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

Award No. 42114
Docket No. MW-42160
15-3-NRAB-00003-130110

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 on October 18 and 20, 2011, when the Carrier assigned outside forces to perform Maintenance of Way work (move and/or transport Carrier work equipment and material assigned to System Curve Gang 9013) from Mankato, Minnesota to Windom, Minnesota and then from Windom, Minnesota to Sheldon, Iowa (System File B-1152U-107/1562800).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of intent to contract out said work or 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 R. Jesse, C. Comer, S. Leners, D. Peterson, G. Dorn, M. Chastain, J. Woodyard and H. Wright shall now '* be allowed an equal share of the straight time and overtime hours worked by the outside contracting force as described in this claim, at their respective rates of pay as compensation for the violation of the Agreement for the work performed by the contractor employees. This equates to three hundred and eight**

(308) divided equally among Claimants, at their respect rate 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 December 27, 2010, the Carrier issued the following notice to the Organization:

"Subject: 15-day notice of our intent to contract the following work:

Location: Various points across the Union Pacific System.

Specific Work: Relocating vehicles, trucks, equipment and materials during non-scheduled working days when changing assembly points through December 31, 2011.

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 Justin Wayne in the Labor Relations Department at (XXX) XXX-XXXX."

On November 28, 2011, the Organization filed a claim alleging that the Carrier assigned outside forces to perform maintenance-of-way work (move and/or transport Carrier work equipment and material assigned to Consolidated System Curve Gang 9013 on October 18 and 19, 2011. Specifically, the Carrier deployed outside forces on 14 Lo-boy trucks to transport equipment a distances of approximately 68 miles (Mankato, Minnesota - Windom, Minnesota) and approximately 70 miles (Windom, Minnesota - Shelton, Iowa). Transporting the equipment, loading and unloading it and materials, consumed 11 hours on October 18 and 11 hours on October 19.

The Organization alleges numerous Rules violations, including Rule 52 – Contracting and the December 11, 1981 Berge-Hopkins National Letter of Agreement (LOA) resulting in a loss of work opportunity for the Claimants that warrants monetary relief. The Carrier denied the claim and appeal.

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.

A concise summary follows of the Organization's arguments and a sampling of the arbitral precedent relied upon in support of its arguments:

- **the claimed work has been historically and customarily performed by BMWE-represented employees and is covered by the Scope Rule of the Agreement;**
- **the claimed work is reserved to the craft by Rules 1, 2, 3, 4, 9, 15, Appendix Y and Attachment Q of the D&RGW Implementing Agreement (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 the LOA;**

- **the Carrier failed to effectively rebut the Organization's assertion that it never received the blanket notice and the burden of proof is on the Carrier to do so;**
- **the blanket notice dated December 27, 2010 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 LOA 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 was equipped to handle this work with qualified and available BMWE-represented employees, but the Carrier failed or refused to assign the claimed work to the Claimants; (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 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)**

A concise summary follows of the Carrier's arguments and a sampling of the arbitral precedent relied upon in support of its arguments:

- **an advance notice of intent to contract out was issued on December 27, 2010 and was followed by a conference;**
- **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";**

- **Rule 52(b) affirms a 40-year 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);**
- **More than 260 Awards have been issued addressing Rule 52 and the Awards "resoundingly" support the Carrier's position but for anomalies such as Third Division Awards 14061 and 29916;**
- **stare decisis applies (Third Division Awards 28619, 30063 and 40861);**
- **the claimed work is not exclusively performed by BMWE-represented employees;**
- **the LOA is not applicable; it does not eliminate contracting rights and specific terms (Rule 52) preside over general terms (LOA) (Third Division Awards 28943, 32534, 33467, 37854 and 40799);**
- **the requested remedy is excessive;**
- **the Claimants were fully employed so monetary relief must be denied (Third Division Awards 31652 and 32352); and**
- **the Organization did not satisfy its burden of proof.**

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 arbitral precedent. In this regard, the Board recognizes the diversity of and divergence in arbitral precedent addressing the issues raised and argued in this case. Precedent – and its application to a particular claim – is a fact-specific dependency. Furthermore, the Board resides over an appellate forum and, as such, arbitral precedent must be considered in the context of a demonstration that relied upon Awards are palpably erroneous.

The Organization argues in its Submission to the Board that the notice of intent to contract out dated December 27, 2010 was not submitted by the Carrier to the General Chairman upon its issuance. The Organization states that it has no record of receipt of the notice. The first time the Organization received the notice was upon its receipt of the Carrier's declination letter dated January 11, 2012.

Following claim denial, the Organization filed an appeal dated February 9, 2012. The appeal makes no reference as to the General Chairman not receiving the notice of intent to contract out. Because this matter was not raised on appeal by the Organization during on-property exchanges, the Board will not consider it as belatedly presented in the Submission.

In the circumstances of this claim, the Board follows on-property Third Division Award 40756 with respect to the notice:

> **"Based on other Awards between the parties, the type of notice given by the Carrier in this case, albeit blanket, has not been shown to violate the notice requirements of Rule 52."**

Supplementing the cited Award is Third Division Award 42076 wherein the Board held "[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 Agreement does not alter this precedent."

The notice covers a geographic area involving maintenance-of-way work sufficiently described as subject to a contracting transaction during a finite period of time. The Parties met in conference where the Carrier asserted its reasons and justification for the notice in this case - Rule 52(a) exception ("not adequately equipped to handle") and mixed practice pursuant to Rule 52(b). In this regard, Rule 52 requires the Parties to engage in a good-faith discussion of the matters covered by the notice in an attempt to reach an understanding. When the Parties enter those discussions, they are not tabula rasa about Rule 52 – Contracting. Specifically, there is a reciprocal requirement for a good-faith attempt to resolve concerns about the notice of intent and the work performed by BMWE-represented employees. Good-faith practices, such as those in the LOA, are of value and utility for the Board when assessing a good-faith attempt to reach an understanding as required by Rule 52. In this case, no understanding was attained because the Organization disputes the reasons and justification stated by the Carrier and offers arbitral precedent countering and contesting the Carrier's relied-upon precedent. Notwithstanding the disputed reasons, justification and precedent, Rule 52 states

that "the Company may nevertheless proceed with . . . contracting, and the Organization may file and progress" a claim.

Given the findings in the circumstances presented, the Board concludes that the Carrier complied with Rule 52 with timely, advance written notice of its intent to contract out prior to consummating a contracting transaction and a good-faith attempt to reach an understanding with reasons and justification during conference. Arbitral precedent supporting the Carrier's position is not exposed as palpably in error. Accordingly, this 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.