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

Award No. 42106
Docket No. MW-42122
15-3-NRAB-00003-130049

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 (KRW Construction) to perform routine Maintenance of Way work (remove/replace crossing track panels and crossing pads and related work) at N. W. 12th Street in Lincoln, Nebraska on June 30, 2011 (System File G-1152U-75/1560169).

(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 said work and failed to make a good-faith attempt to reach an understanding concerning said contracting 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 J. Diaz, R. Schreck, P. Gibson, R. Jensen, J. Mumm and F. Ortez shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for four (4) hours at their respective overtime 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 January 31, 2011, the Carrier issued the notice set forth below to the Organization:

> **"Subject: 15-day notice of our intent to contract the following work:**
>
> **Specific Work: Provide equipment support, including but not limited to, backhoes, excavators, trucks on an as-needed basis for Maintenance of Way forces in the performance of their duties.**
>
> **Location: Various locations on the Council Bluffs Service Unit.**
>
> **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 made with Michael E. (Mac) McNulty in the Labor Relations Department at Telephone No. (XXX) XXX-XXXX."**

By letter dated February 2, 2011, the Organization requested a 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). A conference was convened on February 15, 2011 without resolution or understanding. The Organization issued a post-conference letter dated March 23, 2011.

On August 22, 2011, the Organization filed a claim alleging that the Carrier improperly assigned scope-covered work to outside forces in violation of numerous Rules, including the LOU. The violations warrant a monetary remedy because the Claimants were available, willing and qualified and "the Carrier has all of the equipment necessary to perform this work in the Omaha [Nebraska] area that could have been used to perform [the claimed] work" in Lincoln (Nebraska).

Specifically, the Organization alleges Rules violations occurred when the Carrier:

> **". . . employed a contractor . . . to replace mainline crossing[.] The work consisted of cutting, tearing out old panel, digging out old fill, replacing two new wood tie track panels, replacing ballast, and installing new concrete crossing pads. The contractors had a foreman, a Dump Truck with operator hauling rock, Cat Loader with operator, Crawler Hoe with operator, a Lowboy with operator hauling equipment and assisting laborer operating various hand tools to connect panels."**

On October 18, 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) there is a mixed practice to use outside forces to assist BMWE-represented employees. No monetary remedy was warranted because the Claimants were fully employed with regular hours and overtime and one Claimant was absent from work without pay for personal business on June 30, 2011.

On December 14, 2011, the Organization filed an appeal and reiterated arguments in its claim. The Organization responded further by asserting that it

proved Rules violations with statements from two Claimants attesting to outside forces performing the claimed work. The Organization asserts that the blanket notice is defective because it encompasses multiple unnamed transactions, whereas a notice must be issued for each transaction. There is no Rule 52(a) exception to justify contracting out and no Rule 52(b) prior and existing right of a mixed practice because any time the Organization has been aware of contracting out scope-covered work, it objects. The LOU applies because the Carrier fails to maintain an adequate workforce in order to reduce the incidence of contracting and increase the use of BMWE-represented employees (Award 33 of Public Law Board No. 6204). The claimed work is reserved to BMWE-represented employees because they historically and customarily perform it. The Claimants are qualified and were available to perform the claimed work on rest days or after their regular hours. A monetary remedy is appropriate for Rules violations causing a loss of work opportunity.

On January 26, 2012, the Carrier denied the appeal by reaffirming arguments in its declination letter and disputing the Organization's appeal arguments. Specifically, the type of advance written notice in this claim complies with Rule 52 (Third Division Award 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 with manpower or equipment available to handle this work (Rule 52(a) exception) because the damaged mainline crossing required a "quick fix" so the customer serviced in this area could receive and send materials or goods. There is a mixed practice (Rule 52(b)) in a prior and existing right substantiated in the 1990's with documents provided to the Organization establishing outside forces working in the areas of track and switch repair that included work affected industry customers. Third Division Awards 37365 and 30193, among others, confirm the Carrier's right to contract out. 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 May 30, 2012, a conference was convened without resolution or understanding. The Organization issued a post-conference letter dated June 1, 2012 summarizing its position. The Organization states that no "emergency" existed and equipment located nearby remained idle, so it was available.

On August 20, 2012, the Carrier responded to the Organization's post-conference letter. The Carrier contended that it complied with Rule 52 inasmuch as it was not equipped with manpower or equipment on the claimed date (June 30, 2011) and, even though there was no "emergency," the use of outside forces enabled a "quick fix" to restore service.

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.

For purposes of facilitating the inclusion of each Party's presentation in this award, a summary rendition is provided.

In summary manner the Organization's arguments, along with a sampling of the arbitral precedent in support of its arguments, are: (1) the claimed work 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 and the Carrier failed to prove that BMWE-represented employees performed any of the contracted work; (4) the Carrier failed to provide an 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 the work in such a manner so as to minimize the use of outside forces (Third Division Awards 29121, 40923 and 40929); (6) at least 21 Arbitrators issuing 73 Awards have found the LOU in effect and a basis to sustain a contract violation; (7) 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); (8) 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 BMWE-represented employees in violation of the LOU (Award 33 of Public Law Board No. 6204); (9) the Carrier's obligation to reduce the incidence of contracting includes calling employees on furlough and rescheduling the work in order 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 own employees and assigned the work opportunity to an outside force; (10) exclusivity is inapplicable to contracting out (Third Division Awards 40373 and 40923); (11) the Carrier's asserted past practice for the use of outside forces is invalid because there is no Rule 52(a) exception inasmuch as the Claimants and equipment were available, but the Carrier exerted no effort to use BMWE-represented employees or its equipment (Third Division Awards 40409 and 40411); (12) during the conference on February 2, 2011, the Carrier never disclosed or identified this claimed work as being 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; (13) the blanket notice is deficient under Rule 52 and the LOU and the lack of any specifics from the Carrier's representative during the conference rendered meaningless the requirement for a good-faith attempt to reach an understanding (Third Division Award 41052); (14) 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; (15) the Claimants' unavailability is by design of the Carrier; (16) there was no "emergency;" (17) 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 (18) monetary relief is the standard remedy in arbitration.

In summary manner, the Carrier's arguments, along with a sampling of the arbitral precedent in support of its arguments, are: (1) proper advance notice of its 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 out 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 Maintenance 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 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 because 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 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 terms in Rule 52, which engages 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 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" there is a recognition to reduce the incidence of contracting, which effectively increases the use of BMWE-represented employees. The phrase "to the extent practicable" means, in essence, that there are situations where work customarily performed by BMWE-represented employees will not be performed by them when, for example, an exception under Rule 52(a) applies and is established.

The timely notice dated January 31, 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 30, 2011.

Upon receipt of the notice, the General Chairman requested on February 2, 2011 a conference and it was "promptly" convened on February 15, 2011. During the 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 specified, thereby denying or undermining 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 (Council Bluffs Service Unit) which, should contracting occur, would be subject to Rule 52. The Carrier and Organization each represented a "good faith attempt to reach an understanding" although "understanding" does not equate to resolution. Although no understanding was reached, Rule 52(a) stipulates that the Carrier "may nevertheless proceed with contracting, and the Organization may file and progress claims in connection therewith." After the conference the Carrier proceeded to a contracting transaction with the work commencing on June 30, 2011. There is no indication that the claimed work was contracted prior to issuance on January 31, 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 22, 2011, which has been progressed to the Board for a final decision.

With respect to the claim, the parties convened a conference on May 30, 2012 whereupon each Party's represents that it engaged in a 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 (remove/replace crossing track panels and crossing pads and related work). 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 customarily performing the work does not constitute work reservation given the general Scope (Rule 1), plus the Carrier may contract out under the provisions of Rule 52(a) and Rule 52(b). 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.

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.**

During the on-property exchange, the Carrier referred to a statement by Manager Lauby, but there is no such statement in this record; however, there is a

statement by the Manager of Track Maintenance addressing the same matters attributed to Manager Lauby. The MTM's statement was an on-property exchange and is properly before the Board for consideration. The MTM states that the damaged mainline track rendered the customer serviced at the location "unable to receive or send because of the damage[.]" The Organization does not contest this portion of the statement.

The MTM states further:

> **". . . it was necessary to quickly fix this issue and restore service to the customer and the Carrier did not have the necessary manpower or equipment needed at its disposal to quickly fix the damage. As for the work performed, KRW did not cut out the old panel, nor did it install the concrete crossing pads. That work was performed by Carrier forces."**

The Carrier does not assert that the "quick fix" was an "emergency;" the Organization's argument on emergency in this case is not relevant. The MTM states that BMWE-represented employees installed the concrete crossing pads. The Organization offers the two Claimants' statements for support that no BMWE-represented employee performed any of the work; however, those statements only attest to outside forces performing the claimed work and do not address whether BMWE-represented employees performed work at the location. According to the Carrier, manpower and equipment were not available ("at its disposal") for a "quick fix" of the damaged crossing. The Organization stated in its claim that equipment was available in Omaha for this work at Lincoln; this assertion was not rebutted by the Carrier. The Organization states that the Claimants were qualified and willing to perform the work and the Carrier could have planned for them to do so during the few or several days the track remained inoperable leading up to the day of the claimed work on June 30, 2011. The record does not reflect any effort by the Carrier to schedule the Claimants for this work. The MTM's conclusion that necessary manpower was not at his disposal is not established in the record. The Board finds that the Carrier did not establish its Rule 52(a) exception.

The Carrier also weighs in with Rule 52(b) as a basis to contract out the work. The Carrier submitted favorable precedent on operated equipment, ballast

work and track repair work. Some examples are complete track change and ballast work (Third Division Award 28619), ballast and grading work (Third Division Award 31285), complete new mainline (Third Division Award 31730), and new siding track, grading and ballast (Third Division Award 27010). Aside from relying on precedent, the Carrier referenced documentation furnished to the Organization during the mid to late 1990's showing the use of outside forces and a mixed practice predating 1973 and continuing thereafter. 'The Organization asserts that it objects to mixed practice when it is aware of the situation. Nevertheless, the Board has upheld the position that once the Carrier establishes a mixed practice of contracting the kind of work presented and disputed in this case, the Carrier can rely on Rule 52(b) to justify the instant 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 did not violate the Agreement when it contracted out the claimed work. 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.