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

Award No. 42108
Docket No. MW-42145
15-3-NRAB-00003-130082

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 and Railworks, Inc.) to perform Maintenance of Way work (move ribbon rail on right of way into place for rail relay) in the vicinity of Mile Post 347 on the Blair Subdivision beginning on July 19, 2011 and continuing through July 21, 2011 (System File G-1152U-82/1560474).

(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 said 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 Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants B. Flesher, R. Winter, R. Haner, R. Huntley and S. Jenkins shall now each be compensated for twenty (20) hours at their respective straight time rates of pay and for two and one-half (2.5) hours at their respective time and one-half 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 as well as information and documents for discussion at the conference. It also informed the Carrier that the notice was vague, inadequate and defective under Rule 52 and the December 11, 1981 National Letter of Agreement (LOA). A conference was convened on February 15, 2011, without resolution or understanding. The Organization issued a post-conference letter dated March 23, 2011 asserting, among other matters, that the Carrier did not engage in good-faith conference discussion given the inability of its representative to identify a reason(s) to contract out or provide other specifics about the notice.

On September 12, 2011, the Organization filed a claim stating that the Carrier did not issue an advance written notice prior to assigning scope-covered work to outside forces. In doing so, the Carrier violated numerous Rules and the LOA. Specifically, "the Carrier employed a contractor . . . to move ribbon rail along the shoulder into place to be relayed" and the "contractors had a Foreman, Backhoe with Operator, Speedswing with operator, and two (2) laborers." The violations warrant a monetary remedy because the Claimants were available, willing and qualified to perform this reserved work. Also, the Carrier "has all of the equipment necessary to perform this work in the area that could have been used to perform this work."

On November 3, 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 an advance written notice dated January 31, 2011, (3) there is a mixed practice to use outside forces to assist BMWE-represented employees and (4) the LOA is inapplicable because the specific terms of Rule 52 prevail over the LOA's general provisions. No monetary remedy was warranted because the Claimants were fully employed with their "assigned hours . . . while also enjoying considerable overtime, double time and observance of vacation."

On December 27, 2011, the Organization filed an appeal and reiterated the arguments in its claim establishing a prima facie case of Rules violations. In this regard, the Carrier possesses the records to confirm the hours claimed. 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 files claims. The LOA 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). An authentic opportunity to engage in a good-faith discussion was thwarted by the Carrier's notice and refusal to provide the dates and locations of contemplated contracting transactions. 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 February 10, 2012, the Carrier denied the appeal by reaffirming the arguments in its declination letter and disputing the Organization's appeal arguments. Specifically, the type of advance written notice in this case 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 states:

> **"In the present matter, the outside forces [were] attempting to grade in the area, as part of the new track construction project, and were forced to move the ribbon rail (which had not yet been installed) out of the way so that the grading work could be performed. The moving of the rail in order to grade is no different than other instances where the Carrier is forced to move trees, rocks, and other general debris and materials in order to grade for new track. The mere sliding of the ribbon rail out of the way so that grading could take place was but one step in the new track construction grading process and does not negate from Carrier's well-established practice of contracting out grading work. The Carrier is not obligated to piecemeal work out."**

An exception under Rule 52(a) existed because the Carrier was not adequately equipped to handle the work. A statement by the Manager of Special Projects Field Construction demonstrates the Manager's efforts to have BMWE-represented employees slide the ribbon rail out of the way so as to enable a

contractor to continue with the new track construction project. Responses to the Manager's efforts establish that the Carrier was not adequately equipped with manpower to perform the claimed work.

Aside from Rule 52(a), there is a mixed practice in a prior and existing right under Rule 52(b), which has been substantiated with documents provided to the Organization during the 1990's showing the use of outside forces for more than 90 years in areas such as roadbed and grading work. 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 LOA 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 4, 2012 summarizing its position. The Organization states that the Claimants "could have moved and handled ribbon rail" and "Contractors are not equipped to safely perform duties of handling ribbon rail" because they "are not qualified to perform this work" and "lack of good planning is not a valid excuse to use contractors."

On August 20, 2012, the Carrier responded to the Organization's post-conference letter. The Carrier ". . . finds that its February 10, 2012 response accurately and logically sets forth the proper position and the present claim/appeal shall remain denied."

Having carefully reviewed the record, the Board finds that this 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.

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 of moving and laying/installing

rail and the operation of roadway equipment for such work is customarily and historically performed by BMWE-represented employees; (4) the Carrier failed to provide advance notice as required by Rule 52 and the LOA, which remains 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 (Third Division Awards 29121, 40923 and 40929); (5) 21 Arbitrators issuing 73 Awards have found the LOA is a basis to sustain a contract violation; (6) 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); (7) failure to provide advance notice as well as an authentic opportunity for a good-faith conference demonstrates the Carrier's failure to reduce the incidence of contracting by increasing use of its BMWE-represented employees in violation of the LOA (Award 33 of Public Law Board No. 6204); (8) the Carrier's obligation to reduce the incidence of contracting includes calling employees on furlough and rescheduling work in order to allow BMWE-represented employees to perform it during their regular hours or on overtime; (9) exclusivity is inapplicable to contracting out (Third Division Awards 40373 and 40923); (10) the Carrier's asserted past practice for the use of outside forces is not valid because there is no Rule 52(a) exception because the Claimants and equipment were available (Third Division Awards 40409 and 40411); (11) the Carrier never disclosed or identified this claimed work as subject to contracting out during the conference on February 15, 2012; 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; (12) the blanket notice is deficient under Rule 52 and the LOA 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); (13) 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; (14) the Claimants' unavailability is by design of the Carrier; (15) there was no "emergency;" (16) Rule 52(b) preserves the work reserved to BMWE-represented employees and does not bestow carte blanche authority for the Carrier to contract out work; and (17) 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) the "blanket" notice complies with Rule 52 (Third Division Awards 37332, 37490 and 40752) and constitutes proper advance notice to the General Chairman followed by a good-faith conference with no contracted work performed prior to notice and conference; (2) Rule 52(a) allows the Carrier to proceed with contracting when there is no understanding attained at the conference; (3) an exception under Rule 52(a) applies because the Manager's statement demonstrates that the Carrier was not adequately equipped to handle the work; (4) there is a Rule 52(b) prior and existing right with a mixed practice for more than 90 years to use outside forces, which was documented to the Organization in 1995 and undisputed at that time and thereafter; (5) Third Division Awards 27010, 28619, 31285, 31721, 31730 and 32333 affirm the mixed practice such that stare decisis governs the disposition of this claim; (6) the claimed work was an incidental component to the new construction grading project and such 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; (7) the LOA is unpersuasive and inapplicable because it does not bestow on the Organization a "right" to work that the Organization never possessed and the LOA's general terms do not override the specific terms in Rule 52 (Third Division Awards 28654, 32534 and 40799); (8) the Organization failed to satisfy its burden of proof (Third Division Award 36542); and (9) the requested remedy is improper and excessive because the Claimants were fully employed with their regular hours plus earning overtime, double time and on vacation time (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 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 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 LOA where "to the extent practicable" there is 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 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 the contractors on July 19, 2011.

Having received 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 and location (Council Bluffs 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 equate to resolution. Although no understanding was reached, Rule 52(a) stipulates that the Carrier "may nevertheless proceed with contracting out, 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 July 19, 2011. There is no indication that the claimed work was contracted prior to the 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 September 12, 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 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 (move ribbon rail on right-of-way into place for rail relay). 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 as 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.

The Carrier asserts an exception under Rule 52(a) - not adequately equipped to handle the work - to justify contracting out. In support of that assertion, it submitted the following statement from the Manager of Special Projects Construction:

> **"The new ribbon rail for the second mainline track was unloaded by UPPR forces from a rail train in the Spring of 2011 and placed off the edge of the ballast shoulder, typically on the north side of the existing track. The grading contractor AMES Construction was building grade for the new track on this project. In numerous locations along the north side of the project the new ribbon rails were in the way of placing the dirt (building grade) for the new embankment. The grading contractor AMES Construction worked around these ribbon rails building grade where possible, but in some places the rail prohibited the grading from being completed. UPRR new track construction gang #9070 contacted me and expressed concern that in some places the new rail was getting buried in the dirt which was unacceptable. I requested the #9070 who was on site building track [to] move the rail into the clear back onto the ballast section and they refused and stated they did not have the manpower. I then contacted the Manager of Track Maintenance Mr. Vedder with the same request and he also refused due to no available manpower. I then ordered AMES Construction to move the rail where it was in conflict with the grading to allow the grading to proceed. AMES Construction hired a subcontractor RAILWORKS, who used a third party contractor KRW to perform the work. The bare ribbon rails were moved out of the way, the grade was completed by AMES Construction and the #9070 later installed the ribbon rail etc. . . . and constructed the second mainline track."**

The Board finds that the Manager's statement is supportive of the exception under Rule 52(a) as asserted. The statement demonstrates the Manager's efforts to

obtain additional manpower from its own forces to perform the claimed work. Gang No. 9070 declined the Manager's offer. Given that declination, the Manager had a reasonable basis to conclude that the Carrier was not equipped to handle this claimed work with BMWE-represented employees. In this regard, the claimed work was a piecemeal component of the new track construction project. The Carrier argued that it is not required to piecemeal a project; this was not rebutted by the Organization. Additionally, the Organization did not refute the Manager's statement regarding the piecemeal work declined by Gang No. 9070 other than to disagree and assert that the Claimants could have performed the work. In view of these findings, the Board concludes that the Carrier acted in accordance with Rule 52(a), which allows it to contract out when not equipped to handle the work. Rule 52(a) is sufficient to deny the claim such that Rule 52(b) need not be addressed.

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.