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

Award No. 42102
Docket No. MW-42098
15-3-NRAB-00003-130025

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 (Farr West Paving, Inc.) to perform Maintenance of Way and Structures Department work (remove/replace crossing panels and pads) at right of way crossings between Mile Posts 2 and 11 on the BMI Subdivision beginning on May 17, 2011 and continuing through June 16, 2011 (System File D-1152U-230/1557986).

(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 P. Cardinal, C. Choate, R. Yoder, R. Jastren, C. Sather, E. Wilson and J. Villarreal shall now each be compensated for one hundred eighty (180) 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.

On March 17, 2011, the Carrier issued the following notice to the Organization:

> **"15 DAY NOTICE OF INTENT TO CONTRACT WORK**
>
> **THIS IS TO ADVISE OF THE CARRIER'S INTENT TO CONTRACT THE FOLLOWING WORK:**
>
> **PLACE: At various locations on the Los Angeles Service Unit.**
>
> **SPECIFIC WORK: Flagging and asphalt work in connection with repairing, removing, and replacing road crossings 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."

By letter dated March 23, 2011 the Organization responded to the notice by inquiring whether the notice was issued pursuant to Rule 52 (Union Pacific Agreement) or Rule 59 (Southern Pacific Western Lines Agreement), stating the notice was deficit under the 1981 Berge-Hopkins Letter of Understanding (LOU), observing that BMWE-represented employees customarily perform this work and requesting receipt of certain data and documents for review prior to conference.

On March 30, 2011 a conference convened and was completed without resolution. By letter to the Carrier dated June 9, 2011 the Organization set forth its concerns presented during conference. Specifically, an inadequate and defective blanket notice given obligations imposed on the Carrier by the LOU. The Organization questioned the Carrier's failure to provide training to certify employees for flagging because some state laws require certification and flagging is the type of work that routinely occurs; flagging is scope-covered because it is directly linked to work on the Carrier's property where employees customarily perform rehab crossing work. Also, equipment has been leased or was in the Carrier's equipment inventory. Trucks, however, are not specialized equipment. Rule 52(a) provides rights for each party and the Carrier's forces right is to perform this scope-covered work. Prior to the conference, the Carrier determined to contract this work as shown by the Carrier's representative without authority to reach agreement for craft employees to flag and perform asphalt work. Because the work is performed "as needed" there was sufficient time to schedule craft employees.

On July 11, 2011 the Organization filed its initial claim alleging that the Carrier used outside forces to rehabilitate seven crossings on the BMI Subdivision between Mile Post 2 and Mile Post 11 beginning May 17 and continuing to June 16, 2011. The Organization alleged violations of Rules 1, 2, 3, 4, 5, 9 (to name a few), as well as a violation of the LOU by using outside forces to remove, prepare, grade and install crossings. Outside forces used the same kind of equipment and tools (two

front loaders, one backhoe, various hydraulic and hand tools) the Claimants use when they customarily perform this kind of work. Based on the Special Board of Adjustment's Award in "Loram Rail Handling" this is scope-covered work. No exceptions apply to justify the use of outside contractors. That is, no special skills or special equipment was needed to perform this work. The Carrier failed to provide notice for this claimed work and it did not attempt to reduce the incidence of contracting. A monetary remedy cures the loss of work opportunity and protects the integrity of the Parties' Agreement.

On September 1, 2011, the Carrier denied the claim. Outside forces did not "remove/replace crossing panels and pads" as alleged by the Organization. Rather, outside forces performed asphalt work. The Carrier issued an advance notice dated March 17, 2011 of its intent to contract this work and arbitral precedent supports the Carrier's mixed practice to use outside forces. Because the Organization presented no documents to support its claim, it has not carried its burden of proof to establish a Rule violation. Also, the LOU is not applicable and did not create a new contracting Rule or supersede past, mixed practices. Notwithstanding the LOU, the Carrier retained its right pursuant to Rule 52(b) to contract out.

By letter dated September 7, 2011, the Organization rejected the Carrier's denial of the claim and on October 28, 2011, the Organization filed an appeal with the Carrier's highest designated officer (HDO). Proof that outside forces performed rehabilitation crossing work consists of the Daily Work Report (Form 29041) showing hours expended, Work Orders 5823, 5824, 5825, 6274, 6276 and 6277 identifying the contractor, locations and dates of work performed, as well as a statement from an eyewitness observing outside forces performing rehabilitation crossing work. The Loram Rail Handling Award confirms that pursuant to Rule 9 the disputed work belongs to BMWE-represented employees as further confirmed in Third Division Award 29916. No exception under Rule 52(a) justifies the Carrier's use of outside forces and Rule 52(b), which was implemented in 1973, protects the Organization's rights and practices to perform this work. The Carrier may have contracted this work in the past under certain conditions, but that does not interfere with the Claimants' prior rights pursuant to Rule 52(b) to perform the work now.

As for the Carrier's notice dated March 17, 2011, it does not identify this claimed work and there was no discussion during conference of contract labor, equipment and operators to remove and install track panels and crossing pads.

Because the work performed began on May 17, 2011, the Carrier did not know about it when the blanket notice issued on March 17, 2011; this precluded any good faith discussion at the conference. Notwithstanding the Organization's request for receipt of documents and data prior to the conference, the Carrier never responded. Merely citing past practice during the conference does not satisfy Rule 52(a) and the lack of specifics in the notice violates the LOU, which requires notice for each contracting transaction as determined by Public Law Board No. 7099, Award 14. The LOU remains valid and applicable as observed in Public Law Board No. 6204, Award 33. Finally, Third Division Awards 29531 and 40080 establish monetary relief for the Claimants in this situation without regard to their employment status for lost work opportunities and to enforce the integrity of the Parties' Agreement.

On December 26, 2011 the Carrier denied the appeal and labeled this claim as a factual dispute. Two Managers confirmed that System Gang 8522, not outside forces, removed/replaced the crossing panels and pads between Mile Post 2 and Mile Post 11. Manager Staples stated that "Farwest only performed the duties of asphalt removal/replacement. All of these crossings were built and installed by gang 8522 (system gang)" and Manager Cully wrote "[n]o contractors performed any panel removal or tie removal. They only performed paving work" and outside forces were used "to do the paving work at those crossings which we do not have the means to do internally and this was submitted to the union in February by [Manager] Staples." When there is an "irreconcilable dispute of fact which is central to the disposition of the claim," Third Division Award 33951 held that there is "no alternative but to dismiss the matter."

Third Division Awards 40756, 40758 and 40857, among others, confirm that a blanket notice satisfies Rule 52(a). Regardless, the Carrier provided advance notice on March 17 for the work performed beginning May 17, 2011. This satisfies Rule 52(a). The Carrier's representative at conference understood the kind of work subject to contract and was authorized to make a decision for the use of BMWE-represented employees or outside forces, but the parties did not reach a resolution. Regardless of the level of details or specifics in the Carrier's notice, the Organization always argues improper notice and no good faith discussion during conference.

Rule 52(a) authorizes the Carrier to use outside forces when it is not adequately equipped to handle the work, as evidenced by Manager Cully stating outside forces performed "the paving work at those crossings which we do not have

the means to do internally and this was submitted to the union in February by [Manager] Staples."

The Carrier relies on Public Law Board No. 5546, Award 2 as confirming its authority pursuant to Rule 52(b) to contract asphalt paving work on road crossings. Given the Carrier's established practice of using outside forces, stare decisis should apply to this claim. The Organization advances an interpretation of Rule 52(b) that limits contracting rights to those in existence as of 1973. The Organization's novel interpretation precludes the Parties from addressing evolving practices and "hundreds of arbitration awards support the Carrier's position" whereas there are no Awards supporting the Organization's position, i.e., for the Carrier to rely on a right under Rule 52 it must exist as of 1973. A mixed practice exists as documented in letters issued to the Organization during the 1990's. As for the Loram Award, Third Division Award 40755 states that Loram confirms the Carrier's position for contracting and does not support the Organization.

With respect to the LOU, it is a "dead letter" that was never attached to or included in the Parties' Collective Bargaining Agreement. Third Division Awards 28943, 31281, 33467 and 37854, among many others, do not recognize the LOU as binding or applicable and other Awards do not mention it. Third Division Award 40799 addressed the LOU by noting the specific provisions in a collective bargaining agreement prevail over the general provisions in the LOU.

Finally, the Carrier's highest designated officer stated that the Organization did not identify asphalt in its claim and the claim was incorrectly filed under Rule 52 of the Union Pacific Agreement when Rule 59 of the Southern Pacific Western Lines Agreement is the proper filing domicile.

On February 28, 2012 the parties met in conference but without resolution of the claim. In the Organization's summary of conference letter dated April 2, 2012, it reiterates arguments about the lack of notice, the LOU, Rule 52 and the loss of work opportunity. Manager Track Maintenance (MTM) Cully "distances herself from the work and MTP Staples was not present to observe the full scope of work performed" so the statement by the Boom Truck Driver for Gang 8522 "must stand as fact as he was there and witnessed the work as it took place." The Carrier's summary of conference letter dated June 15, 2012 reiterates this is a factual dispute given the Managers' statements showing an irreconcilable dispute in facts central to the claim.

On September 25, 2012 the Organization filed its claim, which is now before the Board for final adjudication. The Parties' capacious presentations to the Board reflect their arguments and evidence in progression to this proceeding. For purposes of facilitating inclusion of each Party's presentation in this Award, a summary rendition follows.

In summary fashion, the Organization states that the eyewitness statement by the Boom Truck Driver for Gang 8522 establishes that outside forces were performing crossing rehabilitation work even though the Claimants were qualified to operate front end loaders and backhoes readily available to the Carrier within its inventory. Crossing rehabilitation work is customarily and historically performed by BMWE-represented employees and is reserved to them pursuant to Rules 1 and 9 based on 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 Award. Memoranda and correspondence by Carrier officials recognize this reservation of work to BMWE-represented employees. These arbitral interpretations and decisions on work reservation Rules remain applicable, because the wording in the Rules interpreted by the Arbitrators remains unchanged and carried forward in successive Collective Bargaining Agreements.

The Organization states that the Carrier failed to issue a proper advance notice because it does not identify crossing rehabilitation work between Mile Post 2 and Mile Post 11 on the BMI Subdivision and the claimed work never was discussed during conference during which the Carrier did not identify which exception under Rule 52 it was relying upon to contract out the disputed work. The Carrier violated Rule 52 as well as the LOU by not engaging in a good-faith effort to reduce the incidence of contracting; the LOU obligates the Carrier to increase the use of BMWE-represented employees. Although the Carrier asserts that the LOU is not applicable, on-property Third Division Awards 29121 (Fletcher 1992), 40923 (Miller 2011) and 40929 (Miller 2011) state otherwise, as does Award 33 of Public Law Board No. 6204. Through calendar year 2002, 21 different Arbitrators have issued at least 73 Awards (20 of the 73 Awards were on-property Awards) finding the LOU to be applicable. The Carrier's defenses are without merit inasmuch as the Carrier failed to establish that BMWE-represented employees were not equipped to handle the work and failed to establish that outside forces previously performed this work. The requested monetary remedy is appropriate to preserve the integrity of the CBA. Finally, the HDO belatedly raised, for the first time, the Carrier's argument that the

claim arises under the SPWL Agreement and Rule 59. Because the argument was not raised earlier during on-property exchanges, the argument was waived by the Carrier. Regardless, the work was performed pursuant to Rule 52 of the UP Agreement.

In summary fashion, the Carrier argues for claim denial because there is an irreconcilable dispute in facts central to resolving the claim. This irreconcilable fact shows that the Organization failed to sustain its burden of proof. Third Division Awards 30591 and 37204, among others, support the denial of a claim when there is lack of proof due. Aside from lack of proof, the Organization did not claim asphalt work in its claim and the LOU is not applicable. The Organization also lacked proof of any Rules violated, which undermines its excessive request for monetary relief on behalf of fully employed Claimants.

The Board considers, initially, the Carrier's assertion that the claim rightly belongs under Rule 59 of the SPWL Agreement and not Rule 52 of the Union Pacific Agreement. This assertion surfaced for the first time when the HDO denied the Organization's appeal on December 26, 2011. The Carrier's initial claim denial on September 1, 2011 did not contest claim processing under Rule 52. The Board concludes that the Carrier waived any matter of procedural irregularity based on Third Division Award 33153 where a motion to dismiss a claim for procedural irregularity was not presented in response to the initial claim filing, but at a later stage and, by failing to raise it in response to the initial claim, it was "deemed a waiver" and cast aside.

As for the Carrier's assertion that the claim involves an irreconcilable dispute in facts, the Board finds otherwise. The Managers' statements are assessed in the context of the eyewitness statement by the Boom Truck Driver who was present onsite for the duration of the work and observed outside forces engaged in crossing rehabilitation work. Complementing and confirming the onsite observation are the Daily Work Report (Form 29041) showing hours expended, as well as Work Orders 5823, 5824, 5825, 6274, 6276 and 6277 identifying the contractor, locations and dates of claimed work performed. The Daily Work Report and work orders were not disputed by the Carrier. The eyewitness statement and documents are probative evidence that outside forces engaged in the repair and/or removal of crossings and pads and were not limited (as the Carrier asserts) to performing only asphalt work.

The Board finds, furthermore, that the use of outside forces for crossing rehabilitation work beyond asphalt duties was not discussed during conference or encompassed within the Carrier's notice of intent to contract out. Thus, there was no advance notice issued by the Carrier within the time period specified in Rule 52(a). The Carrier's failure to issue a timely advance notice constitutes a violation of Rule 52(a).

In view of the Board's conclusion as to a Rule 52(a) violation, Parts (1) and (2) of the claim are sustained and the remedy set forth in paragraph 3 of the Organization's Statement of Claim is granted. Without an advance notice of intent to use outside forces in accordance with Rule 52(a) and in the absence of any discussion or consideration during conference to schedule BMWE-represented employees to perform work customarily performed by the Claimants, the Board finds that monetary relief reinforces the terms of the Collective Bargaining Agreement and cures the Rule violation.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of July 2015.

CARRIER MEMBERS' DISSENT
to
THIRD DIVISION AWARD 42102 – DOCKET MW-42098
(Referee Patrick Halter)

The Majority was presented with directly conflicting statements from the two primary witnesses regarding the work that was performed by the contractor. Countless Awards have consistently held, in dismissing similar claims, that the Board cannot resolve evidentiary conflicts. For example, in Third Division Award 33895 (Eischen) the Board held:

> **"The Board is confronted on this record with an irreconcilable conflict in material fact, set forth in diametrically opposed written statements from the two primary witnesses. In such situations of evidentiary gridlock, it is well settled that the Board must dismiss the claim on grounds that the moving party has failed to establish a prima facie case. See Third Division Awards 21423, 16780, 16450, 13330; Second Division Awards 7052, 6856; Public Law Board No. 4759, Award 3."**

Likewise, when the Board was confronted with a "factual impasse" and a record that presented "irreconcilable disputes of fact which are central to the disposition of the claim" in on-property Third Division Award 35855 (Kenis) the Board concluded that it had no alternative but to deny the claim because ". . . the Organization, as the moving party in this dispute, failed to meet its evidentiary burden of proving the essential elements of its case." In this vein, also see on-property Third Division Awards 37478 (Kenis), 37204 (Newman), 32926 (Conway), 31831 (Vause), 30212 (Goldstein), and 26604 (Vernon), - all of which stand for the same proposition.

Therefore, pursuant to well-established precedent from the Board and other Section 3 tribunals, the Majority should have dismissed the Organization's claim ". . . on grounds that the moving party has failed to establish a prima facie case . . . " because the Majority had neither the authority nor the competence to resolve such conflict in the evidence. See Third Division Award 19531 (Brent). Unfortunately, the Majority shifted the burden of proof in the instant case to the wrong party by concluding that the Organization's statement held more weight even

though the Carrier's Manager hired and paid the contractor for its service. The Majority thereby erred in its finding that the Carrier failed to meet its burden of proof to support its affirmative defense. The claim, however, was the Organization's - not the Carrier's - and the Majority's conclusion that ". . . the Carrier failed to meet its burden of proof" obviously cannot form the basis for a sustaining award. Thus, this Dissent is required so that future arbitral panels will understand that this Award cannot be considered as precedent in similar cases.

The Majority based its deviation from the principle set forth above on the implied notion that the Carrier has a superior obligation to provide documentary evidence in support of its position than the Organization has to support its basic claim. Not only is that deviation in conflict with Award 33895, with the many Awards cited therein, and with the many Awards that have applied that principle since then, it improperly shifted the initial burden of proof. While Award 33895 recognized that conflicting statements such as were presented in the instant case result in the Organization's failure to establish a prima facie case, the Majority here accepted the Organization's unsupported statement as sufficient evidence to establish a prima facie case, even though the Carrier supplied directly contradictory evidence in response. The circumstances presented in the instant case are exactly the same as those presented in Award 33895, and as in that case, there was no basis here to elevate the Organization's statement over that supplied by the Carrier.

Furthermore, the Neutral references on Page 8 information that does not exist within the record when he cites, "Complementing and confirming the onsite observation are the Daily Work Report (Form 29041) showing hours expended, as well as Work Orders 5823, 5824, 5825, 6274, 6276 and 6277 identifying the contractor, locations and dates of claimed work performed." Although the Organization quoted this letter in its Submission, it cannot be found in the on-property handling; the same can be said for Form 29041 and Work Orders 5823, 5824, 5825, 6274, 6276 and 6277. If they were part of the record, the Neutral would have realized that work orders have nothing to do with contractors, their locations or the dates of the work in this claim. There is absolutely no rationale for the Majority to somehow bolster the Organization's position with documentation that did not exist within either Party's on-property handling.

In addition, the finding of the Majority on Page 8 that the Carrier waived its right to challenge the Organization's erroneous citation of UP Rule 52 instead of SPWL Rule 59 because the argument was not made in the Carrier's initial declination is also out in left field. The established principle and practice is that the on-property record is not closed until a Notice of Intent is filed with the NRAB. Until that point in time, both Parties are charged with the responsibility of exerting every reasonable effort to resolve the claim on the property. The Majority's finding in this case short circuits this joint responsibility of the Parties.

In any event, the Majority's holding here should not be considered as relieving the Organization of its obligation to establish a prima facie case in any claim, nor should it be considered as establishing a precedent that the Carrier cannot fully develop the facts and support its position throughout the on-property handling. Once Form 29041 and the work orders are extricated from the decision (because they were not part of the on-property record), it becomes obvious that both Parties supplied evidence of equal weight here, and the Majority should not have imposed a heavier burden on the Carrier. Because the Majority's finding is in direct conflict with the principle so clearly established in the plethora of Awards which employ the analysis described in Award 33895, the Majority's finding is palpably erroneous. In light of this palpably erroneous finding, the Carrier Members respectfully dissent.

Brant Hanquist *Michael C. Lesnik*

Brant Hanquist **Michael C. Lesnik**
Carrier Member **Carrier Member**

July 13, 2015