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

Award No. 42105
Docket No. MW-42106
15-3-NRAB-00003-130042

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 (Kanza Construction) to perform Maintenance of Way work (load, stockpile and transport ballast and other track material) from Mile Post 156 on the Marysville Subdivision on June 21, 2011 and continuing through June 29, 2011 (System File D-1152U-234/1560160).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out the aforesaid work and when it failed to make a good-faith effort to reach an understanding or 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. Browning, E. Hopken and J. Ross shall now each '* be allowed compensation for the loss of work opportunity suffered. Specifically, the Claimants must be allowed the same number of hours (sixty three (63) hours) worked by each contractor employee at their respective straight time rate of pay ($23.17) as compensation for the hours worked**

by the outside contracting force as described in this claim, or $1460. *'"**

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 notice set forth below 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 North Platte Service Unit.

SPECIFIC WORK: Providing fully operated, fueled and maintained track hoes / excavators with buckets and thumb, backhoe(s), grapple truck(s), dump 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 through December 31, 2011.

THIS WORK IS BEING PERFORMED UNDER THAT 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 January 27, 2011, the Organization requested a conference, as well as certain information and documents at conference, and informed the Carrier that the notice was vague, inadequate and defective under Rule 52 and the December 11, 1981 National Letter of Understanding (LOU). Conference convened on February 1, 2011 without resolution or understanding. The Organization issued a post-conference letter dated February 22, 2011 to which the Carrier responded by letter dated April 29, 2011. Each Party's letter represents its good- faith attempt to reach an understanding on the notice of intent to contract.

On August 17, 2011 the Organization filed a claim stating that the Carrier improperly assigned scope-covered work to outside forces in violation of numerous Rules including the LOU. "The contracted employees were utilizing equipment that is recognized as the same equipment so utilized by employees when assigned to perform the identical tasks." Specifically, "the contracted employees were utilizing dump trucks to perform the scope covered duties." The claimed work is reserved to BMWE-represented employees because they customarily and historically perform such duties; due to the Rules violations a monetary remedy is warranted.

On October 10, 2011, the Carrier denied the claim by asserting (1) the Organization failed to prove any Rules violations, (2) it complied with Rule 52 by providing advance written notice and (3) the Carrier has a right to use outside forces because the "scope of the project was too large for Carrier forces and those forces could not complete the project" plus the statement by the Manager of Track Programs shows that BMWE-represented employees were not adequately equipped to handle the work (Third Division Award 40816). "You should be reminded that the Time Claim/Grievance process is designed primarily to afford an avenue for an employee to obtain restitution for a loss of income, and not as a vehicle to supplement income." No monetary remedy is warranted inasmuch as there was "no harm - no foul."

On December 9, 2011, the Organization filed an appeal and reiterated the arguments set forth in its claim. The Organization responded further by stating that the Carrier failed to provide any requested information or documents during the conference held on February 1, 2011 and thereby denied an authentic opportunity for a good-faith discussion (Third Division Award 31280). The blanket notice also rendered meaningless the good-faith discussion required by Rule 52 and the LOU, which remains applicable because a notice is required for each contracting transaction (Award 33 of Public Law Board No. 6204 and Award 14 of Public Law Board No. 7099). The Carrier failed to establish an exception under Rule 52(a) or any mixed practice. A monetary remedy is warranted to enforce and maintain the integrity of the Agreement.

On January 21, 2012, the Carrier denied the appeal by reaffirming the arguments set forth in its declination letter and disputing the Organization's appeal arguments. Specifically, the type of advance written notice in the instant claim complies with Rule 52 (Third Division Awards 37490 and 40756). A conference was convened, but no understanding was reached; Rule 52 allows the Carrier to proceed with contracting out in that situation. The Carrier was not adequately equipped to handle the work in question (Rule 52(a) exception) and there is a mixed practice (Rule 52(b)) as well as a prior and existing right as documented to the Organization in the 1990's establishing that outside forces perform the claimed work (load, stockpile and transport ballast and other track material). Third Division Awards 30193 and 37365, among others, confirm the Carrier's right to contract out this type of work. The claimed work is not reserved to BMWE-represented employees and

the LOU is not applicable because its general terms do not prevail over the specific terms of Rule 52 (Third Division Award 40799).

On February 28, 2012, a conference convened without resolution or understanding and each Party's position remained unchanged. The Organization issued a post-conference letter dated April 2, 2012 summarizing its position. In this regard, the Organization stated that it submitted a statement from one of the Claimants during conference which "demonstrates equipment was available at a rental outlet and in fact, this is what has been done in the past when Carrier owned equipment was not available." This shows, the Organization asserts, that "the Carrier is failing in its [LOU] obligations to reduce subcontracting, including the procurement of leased/rented equipment."

On June 15, 2012 the Carrier responded to the Organization's post-conference letter. The Carrier reaffirmed its arguments, but did not specifically address the statement from the Claimant presented to it during the conference.

Having carefully reviewed the record, the Board finds that the claim was timely and properly presented and handled by the Organization at all stages of appeal up to and including the Carrier's highest designated officer.

The Organization's arguments, along with precedent in support of its arguments, in its Submission to the Board are: (1) the claimed work of hauling and unloading ballast material is reserved to BMWE-represented employees pursuant to Rules 1, 2, 4, 5, 8 and 9 to name a few (Third Division Awards 14061 and 29916, Award 15 of Public Law Board No. 7096, "Loram Rail Handling" and "Pre-plated Tie Dispute"); (2) the Carrier's prior writings recognize Rules 8 and 9 as work reservation provisions (Third Division Award 29916); (3) the claimed work is customarily and historically performed by BMWE-represented employees; (4) the Carrier failed to provide advance written notice as required by Rule 52 and the LOU; (5) the LOU is applicable and requires the Carrier to maintain an adequate workforce and to plan work in such a manner so as to minimize the use of outside forces and increase the use of BMWE-represented employees (Third Division Award 29121); (6) the only criteria to justify contracting out are contained in Rule 52(a); (7) Rule 52(b) serves only to preserve each Party's rights and practices relative to contracting out and the Organization's right was work reservation at

Rule 9 ("ballasting, loading, unloading and handling of track material and other work incidental thereto"); (8) at least 21 Arbitrators issuing 73 Awards have found the LOU in effect and a basis to sustain a contract violation; (9) the statement by the Manager of Track Programs is undated, unsigned and cannot be authenticated, but it confirms that the work was performed by an outside force; (10) any failure to comply with advance notice requirements prior to entering into a contracting transaction requires sustaining the claim in its entirety (Third Division Awards 29472 and 40964); (11) failure to provide advance notice, as well as an authentic opportunity for conference, demonstrates the Carrier's failure to reduce the incidence of contracting by increasing the use of its forces and is a violation of the LOU (Award 33 of Public Law Board No. 6204); (12) the Carrier's obligation to reduce the incidence of contracting includes calling employees on furlough and rescheduling work so as to allow BMWE-represented employees to perform it during their regular hours or on overtime, but the Carrier engaged in no such effort because it removed the work from its employees and assigned the work opportunity to outside forces; (13) exclusivity is inapplicable to contracting out (Third Division Awards 40373 and 40923); (14) the Carrier's asserted past practice for the use of outside forces is invalid because it failed to establish a Rule 52(a) exception; the Claimants and equipment were available (Third Division Awards 40409 and 40411); (15) during conference on February 1, 2011 the Carrier never disclosed or identified this claimed work as subject to contracting out; thus the Organization never received advance notice of the contracted work prior to the date the contractor performed the work which warrants sustaining the claim (Third Division Awards 29577, 36516, 36964 and 41107; (16) the blanket notice is deficient under Rule 52 and the LOU and the lack of any specifics from the Carrier's representative during conference rendered meaningless the requirement for a good-faith attempt to reach an understanding (Third Division Award 41052); (17) the Carrier's reasons to contract out were offered after-the-fact rather than identified in the notice to contract out when a good-faith discussion could follow in conference; (18) the Claimants' unavailability is by design of the Carrier; (19) there was no emergency; (20) Rule 52(b) preserves the work reserved to BMWE-represented employees and does not bestow carte blanche authority for the Carrier to contract out; and (21) monetary relief is the standard remedy in arbitration.

The Carrier's arguments, along with a sampling of arbitral precedent in support of its arguments, in its Submission to the Board are: (1) proper advance

notice of intent to contract out was issued to the General Chairman followed by a good-faith conference and no contracted work was performed prior thereto; (2) Rule 52(a) allows the Carrier to proceed with contracting when there is no understanding attained at conference; (3) the "blanket" notice complies with Rule 52 (Third Division Awards 37332, 37490 and 40752); (4) the statement by the Manager of Track Programs established a Rule 52(a) exception because the Carrier was not equipped with manpower and equipment on the day and at the location of the claimed work, which compelled use of outside forces to restore the crossing to service for the customer; (5) BMWE-represented employees (and not outside forces) cut out the old panel and installed the concrete crossing pads; (6) there is a Rule 52(b) prior and existing right with a mixed practice to use outside forces, which the Organization did not dispute in 1995 or, thereafter, when the Carrier documented the practice; (7) Third Division Awards 27010, 28619, 31285, 31721, 31730 and 32333 affirm the mixed practice such that stare decisis governs the disposition of the instant claim; (8) the claimed work is not reserved to BMWE-represented employees because the Scope Rule is general (Third Division Award 29007 and Award 8 of Public Law Board No. 4219; (9) the LOU is unpersuasive and inapplicable because it does not bestow on the Organization a "right" to work that the Organization never possessed and the LOU's general terms do not override the specific terms set forth in Rule 52 (Third Division Awards 28654, 32534 and 40799); (10) the Organization failed to satisfy its burden of proof (Third Division Award 36542); and (11) the requested remedy is improper and excessive inasmuch as the Claimants were fully employed and working at the location of the claimed work; moreover, one of the Claimants elected to layoff on personal business (Third Division Award 31652).

Having carefully reviewed the record, the Board is apprised of the Organization's arguments and the Carrier's arguments, as well as the documents relied upon by each, such as emails or statements from officials and employees along with each Party's reference to arbitral precedent. The application of precedent, as well as Rules, in a specific claim is a fact-specific dependency.

The Board finds that the Carrier's notice of intent to contract out the work in question 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 in this case is sufficient because it complies with the negotiated terms set forth in Rule 52, which invites the Organization to determine, upon receipt of the notice of intent to contract out, whether the work belongs to its members. Rule 52 is the negotiated mechanism agreed-upon by the Parties for issuing a notice of intent to contract out, and once that notice is received by the General Chairman, Rule 52 details the process (request a conference) and requirements (reciprocal good faith, exceptions for contracting out and prior and existing rights) to satisfy each Party's obligations of a good-faith attempt to reach an understanding. Because the Parties negotiated and agreed upon the basis or bases under which contracting out may be undertaken, they are aware of the reason(s) applicable when discussing a contracting transaction (contemplated or realized). The Carrier and the Organization are not tabula rasa about Rule 52 (process and substance).

Advance notice, conference and good faith are repeated in the LOU where "to the extent practicable" the incidence of contracting is to be reduced, which effectively increases the use of BMWE-represented employees. The phrase "to the extent practicable" is interpreted and applied because not all work customarily performed by BMWE-represented employees will be performed by them when, for example, an exception under Rule 52(a) applies and is established.

The timely 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 was commenced by contractor forces on June 21, 2011.

Upon receipt of the notice, the General Chairman requested on January 27, 2011 a conference and it was "promptly" convened on February 1, 2011. During conference, the Carrier indicated that the notice could encompass multiple contracting transactions and, at the same time, there may be no contracting transactions. In the Organization's view, the Carrier lacked any or sufficient reasons for the contemplated contracting transaction(s) and there were no dates or locations identified, thereby denying an authentic opportunity for a good-faith discussion to reach an understanding. At the same time, the Carrier's view is that

the notice describes the work as well as the location (North Platte Service Unit) which, should contracting occur, would be subject to Rule 52. The Carrier and the Organization each represented a "good faith attempt to reach an understanding" although "understanding" does not mean a resolution of divergent views. When there is no understanding, Rule 52(a) stipulates that the Carrier "may nevertheless proceed with contracting, and the Organization may file and progress claims in connection therewith." After conference, the Carrier proceeded with a contracting transaction and the work commenced on June 21, 2011. There is no indication that the claimed work was contracted prior to the issuance on January 24, 2011 of the notice of intent to contract out or prior to or during the conference convened on February 15, 2011. Without an understanding and the contracting transaction in effect, the Organization proceeded in accordance with Rule 52(a) to file a claim on August 17, 2011, which has been progressed to the Board for a final decision.

With respect to the claim, the Parties convened a conference on February 28, 2012, which was followed by the Organization's post-conference letter dated April 2, 2012 and the Carrier's response thereto dated June 15, 2012. The post-conference letter, as well as the response thereto, memorialize each Party's good-faith attempt to reach an understanding. In a good faith context, the Carrier does not contest that BMWE-represented employees have customarily and historically performed the claimed work ("load, stockpile and transport ballast and other track material"). Although the Organization asserts that the claimed work is reserved to BMWE-represented employees pursuant to Rules 1, 2, 3, 4, 8 and 9, among others, the Carrier asserts that the Rules do not serve to reserve the work to BMWE-represented employees given Rule 1 – Scope is general in focus and description. The Board finds that the Claimants customarily and historically perform the claimed work, but work reservation is not established in the Rules cited by the Organization. Among those Rules, Rule 8 describes the portions of the work belonging to the Organization that are to be allocated to B&B groups and Rule 9 assigns work intra-craft because it determines which Sub departments will perform the work if it is assigned to the craft.

Because the scope-covered work is customarily performed by the Claimants, contracting out such work is subject to Rule 52. With respect to Rule 52(a), at least one of the exceptions must apply to serve as a basis to contract out. The exceptions are:

(i) special skills not possessed by the Company's employes, special equipment not owned by the Carrier or special materials available only when installed or applied by a supplier;

(ii) work is such that the Carrier is not adequately equipped to handle it;

(iii) emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces.

In its declination letter, the Carrier included and relied on the email by the Manager of Track Programs (MTP) to establish the asserted exception under Rule 52(a) that the "work is such that the Carrier is not adequately equipped to handle it." The statement follows:

> **"This work was done during the undercutting project. Gang 9041 had some equipment and dump trucks and was unable to keep up with the volume of the amount of work during the project and the contractor was used to help. This work was done by regional track gangs and not the service unit. Alvaha Sthalnecker and Jonathan Smith were supervising the gang and can provide some details on how much equipment and hours the gang had during this period."**

The MTP's email is considered in this context. The Claimants were qualified, willing and available to perform the scope-covered work. The Carrier elected not to contact them and the record does not reflect any reasonable effort by the Carrier establishing circumstances that precluded reassigning the Claimants to the claimed work. Additionally, the MTP's statement is silent or does not address the availability of Carrier equipment at the time of this claim. The Carrier's exception (Rule 52(a)) asserts that it was not equipped, but the MTP's email does not establish that assertion. The Board notes that the Carrier did not address in its letter dated June 15, 2012 the statement provided to it during conference on February 28, 2012 by one of the Claimants showing that the Carrier's manner of conducting business on the Marysville Subdivision includes procuring rental equipment of the kind used

in the performance of the claimed work (dump truck, backhoes) "for over a month" duration. Because the Carrier did not sufficiently rebut that the Claimants were qualified and available for the claimed work and the Carrier did not establish that equipment was unavailable in the area on the dates of claimed work, the Board finds that the Carrier did not establish a Rule 52(a) exception as asserted.

The Carrier also weighs in with Rule 52(b) as a prior and existing right to contract out. The Carrier asserts that arbitral precedent affirms a mixed practice to use outside forces for track and roadbed work such as transportation, distribution and removal of ballast and "spoils." On-property Third Division Awards 28619, 30063 and 40861 are favorable regarding mixed practice. Aside from precedent, the Carrier referenced documentation furnished to the Organization during the mid to late 1990's which, the Carrier asserts, the Organization did not rebut or object to upon receipt of such evidence. Reference to that documentation, as well as the inclusion of some or all of it, was part of the on-property exchange, and records stockpiling on the Topeka Branch and similar or identical work of the kind in the instant case in other areas in Kansas. The Organization contends that it objects to mixed practice when aware of it. Nevertheless, the Board has upheld the position that once the Carrier establishes a mixed practice of contracting out the kind of work presented and disputed in the instant claim, the Carrier can rely on Rule 52(b) to justify its contracting transaction (Third Division Award 42191). The Board will not deviate from that precedent because it is not exposed as palpably erroneous.

In short, the Board concludes that the Carrier issued an advance written notice and the parties convened a conference without an understanding being attained. Rule 52 allows contracting out to proceed notwithstanding the conference outcome. The Carrier contracted as allowed under Rule 52. Therefore, 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.