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

Award No. 42111
Docket No. MW-42151
15-3-NRAB-00003-130094

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 (Caylor & Gentz) to perform Maintenance of Way work (operate road graders in connection with grading right of way roads) in and about the South Morrill Yards on the South Morrill Subdivision on August 29, 30, 31, September 1, 2 and 3, 2011 (System File D-1152U-240/1561174).

(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 L. Loya and D. Martinez shall now each be compensated for sixty (60) hours at their respective and applicable 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.

This claim, dated September 20, 2011, is properly before the Board following timely on-property processing (claim filing and responses) and conference. The issue before the Board is whether the Carrier complied with the Collective Bargaining Agreement when it deployed outside forces ("two (2) employees") to operate road graders for the purpose of grading right-of-way roads in the South Morrill Yards on August 29, 30, 31, September 1, 2 and 3, 2011.

Having carefully reviewed the record, the Board is fully apprised of the Organization's and the Carrier's arguments including documents relied upon (emails, statements) and precedent cited (arbitral Awards) by each Party in support of its position. A "Cliffs Notes" rendition of the Parties' presentations follows.

The Organization contends that the Carrier breached Rule 52 and the December 11, 1981 Berge-Hopkins National Letter of Agreement (LOA) because there was no advance written notice for the claimed work. The Carrier's blanket notice dated January 24, 2011 is vague, inadequate and defective in relation to the LOA and Rule 52. It represents "pro forma" compliance without a good-faith effort in conference. Failure to provide an advance written notice warrants sustaining the claim based on precedent established in Third Divisions Awards 40964 and 41107, among others. Also, Third Division Awards 40923 and 40929 confirm that the LOA is applicable and obligates the Carrier to reduce the incidence of contracting and increase the use of BMWE-represented employees. During a perfunctory

conference on February 1, 2011, the Carrier did not identify any reason why or when this claimed work would be contracted. There was no good-faith discussion about alternatives to contracting out, such as assigning the work to the Claimants.

Rather than extending preference to the Claimants for the work based on their seniority, the Carrier deployed outside forces. At the time, Claimant D. Martinez was on grader patrol, but his grader remained idle. Based on the "Loram" Award, the claimed work is scope-covered and Rule 9 – Track Sub department extends a specific grant reserving the work to the craft as noted in on-property Third Division Awards 14061 and 29916, as well as recognized by Carrier officials in their writings. The Carrier's exclusivity argument does not apply in a contracting situation. There was no "emergency" or other exception under Rule 52(a) – such as special skills or forces not equipped to handle the work - that is applicable to this situation. The Claimants operate this equipment when assigned such work.

As for Rule 52(b), the past practice or mixed practice is not proven by the Carrier and the practice, itself, has been disputed by the Organization since 1965, as reflected in Third Division Award 14061 and more recently in Third Division Award 41052. The Organization has a tradition and practice of performing this work pre-dating 1973 and continuing to the present.

Other defenses by the Carrier are without merit – such as the Claimant's full employment status. The Claimants suffered a loss of work opportunity. A monetary remedy is appropriate in this situation based on the precedent established in on-property Award 9 of Public Law Board No. 7101 and on-property Third Division Awards 29577, 38349 and 40965 to name a few.

Conversely, the Carrier states that it provided advance written notice on January 24, 2011 of its intent to contract out and met in a good-faith conference on February 1, 2011. Even though an understanding was not reached, the claimed work was not arranged or conducted prior to conference. On-property Third Division Awards 37322, 37490, 40756, 40758 and 40762 confirm that the "blanket" notice issued in the instant case complies with Rule 52 and preserves the Carrier's right to contract out. Also, the December 11, 1981 LOU is not applicable; it does not diminish the Carrier's right to contract out or provide another contract

obligation beyond Rule 52 as confirmed in Third Division Awards 28654, 31281, 32534, 33467 and 40801 ("specific language prevails over the general language").

Furthermore, Rule 52(b) recognizes the Carrier's mixed practice as a prior and existing right to contract out. Documents disclosed to the Organization show that for nearly 70 years (1918 - 1987) the Carrier has deployed outside forces for the claimed work on the Northwest, Eastern and South-Central Districts. The Organization did not dispute the practice upon receipt of the documentation in 1995.

The Carrier states that Rule 1 – Scope is general in practice, and exclusivity of work for the craft is not established. The Organization failed to meet its burden of proof because there is lack of details to establish any Rules violations. Finally, the requested remedy is excessive because the Claimants were fully employed and thereby suffered no loss of work. Monetary relief should be denied based on the precedent established in Third Division Award 31652. Also, the Collective Bargaining Agreement contains no provision for penalty payments.

The Board finds that the notice of intent to contract out "providing fully fueled, operated and maintained equipment necessary for grading railroad right of way roads" on the North Platte Service Unit through December 31, 2011 complies with Rule 52(a). That is, road grading work is "customarily performed" by the craft, but "under this Agreement may be let to contractors and be performed by contractors' forces." The notice of intent was issued "in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto." The notice of intent identified "fully fueled, operated and maintained equipment necessary for grading railroad right of way roads" as a contracting transaction that may occur on the North Platte Service Unit.

The Organization requested a conference; it was convened on February 1, 2011. During the conference, the "Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting." The Organization asserts that there was no good-faith effort by the Carrier, because it merely repeated that it may contract out the work in the notice, but could not provide particulars as to dates, locations or reasons for contracting. During the conference, the Carrier identified existing rights and practices in Rule 52(b) as the

basis for contracting. The Organization asserts that reliance on existing rights language in Rule 52(b) does not equate to a demonstration of good faith. Should there be no basis for citing Rule 52(b), then there can be no good-faith effort. The Board finds that Third Division Awards 37490, 40756, 40758 and 40759 confirm the Carrier's mixed practice to use outside forces, and it pre-dates and post-dates 1973. In other words, there is a prior and existing practice based on custom whereby BMWE-represented employees perform road grading work and there is a parallel and coincident prior and existing practice for the Carrier to use outside forces for this claimed work when notice and conference have occurred. This arbitral precedent is not shown to be palpably erroneous. Applying this precedent, the Board must deny the claim.

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.