965, 40929, 39139, 38349, 36966, 36964, 36516, 29577 and 28817.

The Carrier contends that the work of rebuilding and replacing the bridge in question was the permanent fix encompassed within its September 7, 2011 advance notice, because the emergency work that consisted of placing a temporary culvert and shoo fly around the area immediately following the derailment in order to get service resumed while the bridge was designed and fabricated did not require any notice, and a conference was held before the bridge construction work commenced, in compliance with its Rule 52(a) obligations. It argues that it has a well-established mixed practice of contracting bridge work, a practice that was never disputed on the property despite knowledge by the Organization, and was supported by numerous examples, and the Board has upheld the Carrier's right to contract such work under the prior existing rights and practices language of Rule 52(b) of the Agreement, citing Third Division Awards 31730, 32333 and 40960. It asserts that the doctrine of stare decisis applies. The Carrier contends that the Organization failed to meet its burden of proving a violation because it provided direct evidence that it was not adequately equipped to handle the work in the time period required due to the derailment, which is a specific exception contained in Rule 52(a). It asserts that the LOU does not apply on this property and did not eliminate or place any further limitations on the Carrier's right to contract out this type of work under Rule 52. Finally, the Carrier stresses that because the Claimants had no loss of earnings, no monetary remedy would be appropriate in any event.

A careful review of the record evidence convinces the Board that the Carrier met its notice and conferencing obligations under Rule 52(a). There is no record support for the Organization's position that the disputed work, which commenced on October 4, was a separate and distinct project from the construction of a new bridge to replace the one damaged by the derailment, which was specified in the notice. As pointed out by the Carrier, the original actions taken in accordance with the emergency exception to Rule 52(a) to get the main line track back in service while the new structure was designed and fabricated did not require notice, and was not the entirety of the work contemplated to rebuild the bridge. A conference was held with the Organization prior to commencement of the disputed work, during which the Carrier explained that the exception being relied upon to contract out the work was that it was not adequately equipped to handle the amount of work involved due to current bridge projects elsewhere and the necessity of getting the bridge built as soon as possible after the derailment. These facts are supported by Managers' statements exchanged on the property, and are unrebutted on the

record. Unlike the cases cited by the Organization finding a violation of Rule 52(a) and sometimes the LOU based upon the absence of any notice, we conclude 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.

With respect to the issue of whether the Carrier violated the Agreement by contracting out this new bridge construction work, there is no dispute that Rule 8, B&B Subdepartment, mentions construction, maintenance and repair of bridges, 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. However, this is not a reservation or guarantee of all bridge construction and maintenance 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 relied upon both grounds.

First, in its on-property correspondence, the Carrier included a statement from one of its Managers contending that, due to unprecedented bridge repairs occasioned by the weather that year, a large amount of necessary bridge work was being performed by BMWE-represented employees at that time, to support its position that Carrier forces were not equipped to handle this bridge construction work in the time required due to the emergency created by the derailment. While opining that the Carrier had adequate time to reassign its forces to this project, the Organization did not adequately rebut the asserted reason for the contracting, which falls within the Rule 52(a) exceptions permitting contracting.

Second, the Carrier consistently justified its right to contract bridge construction and repair 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., Third Division Awards 31730, 32333, 40815 and 40960, but made specific reference to (and provided) documentation previously furnished to the Organization

establishing that it had contracted out this type of work for a century without objection, establishing a mixed practice justifying its entitlement to contract out the work in dispute. 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 e.g., Third Division Awards 30287, 32629 and 37365.

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 out bridge work under Rule 52(b) – which has been previously acknowledged by the Board, see Third Division Awards 40815 and 40960 – 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.