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

Award No. 42117
Docket No. MW-42178
15-3-NRAB-00003-130117

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 (Ames Construction) to perform Maintenance of Way and Structures Department work (dismantle structure, drive sheet piling, assemble new bridge structure and related work) at Mile Post 94.26 on the Kansas Subdivision commencing on September 12, 2011 and continuing through October 1, 2011 (System File D-1152U-244/1561803).

(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 reach an understanding concerning said contracting 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 M. Coan, R. Frenzen, K. Galliardt, M. Hoppes, K. Johnson, J. Snell, J. Barber, R. Creek, J. Novotny and J. Small shall now be compensated at their respective and applicable rates of pay for a proportionate share of the total "straight time and overtime man-hours worked by the outside forces in the performance of the aforesaid work commencing September 12, 2011 and continuing through October 1, 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.

On September 5, 2011, a train derailed causing damage to a bridge at Mile Post 94.26 on the Kansas Subdivision. The damage rendered the track and switches impassable. BMWE-represented employees constructed a shoofly to reduce congestion in the area; however, traffic flow was reduced by 30 percent during bridge reconstruction and track repairs.

The Carrier assigned outside forces to stage material, prepare the site, dismantle the damaged bridge structure, drive sheet piling and assemble the new bridge. Five contract employees worked around the clock in two shifts for six days. BMWE-represented employees worked alongside the outside forces. During restoration work, the bridge remained out of commission.

On October 7, 2011, the Organization filed a claim alleging that the Carrier violated the Agreement when it (1) assigned scope-covered work to outside forces during the period of September 12 through October 1, 2011 and (2) did not fulfill the advance notice and conference requirements because the notice dated September 7, 2011 was served less than 15 days prior to the contracting transaction and the conference occurred after the work performed by outside forces had already commenced.

On December 1, 2011, the Carrier denied the claim by stating that (1) the Organization failed to prove any Rules violations, (2) the claimed work is not

reserved to BME-represented employees and (3) the use of outside forces was consistent with Rule 52 and Rule 5 inasmuch as an "emergency" situation existed due to a wreck interrupting operations. Also, the LOU does not apply and, in any event, the Claimants were fully employed, thereby enduring no monetary loss.

On January 30, 2012, the Organization filed an appeal by reiterating arguments in the claim and disputing the Carrier's arguments in declination letter by asserting no emergency existed due to the use of the shoofly to relieve traffic congestion.

On March 12, 2012, the Carrier denied the appeal by reaffirming the arguments set forth in its declination letter. Although an emergency existed thereby according flexibility for the Carrier to subcontract the claimed work, BMWE-represented employees worked alongside outside force employees.

On May 8, 2012, the parties met in conference, but without resolution or understanding.

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, and 5 and should have been assigned to the Claimants and not assigned to outside forces (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 that Rules 8 and 9 are work reservation Rules (Third Division Award 29916); (3) the claimed work is customarily and historically performed by BMWE-represented employees; (4) the Carrier failed to provide an advance written notice as required by Rule 52 and the December 11, 1981 Berge-Hopkins Letter of Understanding (LOU); (5) the LOU is applicable (Third Division Award 29121); (6) failure to comply with the advance notice requirements prior to entering into a contracting transaction requires the claim to be sustained in its entirety (Third Division Award 29472 and 40964); (7) failure to provide a written advance notice

and an authentic opportunity for conference demonstrates the Carrier's failure to reduce the incidence of contracting and increase the use of its own forces as required by the LOU; (8) the claimed work was not subject to an "emergency" because the construction of the shoofly continued traffic flow; (9) exclusivity is inapplicable to contracting out disputes (Third Division Awards 40373 and 40923); and (10) the Carrier's asserted past practice for the use of outside forces is an invalid defense because there is no Rule 52(a) exception (Third Division Awards 40409 and 40411).

The Carrier's arguments, along with a sampling of the arbitral precedent in support of its arguments, are: (1) stare decisis governs the disposition of this claim because Rules 5 and 52 afford the Carrier more flexibility to respond when an "emergency" exists such that the Carrier is not required to issue notice, hold a conference, or use BMWE-represented employees, as confirmed in Third Division Awards 20527, 29999 and 32277 to name a few; (2) the notice was generated in this case due to the Service Order request for outside forces and was not generated because of any requirement to issue it in the circumstances of this claim; (3) the LOU is not applicable in this dispute; (4) the Organization did not meet its burden of proof as shown by its failure to establish any Rules violations; and (5) the requested remedy is excessive because the Claimants were fully employed and endured no loss of wages.

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." Third Division Award 20527 defines an "emergency" as an "unforeseen combination of circumstances which calls for immediate action." Whether an "emergency" exists is a fact specific determination in the circumstances presented. In the circumstances of this claim, the Board finds that the derailment caused damage to the bridge structure thereby taking it out of commission because the tracks and switches remained impassable. The Carrier immediately responded with its own forces to construct a shoofly so as to alleviate congestion, but the bridge remained impassable until BMWE-represented employees, supplemented by outside forces, restored the bridge structure by working around the clock. These circumstances show that an "emergency" existed due to an unforeseen circumstance of a derailment.

Rule 52(c) provides that the Carrier is not required to issue notice to the Organization when it subcontracts work associated with a derailment. Rule 5 states that the Agreement does not apply "to forces temporarily employed for emergency work incidental to wrecks . . . where the Carrier's operation is interrupted in whole or in part."

The Board follows precedent established in Third Division Award 32097 wherein the Board held that "the derailment constituted an emergency and the Carrier had no contractual obligation to utilize its own forces to repair the damage" and finds that the reduced traffic constituted an interruption "in part" of the Carrier's service. Notwithstanding the lack of any requirement or obligation to use BMWE-represented employees, the Carrier's unrebutted assertion is that its own employees worked alongside outside forces. Because the Board finds that an emergency existed, 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.