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

Award No. 42119
Docket No. MW-42186
15-3-NRAB-00003-130136

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 (Rick Franklin Corporation) to perform Maintenance of Way work (transport/stage track material, remove/install switch panels and related work) at the Hump Yard in Hinkle, Oregon on September 5 and 6, 2011 (System File D-1152U-245/1562794).

(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, Claimants W. Cleaver, J. Decker, M. Smietana, R. Smith, M. Brown, Jr. and T. Sheppard shall now each '* be allowed twenty three (23) hours pay at their respective straight time and overtime rates of pay as compensation for the hours worked by the outside contracting force as described in this claim. ***'"**

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 August 19, 2011, the Carrier issued the notice set forth below to the Organization.

> **"Subject: 15-day notice of our intent to contract the following work.**
>
> **Location: Approximately Boardman, OR (MP 166.00 to MP. 188.00) to Hinkle Yard on the Portland Sub-Division.**
>
> **Specific Work: Providing all labor, tools, materials and equipment, (including but not limited to excavators, cranes, and road graders) necessary to provide grading services and to assist the Carrier's forces in the removal and replacement of switches."**

On September 1, 2011, the parties discussed the notice of intent to contract out and that discussion is memorialized in the Organization's post-conference letter dated February 7, 2012.

On October 19, 2011, the Organization filed a claim alleging that the Carrier violated the Agreement when it assigned scope-covered work to outside forces. Specifically, six contract employees operated three excavators, one dozer and one dump truck with lowboy to transport and stage track material, remove and

dismantle old track panels, grade the sub ballast, install new track panels and transport old material for disposal and\or stock piling. The Organization also alleges that the Carrier did not fulfill the advance notice and conference requirements pursuant to Rule 52 and the December 11, 1981 Berge-Hopkins Letter of Understanding (LOU) because the Carrier's notice of intent to contract dated August 19, 2011 is vague and defective inasmuch as it does not identify the claimed work.

On December 8, 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 BMWE-represented employees and (3) the use of outside forces was consistent with its mixed practice to use contractors to supplement its own forces. Also, the LOU does not apply and the Claimants were fully employed, thereby enduring no monetary loss.

On February 7, 2012, the Organization filed an appeal by reiterating the arguments set forth in its claim and asserting that the Carrier had not (1) engaged in a good-faith effort to reduce the incidence of contracting and (2) maintained an adequate workforce.

On March 23, 2012, the Carrier denied the appeal by reaffirming the arguments set forth in its declination letter and asserted an exception under Rule 52(a) because it was not adequately equipped to handle the project.

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

On May 25, 2012, the Organization submitted a "last say" letter to the Carrier summarizing BMWE's view of the conference and the Carrier's arguments.

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, 5, 9 and should have been assigned to the Claimants and not assigned to outside forces (Third Division Awards 14061, 29916 and 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 Awards 29916, 39301 and Award 15 of Public Law Board No. 7096); (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) because the notice does not identify the claimed work or any reason for contracting out; (5) the LOU is applicable as affirmed in at least 20 on-property Awards (Third Division Awards 29121, 40923 and 40929); (6) failure to comply with advance notice requirements prior to entering into a contracting transaction requires the claim to be sustained in its entirety (Third Division Awards 29472, 36966, 40964 and Awards 6, 8, 10, 12 and 16 of Public Law Board No. 6205); (7) failure to provide an 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 (Third Division Award 29121); (8) exclusivity is inapplicable to contracting out disputes (Third Division Awards 40373 and 40923); (9) the Carrier's asserted past practice for the use of outside forces is an invalid defense because there is no Rule 52(a) exception or Rule 52(b) prior and existing right on this property (Third Division Awards 40409 and 40411); and (10) a monetary remedy is appropriate to compensate for the lost work opportunity (Third Division Awards 38349, 39139, 40964 and Award 9 of Public Law Board No. 7101).

In summary manner, the Carrier's arguments, along with a sampling of the arbitral precedent in support of its arguments, are: (1) the claim must be denied because there is an irreconcilable dispute of material fact with the Organization alleging, but not proving, that contractors installed track, whereas the Manager states that contractors provided only grading services and work related thereto (Third Division Awards 29859, 30460 and 33951); (2) the Carrier provided an advance notice on August 19, 2011 of its intent to contract out grading work and the contracted work did not commence until after notice and a good-faith conference in an effort to reach an understanding, but Rule 52 recognizes the Carrier's right to proceed with contracting when there is no understanding (Third Division Awards 37490 and 40762); (3) Rule 52(b) and arbitral precedent (Third Division Award

30193) affirm the past, almost 70-year mixed practice (1918-1987) to use contractors for grading work on the Northwest Division, so stare decisis governs, plus there is no obligation for the Carrier to rent or procure equipment for the use of BMWE-represented employees and the "Loram Award" is an unpersuasive argument; (4) the LOU is inapplicable as confirmed by Third Division Awards 28943, 31281 and 37854 and the LOU states that it applies only to work within the scope of the applicable Schedule Agreement such that it did not create a right to work not possessed by the Organization; (5) the requested remedy is excessive and improper because the Claimants were fully employed and endured no loss of earnings (Third Division Award 31652); and (6) the Organization failed to prove any Rules violation, so the claim must be denied (Third Division Awards 21615, 27895 and 36542).

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. Reasonable and differing interpretations of Rules, standing alone, are insufficient to establish alleged Rules violations. As for arbitral precedent, the Board recognizes the diversity of and divergence 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.

The Board will not consider the Carrier's asserted "irreconcilable dispute of fact" argument in this case because that assertion was not presented or argued during the on-property exchange. Nevertheless, the Board finds that (1) the Carrier met its notice and conference requirements pursuant to Rule 52(a) because notice was issued on August 19, 2011 and contract work began 17 days thereafter on September 5, 2011; (2) Rule 52(a) allows contracting out even where no resolution or understanding is attained during conference; (3) Rule 52(b) allows the Carrier to contract out based on its mixed practice on the Northwest Division that pre-dates and post-dates the Rule; (4) arbitral precedent relied upon by the Carrier is not exposed as palpably erroneous; and (5) the Organization failed to sustain its burden of proof regarding the alleged Rules violations. In view of these findings, the 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.