

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42113
Docket No. MW-42158
15-3-NRAB-00003-130104**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

**(Brotherhood of Maintenance of Way Employees 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 (Robinson Excavating) to perform Maintenance of Way work (transport, handle and distribute ballast, crossing pads and track panels) in connection with rehabbing crossings on the Nampa Subdivision beginning on August 1, 2011 and continuing through October 27, 2011 (System File D-1152U-241/1561536).**
- (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 when it 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, Claimant H. Brown shall now be compensated at the applicable roadway equipment operator’s rate of pay for all straight time and overtime hours worked by the employee from the outside force in performing the aforesaid work beginning August 1, 2011 and continuing through October 27, 2011.”**

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.

The Board finds that this claim dated September 29, 2011 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 issue is whether the Carrier complied with the Agreement when it assigned an outside force to perform maintenance-of-way work such as transporting, handling and distributing ballast, crossing pads and track panels in connection with rehabbing crossings on the Nampa Subdivision beginning on August 1 and continuing through October 27, 2011.

Other work performed by the contractor's employee involved the removal of crossing panels, preparing sub-grade, handling new track panels, installing crossing pads, distributing ballast and cleaning the right-of-way, as well as work associated therewith. The contractor's employee operated a crawler backhoe and a dump truck while performing duties as directed by Gang 6900.

The Organization alleges a violation of Rule 52 – Contracting and the December 11, 1981 Berge-Hopkins National Letter of Agreement (LOA) resulting in a loss of work opportunity for the Claimant that warrants monetary relief.

Having carefully reviewed the record, the Board is apprised of the Organization's arguments and the Carrier's arguments and the documents relied upon by each party, such as emails or statements from officials and employees, as well as cited arbitral precedent.

Itemized below are the Organization's arguments and a sampling of its relied-upon arbitral precedent:

- the claimed work has been historically and customarily performed by the BMWWE-represented employees;
- the claimed work is reserved to the craft by Rules 1, 2, 3, 4, 5, 9, 10, 52 and Appendix Y (Third Division Awards 14061 and 29916; Award 15 of Public Law Board No. 7096, "Loram Rail Handling" and "Pre-plated Tie Dispute");
- the Carrier failed to provide an advance written notice as required by Rule 52 and LOU;
- the blanket notice dated March 21, 2011 is vague and defective because the work performed by the outside force was not specified in the notice (Third Division Awards 29577, 38349, 40965 and 41107);
- the LOU is applicable and limits the Carrier's right in Rule 52(b) by imposing a good-faith requirement to reduce the incidence of contracting out;
- the Carrier failed to make a good-faith effort with notice and conference to reduce the incidence of contracting out and increasing the use of BMWWE-represented employees, including the procurement of rental equipment (Public Law Board No. 6204, Award 33 and Third Division Awards 29121, 40923 and 41052);
- the Carrier was equipped to handle this work with qualified and available BMWWE-represented employees, but the Carrier failed or refused to assign the claimed work to the Claimant notwithstanding his availability (Third Division Awards 21678, 24897 and 35975);
- work exclusivity is not applicable (Public Law Board No. 7096, Awards 1 and 14);
- the Carrier failed to prove that outside forces performed this work in the past;
- Rule 52(b) is not an unrestricted right to contract out scope-covered work and there is no mutuality regarding the mixed practice asserted by the Carrier;

- the standard remedy in arbitration of monetary relief is appropriate and warranted in this claim (Third Division Awards 37315, 39301 and 39139, as well as Award 9 of Public Law Board No. 7101)

Itemized below are the Carrier's arguments and a sampling of its relied-upon arbitral precedent:

- an advance notice of intent to contract out was issued on March 21, 2001 and a conference was convened on April 5, 2011 without realizing an understanding;
- the notice complies with Rule 52 (Third Division Awards 40756 and 40762, as well as Award 8 of Public Law Board No. 6205);
- Rule 52(a) allows outside force use when the Carrier "is not adequately equipped to handle the work" which was not refuted and "must be taken as true" (Third Division Awards 29859 and 30460);
- Rule 52(b) affirms the Carrier's mixed practice to contract out in this situation because it is a prior and existing right and practice documented and disclosed to the Organization (Third Division Awards 27010, 30032, 33645, 37644, 40077 and 41015);
- stare decisis applies (Third Division Awards 28619, 30063 and 40861);
- the claimed work is not exclusively performed by BMW-represented employees;
- the LOU is not applicable; it does not eliminate contracting rights and specific terms (Rule 52) preside over general terms (LOU) (Third Division Awards 28943, 32534, 33467, 37854 and 40799);
- the requested remedy is improper because the Claimant worked his regularly assigned hours and overtime requested is excessive because the outside force did not work overtime;
- the Claimant was fully employed and suffered no loss of earnings so monetary relief must be denied (Third Division Awards 31652 and 32352); and

- the Organization did not satisfy its burden of proof.

The record shows that on March 21, 2011, the Carrier issued “a 15-day notice of our intent to contract” at “[v]arious road crossings” on the Nampa Subdivision for “[s]pecific work: provide operated equipment for the excavation of road crossings as directed by the extra gang.” The Board finds that the contractor’s employee operated equipment in connection with the excavation of road crossings.

The Board also finds that the contractor’s employee performed duties without regard to whether the work was in connection with excavation of road crossings, thereby performing work not identified in the notice. For example, the contractor’s employee engaged in a range of maintenance-of-way work customarily performed by BMWWE-represented employees such as installing crossing pads, preparing sub-grade, handling new track panels and distributing materials and ballast. Along with members of Gang 6900 the contractor’s employee attended the Carrier’s safety meeting. During on-property processing the Carrier did not contest the range of duties performed by the contractor’s employee, but supported its position as covered by Rule 52 and a mixed practice.

Because the duties performed by the contractor’s employee extended beyond the excavation of road crossings set forth in the notice of intent to contract out, the Carrier’s March 21, 2011 notice did not comply with the terms set forth in Rule 52(a) requiring issuance of an advance written notice for work subject to contracting out. Moreover, because the notice issued did not encompass all duties performed by the contractor’s employee, the “unnoticed” duties could not have been discussed in conference. Thus, there was no good-faith effort by the Carrier to reach an understanding with regard to all aspects of maintenance-of-way duties that it intended to contract out. Based on the Board’s findings with respect to notice and lack thereof as to work performed by the contractor’s employee, Part 1 and Part 2 (Rule 52) of the claim are sustained.

As for remedy, Third Division Awards 31652 and 32353, as well as Award 4 of Public Law Board No. 7097 support a monetary remedy. In this regard, once the Carrier assigned the work to the outside force the work opportunity was foregone for the Claimant. The Board applies and follows that precedent in the circumstances of this claim, as well as precedent in Award 9 of Public Law Board No. 7101 – “[i]t is well established that full employment . . . [does] not suffice as a defense to a compensatory remedy when the Organization has satisfied its burden of

proof that the Carrier violated the Agreement[.]” Compensation at the straight time rate of pay will be awarded to the Claimant; the Carrier and the Organization will review payment to the outside force to verify whether overtime hours were incurred and, if so, render the appropriate payment to the Claimant.

In short, the Organization satisfied its burden of proof and a monetary remedy rectifies the contract violation.

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.