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

Award No. 42116
Docket No. MW-42175
15-3-NRAB-00003-130113

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

(Brotherhood of Maintenance of Way Employes 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 (KRW Construction) to perform Maintenance of Way and Structures Department work (digging a drain and related work) at Mile Post 336.75 on the Omaha Subdivision on August 29, 2011 (System File G-1152U-88/1561826).

(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 the aforesaid 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 Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants B. Flesher, P. Gibson, R. Jensen and R. Winters shall now each '. . . be compensated for an equal share of all the hours worked by the Contractors employees, at the applicable rate. . . .'"

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 (XXX) XXX-XXXX."**

On February 2, 2011, the Organization requested a conference and the receipt of certain data and documents prior to conference. During conference on February 15, 2011, the Organization informed the Carrier that the notice was vague and inadequate and exhibited a lack of good faith under Rule 52 and the December 11, 1981 Berge-Hopkins Letter of Understanding (LOU).

On October 17, 2011, the Organization filed a claim alleging that the Carrier violated the Agreement when it assigned outside forces to dig a French drain at Mile Post 336.75 near Loveland, Iowa. Contractor forces operated a front end loader, a dump truck and a track hoe for eight hours each for a total of 24 hours. This work is reserved to qualified BMWE-represented employees and equipment was available within the Carrier's inventory or available to rent for the Claimants' use. Also, the Carrier did not issue an advance notice of intent to contract out the work as required by Rule 52 and the LOU.

On December 7, 2011, the Carrier denied the claim by stating that (1) the Organization failed to prove any Rules violations, (2) the work is not reserved to BMWE-represented employees, (3) there is a mixed practice (Rule 52(b)), (4) an advance notice was issued (January 31, 2011), (5) the LOU does not apply and (6) the Claimants were fully employed, thereby enduring no monetary loss.

On January 26, 2012, the Organization filed an appeal reiterating the arguments set forth in the claim, e.g., reserved work as BMWE-represented employees always perform it. Work Rules were cited in the claim and the Carrier can verify the hours worked by reviewing contractor invoices. The blanket notice exhibits a lack of good-faith effort by the Carrier to reduce the incidence of contracting and procure rental equipment for the Claimants to use. Fully employed Claimants is no defense for a contract violation resulting in the loss of work opportunity and the wages associated with that loss.

On March 8, 2012, the Carrier denied the appeal by reaffirming the arguments set forth in its declination letter, e.g., contracted work was performed after notice and a good-faith conference and there is a Rule 52(b) mixed practice. The Carrier stated that outside forces dug a trench, not a French drain. The Carrier cites Rule 52(c) as affording it flexibility in "emergency" situations. Manager Vedder's statement establishes an emergency caused by destabilizing

issues (track/roadbed) causing the track to fall to ten MPH. To protect employees and equipment, immediate action was required. Manager Veddar states that he did not have the equipment to handle this situation, which is a Rule 52(a) exception.

On August 29, 2012, the Parties convened a conference, but no resolution or understanding was attained. The Organization's August 30, 2012 post-conference letter states that the Manager's statement reveals that the roadbed problem existed "for some time [at least two weeks prior to the work being performed] and "was causing a slow order on a daily basis, which gives the Carrier ample opportunity to use the Claimants[.]" The Carrier's lack of planning and neglect is not an emergency or justification for the use of outside forces.

The Carrier's post-conference letter dated October 16, 2012 points out that the Organization acknowledged only the "Claimant" as able to operate all equipment, thereby rendering three Claimants unable to operate the equipment. The Organization did not prove that equipment was in the area and available for this work. This was an emergency situation that the Carrier was not equipped to handle, but could address through its mixed practice to use outside forces.

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 summary follows of the Organization's arguments along with a sampling of the arbitral precedent relied upon to support its arguments:

- **the claimed work has been historically and customarily performed by BMWE-represented employees and is scope-covered pursuant to the Agreement;**

- **the claimed work is reserved to the craft by various Rules such as Rules 1, 2, 3 and 9 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 the LOU;**

- **the blanket notice 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 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 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)**

A summary follows of the Carrier's arguments along with a sampling of the arbitral precedent relied upon to support its arguments:

- **the existence of an "emergency" condition abrogates the notice requirement and affords the Carrier greater latitude with regard to the use of outside forces;**

- **notwithstanding the emergency situation, the Carrier issued a proper advance notice (January 31, 2011), furnished it to the General Chairman and a conference was convened; the notice complies with Rule 52 (Third Division Awards 40756 and 40762, as well as Award 8 of Public Law Board No. 6205);**

- **the on-property statement of Manager Veddar establishes the Rule 52(a) exception, e.g., the Carrier was not adequately equipped to perform the work in the limited period of time required for this situation;**

- **documents provided to the Organization establish a Rule 52(b) mixed practice for more than 40 years to contract out in this situation because it is a prior and existing right and practice (Third Division Awards 27010, 30032, 33645, 37644, 40077 and 41015);**

- **the LOU is inapplicable and an unpersuasive argument because 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 Organization did not meet its burden of proof given its lack of facts or Agreement support negating the Carrier's right to rely on Rule 52; more than 260 Awards have been issued addressing Rule 52 and they "resoundingly" support the Carrier's position; stare decisis Awards 28619, 30063 and 40861);**

- **the requested remedy is improper and excessive because the Claimants were fully employed and suffered no harm (Third Division Awards 31652 and 32352);**

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, 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. Because the Board resides over an appellate forum, arbitral precedent must be considered in the context of a demonstration that relied upon Awards are palpably erroneous.

As for the claimed work – digging or excavating a trench and installing a drain along with rock and backfilling – was undertaken to address a drainage issue along the right-of-way. This type of work – maintaining and repairing the right-of-way along tracks, including the installation of drains and the operation of associated equipment – is historically and customarily performed by BMWE-represented employees.

Because an emergency existed, the Carrier asserts, notice was not required. As stated in Third Division Award 29164, "[h]aving asserted the affirmative defense of emergency, the Carrier assumes the burden of establishing on the record that one did in fact exist." Given the flexibility accorded the Carrier when an emergency exists, it generally surfaces as the explanation or rationale for contracting early on during on-property exchanges. In this situation, the Carrier did not assert the affirmative defense of emergency until after the claim was denied. An emergency connotes an unforeseen situation which could not be addressed through planning or reasonably anticipated prior to its occurrence. The record shows that the drainage problem had been ongoing for about two weeks; it was not a sudden unforeseen event that led to an unanticipated destabilization of the roadbed. The Carrier elected not to respond during the two weeks with full knowledge of the drainage problem; this delayed response is not symptomatic of a response to an emergency. In view of the Carrier's languid response asserting emergency as a rationale and its two-week observance of the drainage problem before obtaining outside forces, the Board finds that the Carrier's affirmative defense was not established. This situation was not an emergency and, therefore, notice of intent to contract out was required.

As for the notice issued on January 31, 2011, the Board follows on-property Third Division Award 40756, which concluded that "[b]ased 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 on-property Third Division Award 42076 stating "[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 the Council Bluffs Service Unit and involves maintenance-of-way work sufficiently described as subject to a contracting transaction. 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 under Rule 52(b). The purpose of the Rule is for the Parties to engage in a good-faith discussion of the claimed work subject to the notice in an attempt to reach an understanding. When the Parties enter those discussions, they are not tabula rasa about Rule 52 – Contracting. That is, they have been aware of and knowledgeable about the reciprocal requirement for a good-faith attempt since implementation of the Rule in 1973; the Parties reaffirmed the good-faith obligation in the LOU in 1981. In this case, no understanding was attained because the Organization disputes the explanation and rationale stated by the Carrier and offers arbitral precedent countering and contesting the Carrier's relied-upon precedent.

According to the Carrier, more than 260 Awards support its interpretation and application of Rule 52(a), (b), (c) and (d). The Board finds that the precedent relied upon by the Carrier interpreting and applying Rule 52 is not exposed as palpably erroneous. In view of that finding, and noting insufficient evidence establishing the various Rules violations alleged in the claim, 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.