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

Award No. 42103
Docket No. MW-42100
15-3-NRAB-00003-130029

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 (Rick Franklin Construction) to perform Maintenance of Way and Structures Department work (track maintenance and repair) on the Rivergate Yard Track in Portland, Oregon on June 6 and 7, 2011 (System File T-1152U-511/1558562).

(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. Hallgren, B. Nelson, G. Lee and C. Washington shall now each be compensated for twenty (20) 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 May 16, 2011, the Carrier issued the following notice to the Organization:

> **"Subject: 15-day notice of our intent to contract the following work:**
>
> **Location: Portland Service Unit – Portland Subdivision, Kenton Line Seattle Subdivision to include all Terminals and Main Tracks Portland to Seattle to Wellsberg Jct.**
>
> **Specific Work: Provide equipment support, including but not limited to back hoes, excavators, trucks, etc., on an as needed basis to assist maintenance of way forces in the performance of their duties. Work may also include, but [is] not limited to road crossing repairs (including asphalt, track removal/replacement), traffic control equipment transloading, brush cutting/mowing, fence repair/installation, dust control (spraying), right of way road grading, removal of yard and right of way debris/material and provide necessary equipment support for derailment assistance/cleanup. Any New construction work with port of Portland.**
>
> **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 Dominic Ring in the Labor Relations Department at phone (402) 544-3445."**

By letter dated May 23, 2011, the Organization responded to the notice by requesting a conference and inquiring whether the notice was issued pursuant to Rule

59, Rule 52 or Rule 1(b). The Organization described the blanket notice as procedurally inadequate and/or defective due to its vagueness and inconsistency with Rules 59, 52 or 1(b) and the Berge-Hopkins Letter of Understanding (LOU).

> **"Absent from the notice is the basic information such as the work's scheduled commencement date, the work's scheduled ending date, the exact location identified by city, address, milepost, etc., a complete description of all work to be performed by outside forces and the reason that the Carrier is intending to contract out this specific work."**

This work has been customarily assigned to and performed by BMWE-represented employees because the work is reserved to them under the Agreement. Finally, the Organization requested that the Carrier have certain data and documents available for discussion at the conference.

Conference convened on June 7, 2011; however, there was no resolution. By letter to the Carrier dated August 23, 2011, the Organization presented its summary of conference as follows:

> **". . . the list of work to be contracted appears to be an all-inclusive effort to give away any maintenance or new construction to contracted forces. You advised that there are no contracts in place but we are skeptical as the intent is rather obvious. We therefore request a copy of any contract related to the work described in the instant notice. You gave no indication as what may constitute a need to contract. You did not identify any equipment for which the Carrier does not already own. You did not provide any information on projects that would have such priority that Carrier forces could not be delegated to perform as needed maintenance work referenced herein. Indeed, your sum total of justifying unidentified contracting transaction for unidentified need was the Carrier has a past practice. Your reliance on past practice in the instant case exemplifies your attitude across the board in handling service orders in good faith manner. Your attitude throws up a block wall so high there can never be any good faith discussion on need or alternatives. You simply state past practice, close the door. You are completely ignoring the purpose of coming together in a good faith manner."**

The Organization reiterated its concerns about the "inadequate" notice.

"Simply throwing a notification to contract unnamed equipment for unspecified work at some point in time in Portland Oregon does not satisfy the Carrier's notice obligations under the controlling language of our respective Agreements and does not even resemble the commitments made by the parties on December 11, 1981. 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 implied or listed present valid concerns.

. . . Even if the Carrier was not obligated to provide such information up front [reasons for contracting and exceptions justifying it], you cannot even provide that information during conference. This makes the ceremony of coming together to try to reach an understanding or discuss alternatives, simply pro forma.

. . . the function of this conference was merely informational. While you assert that you have authority to return this work to the craft, it became apparent that the authority you claim is limited to making suggestions to managers who have already made up their minds to move the work away from the craft . . . you did not talk to any managers in that regard.

While the notice spoke to as needed contracting of equipment it failed to identify any specific need, or even define the term 'equipment. . . .' Your failure to identify the work and the equipment leaves us without opportunity to discuss alternatives to contracting unnamed equipment . . . numerous arbitral Boards have taken the position that notice of this nature fail[s] to comply with the . . . Agreement . . . this failure represents a violation in and of itself.

> **While you cited past practice in contracting this work . . . exactly what practice are you speaking [of]? You have not identified any work . . . the work may have been contracted at certain times in the past, does not remove the work from the craft . . . should you desire to cite past practice of the Carrier, we will accept nothing except precise and specific reference to incidents on this property, where employees are represented by [BMWE] instead of simply citing Exhibits which are irrelevant to the issue at hand . . . the work at hand, program and routine maintenance is covered by Rules 8, 9, and 10 of our Agreement . . . M/W employees have a rich history of performing this type of work . . . there are Carrier forces that are headquartered in the area of the work and they certainly could be made available.**
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> **. . . the LOU obligates UP to make good-faith efforts to reduce subcontracting, including the procurement of rental equipment . . . we once again request that you refrain from contracting out this work and instead assign M/W forces who are both qualified and willing to perform the work."**

On July 14, 2011, the Organization filed its initial claim alleging violations of Rules 1, 2, 3, 4, 9, 10, 13, 14, 15, 16, 26, 27, 33, 35, 52, Appendix T and the LOU. Specifically:

> **"Commencing on June 6, 2011 from 0700 until 1600 the Carrier chose to utilize [outside forces] to perform regular track maintenance and repair in the Rivergate Yard on track 301 at approximately mile post (3). June 4, 2011 two days prior a train derailed in the same location causing the damage that was repaired on June 6, 2011. The Carrier called said contractors two days later to repair the damaged track. The contractors utilized an Excavator, Front End Loader, Bull Dozer and contractor employees to take apart, clean up, scrape, build grade, and reinstall four track panels at the derailment location[.]"**

The Organization states this was not an emergency because the work did not begin until two days after the derailment. By past practice, BMWE-represented employees perform this work on a historical and customary basis. Exceptions under Rule 52 do not apply because there were no special skills and no special equipment required. The Carrier failed to provide notice for this work as required by Rule 52 and the LOU.

On September 8, 2011, the Carrier denied the claim. Based on the fact pattern presented by the Organization, there were no Rules violations. The Organization's description of the claimed work on certain dates is inaccurate given the statement from the Manager of Track Maintenance (MTM). As noted in on-property Third Division Award 40799, the five exceptions in Rule 52(a) prevail over the general provisions in the Letter of Understanding (LOU) which is inapplicable because it merely reaffirms the notice requirement and encourages the Parties to resolve differences at the local level. Rule 52(a) "permits the Carrier to use outside forces where the 'Company is not adequately equipped to handle the work . . . .'" Also, Rule 52(b) allows 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 claimed work. The LOU did not create a separate, new contracting Rule or supersede past practice exceptions. Third Divisions Awards 28654, 28943, 31281, 32534, 33467 and 37854 dismiss the LOU, or do not acknowledge it.

The Carrier argues that exclusivity to this work does not exist because Rule 1 is a general scope Rule and Third Division Awards 28789 and 29007 held that this type of Rule is not determinative as to whether work falls under the scope Rule's coverage.

Third Division Awards 36542 and 37103 confirm that the burden of proof resides with the Organization to establish its claim to the work and to establish damages for the requested remedy. The claim is excessive because the Claimants were fully employed and earning overtime, so they endured no loss of wages.

On November 2, 2011 the Organization appealed the Carrier's decision to deny its claim. The Organization reiterates that no emergency existed, BMWE-represented employees historically perform this work, exceptions under Rule 52(a) do not apply (no special skills, no special equipment, equipment in Carrier's inventory or otherwise available, no emergency, not beyond the capacity of BMWE-represented employees). Also, there was no prior notice as required by the LOU and Rule 52, the undated MTM statement is self-serving, other tracks in the yard were available for use and Rule 9 confirms this work is reserved to BMWE-represented employees. Monetary relief is appropriate for loss of work opportunities.

On December 28, 2011, the Carrier issued a declination to the appeal by reiterating arguments and positions set forth in its initial denial of the claim. The Organization did not submit any document showing that the work occurred as alleged. Thus, alleging a violation without satisfying the burden of proof leads to claim denial.

Aside from lack of proof, this was an emergency, which accords wide latitude for the Carrier such as relief from providing notice. In this regard, the derailment was an "unforeseen combination of circumstances which calls for immediate action." Because it was an emergency the Carrier could not stand by and wait for a conference to convene following a 15-day advance notice. Stare decisis applies in this claim based on Third Division Awards 29965, 32097 and 38953, among others.

Regardless of the emergency, the Carrier complied with proper notice requirements and acted in accordance with exceptions to contract out set forth in Rule 52. The Organization rejects every notice no matter how detailed; 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 this regard, the Manager's statement reflected that Claimants Lee and Washington performed the claimed work.

As for Rule 1 (Scope), only Rule 4 is incorporated within Rule 1 and that Rule lists undefined job titles within Sub departments and does not confer exclusivity to the contested work. The same conclusions apply to Rules 8, 9 and 10 (explanatory Rules) 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 conflicts with the plain language rule of contract interpretation. There is no arbitral Award concluding that Rule 52(b) limits the Carrier to existing rights prior to 1973.

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

A conference convened on January 31, 2012; however, there was no understanding or resolution. By letter dated March 27, 2012 addressed to the Carrier, the Organization reiterated its arguments to support its claim and, by letter dated June 15, 2012, the Carrier responded with a reiteration of its arguments denying the claim. Accordingly, this matter is now before the Board for final adjudication.

The Board's review of each Party's Submission confirms arguments, supporting documents and arbitral Awards relied upon during the processing of the claim. For purposes of inclusion in this decision, a topical summary follows.

According to the Organization, the claimed work of installing track panels and cleaning right-of-way along track and work associated therewith is work customarily and historically performed by BMWE-represented employees and is reserved to them 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 Special Board of Adjustment (Loram Rail Handling). Certain memoranda and correspondence by Carrier officials recognize Rules 8 and 9 as work reservation provisions. The Carrier violated Rule 52 and the LOU by not engaging in a good-faith effort to reduce contracting. The Carrier's notice only advises the Organization of an intent to enter into unspecified transactions with contractors. 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 LOU is not applicable, on-property Third Division Awards 29121 (Fletcher 1992), 40923 (Miller 2011) and 40929 (Miller 2011) state otherwise. The Carrier did not issue a proper advance written notice and there was no emergency, which is an affirmative defense the Carrier failed to prove. The Carrier also failed to establish that BMWE-represented forces were not equipped to handle the work, or that outside forces have previously performed this work; Carrier forces were ready, available and willing to perform the work; and the requested monetary remedy is appropriate to preserve the integrity of the Parties' Agreement.

According to the Carrier, stare decisis governs the disposition of the claim; the LOU is not applicable; the Carrier possesses rights under the Parties' Agreement to use outside forces during an emergency; the requested remedy is excessive because the Claimants suffered no loss of wages or work opportunity and there is no proof that contractors worked the hours claimed.

The Board initially considers the Carrier's assertion of an "emergency." As quoted in on-property Award 14 of Public Law Board No. 7096:

> **"A review of Third Division Awards reveals that the existence of an 'emergency' in a derailment situation requires a case by case analysis. (See, e.g., Third Division Award 37644 where the Board stated '[d]erailments are not 'one-shoe-fits-all . . . .' Further review of Third Division Awards support[s] the conclusion that any claimed emergency must be bona fide where time is of the essence thereby rendering the**

Carrier's obligation to supply a Rule 52 notice impractical given the exigencies that then exist[.]"

The Carrier's assertion of an emergency represents an affirmative defense. The Board applies the precedent in Third Division Award 29164, i.e., "the Carrier assumes the burden of establishing on the record that one did in fact exist."

The finding is that on June 4, 2011, a derailment occurred at approximately 9:00 P.M. on Track 301 in Rivergate Yard. At approximately 1:00 P.M. on June 5, the Car Department began re-railing the derailed cars onto other tracks in the yard. This process continued into the morning hours on June 6. After the track area was cleared of cars, BMWE-represented employees and an outside contractor began track repairs and maintenance at 5:00 A.M. on June 6.

This situation, the Carrier states, constituted an emergency, citing Third Division Award 20527 where emergency was defined as an "unforeseen combination of circumstances which calls for immediate action." The "unforeseen combination of circumstances" arising, causing, associated with or contributing to this situation requiring "immediate action" are not established in the record before the Board. Rather, the record establishes only that there was a derailment on Track 301 (one of several tracks in the yard) and, 16 hours after it occurred, the Carrier began the process of re-railing the derailed cars. Manager Ortegon's email, which was relied upon by the Carrier, makes no reference to the situation as an emergency. There is, moreover, no showing that during the intervening 16 hours, and continuing into June 7, operations were impaired in part or in whole. For example, in on-property Third Division Award 32097 the derailment damaged track (as in this situation) and shut down the mainline for 24 hours (there was no such showing in this situation). Applying arbitral precedent – a derailment is not a "one-shoe-fits-all" situation – these findings lead the Board to conclude that this was not an emergency situation.

The Board finds, additionally, that the Carrier did not disclose during conference on June 7, 2011 that it had already contracted out the work beginning no later than June 6. During conference, the Carrier did not state that there was an emergency, but rather asserted unspecified work would be contracted out. Our finding is that the Carrier already contracted out this work prior to conference, but did not disclose it. This lack of disclosure does not constitute engaging in good-faith and, in the circumstances of this claim, violates Rule 52(a).

Notwithstanding the Rule violation, the Board notes Manager Ortegon's email states that Claimants Lee and Washington "worked with the contractors to restore the track to service[.]" In the absence of statements by the Claimants contrary to the Manager's email or documents establishing otherwise, the Board credits the Manager's statement to rebut the claim for Claimants Lee and Washington.

The Carrier asserts that a monetary remedy for any of the Claimants is not warranted because they were fully employed and, thereby, unavailable for this claimed work. The Board is well apprised of the competing arguments and arbitral opinion on monetary remedy. The findings in this claim show that there was no discussion during conference about scheduling BMWE-represented employees for this work because it already had been contracted prior to the conference. Aside from not disclosing that this work had been contracted out, the Carrier did not state there was an emergency. In this regard, the Carrier did not assert its affirmative "emergency" defense until its claim declination. Claimants Hallgren and Nelson were fully employed because the Carrier scheduled them to be at a different location to perform other duties rather than consider them as part of its mixed practice. In the circumstances of this claim, a cease and desist or similar hortatory wording of a prospective remedy is insufficient. The Board finds that a monetary remedy for Claimants Hallgren and Nelson fosters the letter and spirit of conference as agreed to by the Parties in the cited Rules.

AWARD

Claim sustained in accordance with the Findings.

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.