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

Award No. 42079
Docket No. MW-42195
15-3-NRAB-00003-130147

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 (Herzog) to perform Maintenance of Way and Structures Department work (ditching, cleaning cuts and associated right of way cleanup duties) at various locations on the La Grande Subdivision commencing on September 15, 2011 and continuing (System File D-1152U-250/1563250).

(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 National Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant K. Robins shall now '* be allowed an equal share of the straight time and overtime hours worked by the outside contracting force as described in this claim, at his respective Group 19 rate 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.

This case involves contracting the work of providing labor and material in connection with the Herzog multi-purpose machine (MPM) to assist in clearing ties and scrap material, removing vegetation, ditching and associated duties on the LaGrande Subdivision. From the extensive and somewhat confusing record, it appears that after serving notice and holding a conference, the Carrier entered into a service contract with Herzog for the use of its MPM, a patented self-propelled multifunction, multi-task track machine with six cars and one operator, that can pick up scrap, ties, rail, haul and place rip/rap and clean and dig ditches at the same time, in May 2005 for a three-year term, which was extended for another three-year term in 2008. It also appears that, at different times when utilizing this equipment at various locations throughout its system, the Carrier served contracting notices to the Organization concerning a specified area and relating to a specific service order, and conferences were held regarding such notices.

This claim relates to work performed on the LaGrande Subdivision, which was covered in contracting notices encompassing the Nampa, Huntington, LaGrande and Portland Subdivisions. The confusion in the record stems from the inclusion and mention of three identical contracting notices covering the use of the MPM on this territory with different service order numbers - December 22, 2010 leading to a conference held on January 4, 2011; March 10, 2011 leading to a conference held on March 30, 2011 and/or June 7, 2011 - each confirmed by identical letters from the Organization summarizing the content of the conferences

and objecting to the contracting. While it is not clear exactly which notice encompasses the disputed work in the instant case, as they all include the LaGrande Subdivision and the use of the MPM, are identical in form, and led to conferences with the same content, we deem it appropriate for the Board to consider the content of the notice, and the fact that it was sent 15 days prior to the actual contracting transaction herein involved and resulted in a conference prior the performance of the disputed work, when determining whether the Carrier met its obligations under Rule 52(a) in this case.

The instant claim was filed on November 14, 2011, and protests the use of the MPM with operator starting on September 19, 2011 at various locations on the LaGrande Subdivision, asserting that Rule 9 reserves the work of construction and maintenance of roadway and track to BMWE-represented employees, Roadway Equipment Operators 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, noting that the Carrier maintains similar equipment that could have done the job or it could have leased the Georgetown slot machine to be operated by an employee if it wanted greater efficiency. The Organization stressed that the Agreement protected the work, not the method of performing it. The claim also alleges that the Carrier's blanket notice did not satisfy its obligations pursuant to Rule 52 and the December 11, 1981 Berge-Hopkins Letter of Understanding (LOU). The Organization asserts a loss of work opportunity supporting a monetary remedy.

In its initial denial on December 30, 2011, the Carrier 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 mixed practice of contracting right-of-way maintenance 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 28619, 31721 and 33645. The Carrier also noted that it met the Rule 52(a) exception permitting contracting for the use of specialized equipment, such as the MPM machine. 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 Claimant, who was not qualified to operate the involved

machine, suffered no monetary loss because he was fully employed on the contracting dates.

During subsequent appeals and correspondence on the property, the Organization stressed the blanket nature of the notice which did not define the location, dates or specific work, the fact that the Carrier did not know which of multiple notices related to this transaction, that the contract was entered into prior to the notice and conference undermining the purpose of Rule 52(a) and the LOU, that this work is reserved to BMWE-represented employees under Rule 9, and that the Carrier had the necessary equipment and operators to perform this job or could have leased it. It included multiple statements from BMWE-represented employees indicating that they had performed similar duties.

In its subsequent denials and correspondence, the Carrier made clear its position that proper advance notice was provided, conferences were held during which the specialized nature of the MPM was discussed in detail, the reason why it was different from and much more efficient than any of its own equipment, that it could not be leased without an operator, that Rule 52(a) permitted it to contract out work requiring specialized equipment, and that its mixed practice of contracting right-of-way maintenance work and the use of operated equipment supported its right to contract the contested work under the prior and existing rights language of Rule 52(b). The Carrier included statements from Managers and its Director explaining both the nature of the equipment and how it could be used to efficiently unload and load materials, access remote areas without right-of-way, and to perform ditching in environmentally sensitive areas, as well as a prepared statement given to the Organization to demonstrate the increased effectiveness and efficiencies of the MPM and the difference between it and other machines. It stressed that the Claimant was not qualified to operate this equipment, which could only be leased with a certified operator, and 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 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 right-of-way maintenance, 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 did not meet its burden of establishing why this special equipment was necessary in this instance and it could not use its own equipment or lease equipment without an operator, citing Third Division Awards 40409 and 40411; (5) 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; and (6) a monetary remedy is appropriate to preserve the integrity of the Agreement and make the Claimant 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 use of the Herzog MPM with an operator to help clear ties and scrap material, remove vegetation and perform ditching and associated duties on the LaGrange Subdivision was the subject of a number of advance notices relating to specific service orders in 2011, each leading to a conference with the Organization during which there was a good-faith discussion about the necessity of this specialized equipment and the Carrier's inability to lease it without an operator, the conference related to the work in question was held well before the work commenced, and that it was in compliance with its Rule 52(a) notice obligation, citing Third Division Awards 40863, 40857, 40758, 40756, 37490, 37332 and 33646. The Carrier argues that it satisfied the Rule 52(a) exception permitting contracting for the use of specialized equipment, relying on Public Law Board No. 6205, Award 1 and Third Division Award 40922. The Carrier asserts that it has a well-established mixed practice of contracting right-of-way maintenance work and the use of operated equipment, 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 40861, 37644, 33645, 30063, 28619, 27010; Public Law Board No. 5546, Awards 15 &

16. It 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 and 40799. Finally, the Carrier argues that no monetary remedy is appropriate because the Claimant was fully employed, and 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 evidence convinces the Board that the Carrier met its notice and conferencing obligations under Rule 52(a). Notices that have 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 24242, 25677, 26762, 40997, 41102 and 41105. We find that the notices served in the instant case gave the Organization sufficient information so as to take a position as to why the specified contracting should not take place. Apparently, it did so in correspondence regarding the notice and in the conferences 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. During the conference, the Carrier asserted that the contracting was taking place under the specialized equipment exception in Rule 52(a) as well as the prior and existing rights and practices language of Rule 52(b) due to its extensive mixed practice on the property. Unlike the majority of the 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 28654, 28943, 31281, 32534, 33467 and 37854.

Additionally, the record evidence supports the Carrier's contention that it established that the contract in question fell within the specialized equipment exception contained in Rule 52(a) and that it explained to the Organization in detail why its own equipment could not perform the extent and scope of the work accomplished by the MPM more efficiently and with speed and versatility, and

showed that it was unable to lease this patented equipment without an operator from Herzog. Public Law Board No. 6205, Award 1 held that the Carrier's contracting another piece of patented specialized equipment from Herzog with an operator for efficiency purposes was within the Carrier's management prerogative, and fell within the exception to contracting scope-covered work contained in Rule 52(a). See also Third Division Award 40922. 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, 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.