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

Award No. 42101
Docket No. MW-42097
15-3-NRAB-00003-130024

The Third Division consisted of the regular members and in addition Referee Patrick Halter 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 Hulcher, Inc., Haz Mat Inc. and Kanza Construction) to perform Maintenance of Way and Structures Department work (clean right of way) in the Bailey Yard at North Platte, Nebraska commencing on May 16, 2011 and continuing through May 24, 2011 (System File D-1152U-231/1558563).

(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 Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants M. Ramos, D. Wineinger, C. Klinkefus, D. Soncksen, A. Kuenning, C. Jenks, D. Georgious, L. James, C. Barker, P. Walker, T. Collins, T. Engleman, J. Jared, G. Shotkoski, K. Szwanek, M. Diedel, J. Kramer, T. Hite, M. Mitchell, M. Reichenberg, C. Cauffman, R. Merksick, D. Vogt, D. Perlinger, R. Rangel, J. Bokoskie, R. Hansen, S. Dodge and H. Guy, II shall now each '* be allowed one hundred eight (108)**

hours pay at their respective straight time and overtime rates of pay as compensation for the hours worked by the outside contracting force as described in this claim. *'"**

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.

On January 24, 2011, the Carrier issued the following notice to the Organization:

"THIS IS TO ADVISE OF THE CARRIER'S INTENT TO CONTRACT THE FOLLOWING WORK:

PLACE: At various locations on the North Platte Service Unit.

SPECIFIC WORK: Providing fully operated, fueled and maintained track hoes/excavators with buckets and thumb, backhoe(s), grapple truck(s), loaders necessary to assist with routine and emergency right of way cleanup. Loading, unloading, and hauling ties, scrap, fill material, ballast and asphalt and snow removal commencing February 7, 2011 thru December 31, 2011.

THIS WORK IS BEING PERFORMED UNDER THE PROVISION OF THE AGREEMENT WHICH STATES 'NOTHING CONTAINED IN THIS RULE SHALL AFFECT

> **PRIOR AND EXISTING RIGHTS AND PRACTICES OF EITHER PARTY IN CONNECTION WITH CONTRACTING OUT.'**
>
> **SERVING OF THIS 'NOTICE' IS NOT TO BE CONSTRUED AS AN INDICATION THAT THE WORK DESCRIBED ABOVE NECESSARILY FALLS WITHIN THE 'SCOPE' OF YOUR AGREEMENT, NOR AS AN INDICATION THAT SUCH WORK IS NECESSARILY RESERVED, AS A MATTER OF PRACTICE, TO THOSE EMPLOYEES REPRESENTED BY THE BMWE.**
>
> **IN THE EVENT YOU DESIRE A CONFERENCE IN CONNECTION WITH THIS NOTICE, ALL FOLLOW-UP CONTACTS SHOULD BE WITH THE LABOR RELATIONS DEPARTMENT."**

Pursuant to the Carrier's notice, the Organization requested a conference on January 27, 2011, stating the notice was procedurally inadequate and vague because it did not (i) identify the dates for starting and concluding contracted work, (ii) specify the location of work by city, address and milepost and (iii) describe all work to be performed by outside forces and the reasons therefor. The Organization requested receipt of information and documents related to these matters prior to the conference to facilitate ". . . a good faith attempt to reach an understanding concerning this contemplated transaction . . ." noting ". . . this work has customarily been assigned to and performed by the employees of the Carrier's Maintenance of Way Department . . ." and, as such, is reserved to BMWE-represented employees under the Collective Bargaining Agreement (CBA).

The Organization did not receive the requested information and documents prior to the conference convening pursuant to Rule 52(a) on February 1, 2011. Following conference, the Organization issued a conference-summary letter dated February 22, 2011, for Service Order MIL 012411B. The Organization's summary stated:

> **"The subject of this notice as written and as was developed at conference is 'as needed' equipment supplementation for routine and emergency right of way cleanup, including but not limited to**

> **track hoes, loaders, dump trucks, grapple trucks as well as across the entire North Platte Service Unit. You [Assistant Director Labor Relations Justin Wayne] advised that this was intended to continue through the calendar year and involved multiple transactions. You asserted the Carrier has a past/mixed practice of contracting such work. You also allowed that, while this is just a list of work that may or may not happen you were agreeable to looking to some leasing of equipment and offered to sit down with the Organization and DTM Miller to try to find some common ground in regard this proposed transaction(s). You stated no contract was currently in place. We then requested copies of any contracts or proposals related to this service order."**

The Organization continued in its letter to reiterate its initial response to the "inadequate" notice.

> **"Simply throwing notification to contract equipment and trucks for emergency and routine right of way cleanup on the North Platte Service Unit does not satisfy the Carrier's notice obligations under the controlling language of Rule 52(a) and does not even resemble the commitments made by the parties on December 11, 1981 [Letter of Understanding]." This is something that has been recognized at numerous Arbitral Boards (See PLB 7099 Award #14 among others). Blanket notices such as this do not provide an opportunity for the parties to engage in any meaningful dialogue concerning the valid reasons why such contracting may or may not be necessary. Further, since blanket notices do not speak to specific contracting transactions at a given location and at a given time, there is no way to separate opportunities to preserve future work to the craft while acknowledging instances where the exceptions listed within Rule 52(a) present valid concerns."**

According to the Organization, the Carrier did not or could not specify criteria for contracting out this scope-covered work. BMWE-represented employees possess any special skills required for performing this work and the Organization could identify qualified employees to operate trucks and equipment;

however, no special equipment is needed because the Carrier owns the equipment for this contemplated work and no special materials are required. Furthermore, there is no emergency and the work is not beyond the Carrier's capacity to handle because it is to be performed only on an "as needed" basis. The Carrier's failure to provide detailed information during the conference renders as meaningless good faith discussions. Although the Carrier asserts a past practice to justify contracting out scope-covered work, there is also a past practice for the Carrier's own forces to perform this scope-covered work.

In a concluding comment, the Organization stated:

> **"The aforementioned notwithstanding, you did offer to mediate some sort of understanding between the Organization and the Director Track Maintenance, presumably to mitigate the effects of any contracting under this service order. We would be happy to sit down and discuss the Carrier's genuine need for any and all contracting that treads upon [the] BMWED M/W workforce[.]"**

The Carrier responded by letter dated April 29, 2011, stating that ". . . as explained during the conference . . ." the notice is ". . . in the same format and contains the same type of information that has been furnished for years . . ." and has been confirmed as adequate in on-property Third Division Awards 30063, 30185, 30199, 30287, 30869, 31170, 32322, 32333, 32534, 33645, 33646 and 37332. Additionally, recent on-property Third Division Awards 40756, 40758 and 40759 found that "blanket notices" satisfy the requirements of Rule 52. The Carrier's past practice for contracting out under Rule 52(b) for this work has been established with documents previously disclosed to the Organization (once in 1995, three times in 1996 and once in 1997). This work often requires special skills and/or special equipment; the Carrier stated it would ". . . be mindful of all furloughed employees." As for the December 11, 1981 Letter of Understanding, ". . . there is simply no basis or support for the BMWED's argument that [it] destroyed the Carrier's contractual rights afforded under Rule 52(b) to contract out our maintenance work . . ." and it ". . . does not give the Organization a new right to work that was never owned by the BMWE." In this regard, on-property Third Division Award 40800 states the Letter of Understanding is ". . . a general statement of aspiration without meaningful guidance."

On July 14, 2011, the Organization filed a claim alleging violations of Rules 1, 2, 3, 4, 9, 10, 13, 15, 16, 19, 20, 21, 23, 26, 27, 35, 52 and the December 11, 1981 Letter of Understanding. Specifically:

> **". . . when, commencing on May 16, 2011, and continuing for nine (9) days, the Carrier failed to assign the duties of operating Maintenance of Way equipment to load, transport, stockpile, and the duties associated with clean up of the Bailey Yard in North Platte Nebraska. Instead the Carrier assigned these duties and functions to an undermined number of contracted employees from the outside contractors[.] By doing so the Carrier has effectively denied and deprived Claimants of work and compensation that they were and are entitled to by virtue of their established seniority within [the] Track and the Roadway Equipment Subdepartments, within the Maintenance of Way and Structures Department as defined by our Collective Bargaining Agreement.**
>
> > **'Commencing on May 16, 2011, in preparation for the President's Special Train, an undetermined number of contract employees from no less than three (3) outside contracting firms . . . were observed working twelve hours per day to clean, transport, stockpile, and/or dispose of track material both new and used, OTM, used ties, debris piles, ballast and spoils. This work was precipitated by an anticipated visit from the President's Special Inspection Train. The work that was performed was work that had been deferred and is normally performed on an ongoing basis by M/W forces assigned to the area. We are advised the contracted forces utilized equipment including but not limited to loaders, backhoes, trucks, hand tools, to pickup, organize and perform general housekeeping duties normally assigned to the Carrier's M/W forces . . . . Maintenance of Way forces regularly and customarily assigned to perform these duties were not allowed to participate in any overtime service.**

> **The referred to duties of operating, maintaining and servicing recognized maintenance of way equipment along with the associated duties incidental to the work in this instant case have customarily and primarily been assigned to the employees who have established and maintained seniority within the seniority groups and classes as defined by our current working agreement[.]'"**

According to the Organization, the Carrier violated Rule 52 because it failed to issue advance notice specific to the work performed at Bailey Yard. Aside from the notice, it failed to establish any exception under Rule 52(a) as applying in this situation and it disregarded the December 11, 1981 Letter of Understanding and the Carrier's obligation to reduce the incidence of outside force usage. The December 11, 1981 Letter of Understanding ". . . created a valid obligation retained by the Carrier to reduce subcontracting . . ." and it ". . . is an additional obligation that serves to support Rule 52 . . ." in the Agreement. All of this caused a loss of work and wages for BMWE-represented employees.

On September 8, 2011, the Carrier denied the claim, stating, in part, as follows:

> **"The Carrier finds it significant that the Organization acknowledges that the Carrier did provide notice and did meet with the Organization to conference the matter. Notwithstanding the fact that the Carrier provided notice and conferenced the matter, the Carrier must draw attention to the fact that this work was also being performed by the Claimants in efforts to ensure and provide a clean and safe work environment for all employees of the Bailey Yard. I ask the Organization to review the attached statement from Mrs. Karen L. Fuller. Mrs. Fuller provides very accurate details of the work performed and that the Organization has received proper notice for the cited."**

According to the Carrier, Rule 52(b) allows for the use of outside forces – "Nothing contained in this rule will affect prior and existing rights and practices of either party in connection with contracting out" – because the Carrier has a well-

established mixed practice of contracting out the kind of work contested in this claim. The December 11, 1981 Letter of Understanding did not create a separate, new contracting Rule or supersede past practice exceptions. As noted in on-property Third Division Award 40799, the five exceptions in Rule 52(a) prevail over the general provisions in the December 11, 1981 Letter of Understanding, which merely reaffirms the notice requirement and encourages the parties to resolve differences at the local level.

The Carrier argued that exclusivity to this work does not exist under the Rules because Rule 1 is a "general" scope Rule and Third Division Awards 28790 and 29007 hold that this type of Rule is not determinative as to whether work falls under the scope's coverage. Any reliance on the Loram Award is misplaced because it did not confer exclusivity of work on BMWE-represented employees; the Loram Award found a timely notice and conference violation.

The burden of proof resides with the Organization to establish its claim to the work and to establish damages for remedy purposes. The claim is excessive because the Claimants were fully employed and opposed to ("be complaining") about the hours needed to clean up Bailey Yard. A monetary remedy is not forthcoming ". . . in the absence of a proven loss of earnings or work opportunity . . ." as stated in on-property Third Division Award 37103.

On November 3, 2011, the Organization appealed the claim denial stating "[o]ur position as stated in our initial claim correspondence remains unchanged and, by reference, is incorporated herein as part of this appeal." The unsigned letter attributed to Mrs. Fuller, an Administrative Assistant, is discredited by the Organization because there is no way to assess her personal knowledge, role or authority in this contract transaction and claimed work.

Among other items, the Organization states a blanket notice is insufficient to satisfy the "Carrier's contractual obligations" because Rule 52 requires notice ". . . for each instance where the Carrier intends to contract out work customarily performed by . . ." BMWE-represented employees as found in Award 14 of Public Law Board No. 7099. Failure to provide a notice specifically tailored to a particular subcontracting transaction undermines the "function of the notice," which is to ". . . allow the Organization the opportunity to convince the Carrier to not

contract out the work." (See, Third Division Award 31280.) The notice dated January 24, 2011, however, is ". . . simply a catch all general description of what may or may not be farmed out . . ." on routine maintenance and reflects the Carrier disdain for good-faith bargaining. The Carrier failed to provide information requested by the Organization that related to this Service Order – work location, dates of work, description of work, reasons for contracting out – thereby precluding a good-faith conference to reach an understanding.

Past practice is not one of the exceptions under Rule 52(a). Both parties are covered by Rule 52(b), which means BMWE-represented employees hold a right to continue to perform work listed within the Rule and historically performed by the craft.

> **"If the Carrier is to rightfully contract work under either 52(a) or 52(b), it is your obligation to provide the reasons . . . or show beyond any doubt, that you contracted the work prior to 1973 as a matter of practice. The Carrier cannot establish a practice by violating the agreement, and then assert we cannot show exclusivity or customary practice. The same holds true for your purported mixed practice."**

The Organization asserts that the work is reserved to BMWE-represented employees by Rules 8 and 9, which the Carrier acknowledged as noted in on-property Third Division Award 29916. The Organization relies upon the Loram Award as recognizing that when a Rule is specific about a list of work assigned to employees then the work is scope-covered and reserved for whom the contract is made. Finally the December 11, 1981 Letter of Understanding remains in effect and applicable in this claim based on the Agreement and accompanying documents arrived at through national negotiations. Third Division Award 29121 stated "It is not simply a dead letter which can be ignored . . ." and it was the basis for sustaining claims in Award 33 of Public Law Board No. 6204 and Third Division Award 38349.

Because North Platte Terminal is the home base for the Claimants, they are well-aware of subcontracting incidents that deny them work opportunities. The Carrier received the subcontractor's invoice for services, which details the hours for work performed and disputed in this claim. Notwithstanding the problematic

nature of the unsigned statement attributed to Mrs. Fuller, her statement confirms subcontractors performed the disputed work during regular hours and on overtime. "There is no showing the work at bar could not have been performed on rest days or overtime . . . deferred or postponed [.]" The Claimants' status at work cannot be used to deny them compensation for a lost work opportunity and a monetary remedy reinforces the integrity of the Agreement. (See, Third Division Awards 28817, 29531, 32862, 40080 and Award 6 of Public Law Board No. 7099.)

On December 26, 2011, the Carrier issued a declination to the appeal by reiterating arguments and positions set forth in its initial denial of the claim. The Carrier notes that the claim must be denied because the Organization did not submit any documentation showing that the work occurred as alleged. Thus, alleging a violation without satisfying the burden of proof leads to claim denial. As for the notice, numerous Third Division Awards cited in the claim denial affirm the notice. Regardless, the Organization rejects every notice issued no matter how detailed and failure to reach an understanding during conference does not preclude the Carrier from subcontracting. The Carrier's representative was the authorized decision maker at the conference. Because the Carrier was not adequately equipped to handle the work and the Claimants were fully employed, the Carrier contracted out in accordance with Rule 52(a). In view of numerous on-property Awards confirming the Carrier's right to contract out based on an exception under Rule 52(a) and past practice as confirmed in statements from Managers, stare decisis should apply to this claim. As for the December 11, 1981 Letter of Understanding, it ". . . was never added or recognized when the Agreement was updated in July 2001," which means it is not applicable on this property. Third Divisions Awards 28654, 28943, 31281, 32534, 33467 and 37854 dismiss the December 11, 1981 Letter of Understanding or do not acknowledge it.

As for Rule 1 (Scope), only Rule 4 is incorporated within Rule 1 and that Rule lists undefined job titles within Subdepartments and does not confer exclusivity to the contested work. The same conclusions apply to Rules 8, 9 and 10 given on-property Third Division Awards 26453, 32349 and 37850. Absent a reservation of work Rule the Organization cannot prove or claim the exclusive right to perform the disputed work. Furthermore, the Organization's assertion that "existing rights" referenced in Rule 52(b) means the right must have existed prior to 1973 "is a new argument' and conflicts with the plain language rule of contract interpretation.

Rule 52(b) does not limit the Carrier to those rights prior to 1973; "literally hundreds of subcontracting awards . . . by arbitration boards, not a single one states that the subcontracting practices referenced in Rule 52(b) apply only to those practices established prior to 1973." The Carrier asserts, furthermore, that no side letter or letters of understanding attached to the parties' Agreement indicate that Rule 52(b) is limited to pre-1973 rights.

Finally, no monetary remedy is warranted because the Claimants endured no monetary loss inasmuch as they performed duties on their regularly assigned shifts during the period of time covered by this claim.

A conference convened on February 28, 2012; however, the parties did not reach an understanding. This matter is now before the Board for final adjudication.

On April 2, 2012, the Organization issued its summary of the conference: (i) the notice is inadequate and covers multiple transactions, which precludes good-faith conference; (ii) claimed work is routine and scope-covered under Rule 9, which could have been scheduled for the Claimants because it was deferred maintenance; (iii) no exception under Rule 52(a) was satisfied and Rule 52(b) applies to each party so the Carrier cannot violate it to justify its asserted mixed practice; (iv) the Carrier intentionally did not comply with the December 11, 1981 Letter of Understanding and is removing scope-covered work from the Claimants causing them a loss of work opportunity resulting in a loss of wages; and (v) statements from Managers concerning practice are not relevant because they address special equipment (not needed for disputed work) and another project.

On June 15, 2012, the Carrier responded to the Organization's summary-conference letter and contended: (i) the timely notice was issued in good faith to inform the Organization that a contractor may be needed to provide operated equipment support; (ii) contracted work was performed in accordance with Rule 52(a); (iii) voluminous documents have been provided to the Organization establishing the Carrier's past practice of contracting this type of work; (iv) the December 11, 1981 Letter of Understanding is not applicable; (v) there is no work reservation scope Rule; and (vi) the Organization failed to meet its burden of proof, so the claim must be denied.

The Board thoroughly reviewed each party's Submission; arguments in the Submissions reiterate the points asserted during the processing of the claim and recite the arbitral decisions in support of their respective arguments. For purposes of inclusion in this decision, a topical summary follows.

According to the Organization, the work of clearing and cleaning the right-of-way and related stockpiling and track work is customarily and historically performed by BMWE-represented employees and is work reserved to Carrier's forces under Rules 1 and 9 as noted in Third Division Awards 14061, 28817, 29916, 37315, and 39301, as well as Award 15 of Public Law Board No. 7096 and the "Loram Rail Handling" Special Board of Adjustment. Certain correspondence and memoranda by Carrier Officials recognize this reservation of work to BMWE-represented employees. The Carrier violated Rule 52 and the December 11, 1981 Letter of Understanding by not engaging in a good-faith effort to reduce the incidence of contracting. During the conference, the Carrier did not identify which exception under Rule 52 it was relying upon for this contracting out. Although the Carrier asserts that the December 11, 1981 Letter of Understanding is not applicable, on-property Third Division Awards 29121 (Referee Fletcher, 1992), 40923 (Referee Miller, 2011) and 40929 (Referee Miller, 2011) state otherwise. The Carrier did not issue proper advance written notice; the Carrier failed to establish that its forces were not equipped to handle the work; the Carrier failed to establish that outside forces have previously performed this work; the Carrier's own forces were ready, available and willing to perform the work; and the requested monetary remedy is appropriate to preserve the integrity of the Agreement.

According to the Carrier, it provided advance notice of its intent to contract, Rule 52 and arbitral precedent affirm the Carrier's past practice and right to use contractors in this matter such that stare decisis applies, the December 11, 1981 Letter of Understanding is not applicable, the requested remedy is improper, and the Organization failed to satisfy its burden of proof, so the claim must be denied.

Having digested the voluminous record, the Board finds that the Carrier's notice of intent to contract complies with Rule 52(a). As observed in on-property Third Division Award 42076, ". . . [n]otices that have similar or greater breadth and scope, with less particularity, have been found to be sufficient by the Board on this property . . ." and ". . . [t]he Organization's reliance on cases concerning other

properties or other Agreements does not alter this precedent." The notice involved in the instant claim is sufficient because it complies with the terms in Rule 52, which engages the Organization to determine, upon receipt of the notice, if the cited work belongs to its members.

The notice dated January 24, 2011, was issued to the General Chairman ". . . in writing as far in advance of the date of the contracting transaction as [was] practicable and in any event not less than fifteen (15) days prior" to the date the work commenced being performed by subcontractors in October 2011. The notice was timely.

Upon receipt of the notice on January 27, 2011, the General Chairman requested ". . . a meeting to discuss matters relating to the said contracting transaction . . ." and the conference "promptly" convened on February 1, 2011. During conference the Carrier indicated that the notice could encompass more than one contracting transaction and, at the same time, there may be no contracting transaction. The Carrier and the Organization each represented a "good faith attempt to reach an understanding" as required by Rule 52 and the December 11, 1981 Letter of Understanding as reflected in post-conference summary letters dated February 22 and April 29, 2011. In this regard, the December 11, 1981 Letter of Understanding reflects the principles and practices itemized in Rule 52. That is, "to the extent practicable" the Carrier is to reduce the incidence of contracting out by engaging in good-faith efforts with the Organization and this determination is fact specific to each situation. The parties are not tabula rasa about Rule 52 and contracting during conference wherein they engage in the reciprocal requirement of good faith about the notice of intent to contract and work performed by BMWE-represented employees.

Even though no understanding was reached, Rule 52(a) states that the Carrier ". . . may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith." In this situation the Carrier proceeded to contract after conference and the Organization's claim has been progressed to the Board for a final decision.

Rule 52(b) states that "[i]ts purpose is to require the Carrier to give advance notice and if requested, to meet with the General Chairman . . . to discuss and if

possible reach an understanding in connection therewith." There was timely, advance notice and a meeting was promptly held as requested.

No explanation or reason for subcontracting is itemized in the advance notice of intent to contract although wording identical to that found in Rule 52(d) is contained in the notice. Regardless, the act of issuing a notice of intent to contract invokes Rule 52 – Contracting, which encompasses (1) process as in advance notice, (2) good-faith efforts to reduce the incidence of contracting "to the extent practicable" and (3) justification (exceptions, prior and existing rights and practices) no later than during conference.

The Carrier asserts that its forces were not equipped to handle the work (an exception to justify contracting under Rule 52(a)) and, for support, provided a letter from Mrs. Karen L. Fuller. Unlike other letters from the Carrier in the record that are on Union Pacific Railroad Company stationery, the Fuller letter is not on Carrier stationery and is unsigned. If it is not a letter but an e-mail then it does not contain any identifiable trappings of an official Carrier e-mail the same as other Carrier emails in this record. The circumstances of the Fuller document creation render it as unexceptional evidence of questionable value.

Furthermore, the Board is not persuaded that the Carrier identified with sufficient specificity during conference which exception under Rule 52(a) it was relying upon for this claimed work. In its Submission the Carrier relies on "such work that the Company is not adequately equipped to handle the work . . . <u>beyond the capacity of Company's forces</u>." (emphasis added) The underscored phrase attaches and refers to the exception for an emergency and it does not apply to the "not adequately equipped to handle the work" exception. A Rule 52(a) exception was not established by the Carrier.

Aside from Rule 52(a), the Carrier relies on Rule 52(b) and a mixed practice. Notwithstanding the Claimants having customarily and historically performed the routine maintenance work disputed in the claim, it has been contracted out by the Carrier in the past, which brings it within Rule 52(b) as a prior and existing right. Removal of scrap and debris is documented by the Carrier and was disclosed to the Organization to show outside forces removing trash, debris and related claimed work in a track yard on dates prior to and after the effective date of Rule 52. The

Carrier asserted a mixed practice during conference and claim processing. Third Division Awards 30032, 40077 and 41015 affirm the Carrier's practice of contracting out this kind of work when there is a documented mixed practice. Rule 52(b) is established because this claimed work is not reserved to BMWE-represented forces. In this regard, Rule 1 is a "general" scope Rule; Rule 8 describes those aspects of the work belonging to the Organization that are to be allocated to B&B groups and Rule 9 assigns work intra-craft inasmuch as it determines which Sub departments will perform the work if it is assigned to the craft.

The Organization established that the claimed work was performed on the claimed dates and that such work has been historically performed by BMWE-represented employees. At the same time, the Carrier established a Rule 52(b) prior and existing practice of subcontracting such work as needed. In view of this finding coupled with a procedurally appropriate notice of intent to contract under Rule 52(a), the Board concludes that the claim must be denied.

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 13th day of July 2015.