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

Award No. 42156
Docket No. MW-42222
15-3-NRAB-00003-130166

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 (Rick Franklin Company) to perform Maintenance of Way work (load and transport rail) from the Albina Yard to Mile Post 767 near Portland, Oregon on October 9, 2011 (System File T-1152U-535/1563874).

(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 C. Hatch shall now be compensated for ten (10) hours at his respective straight time 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.

By 15-day notice dated May 16, 2011, the Carrier advised the General Chairman of its intent to contract out the following work:

> **"Location: Portland Service Unit - Portland Subdivision, Kenton Line Seattle Subdivision to include all Terminals and Main Tracks Portland to Seattle to Wellsbert Jct.**
>
> **Specific Work: Provide equipment support, including but not limited to back hoes, excavators, trucks, etc., on an as needed basis to assist maintenance of way forces in the performance of their duties. Work may also include, but not limited to road crossing repairs (including asphalt, track removal/replacement), traffic control equipment transloading, brush cutting/mowing, fence repair/installation, dust control (spraying), right of way road grading, removal of yard and right of way debris/material and provide necessary equipment support for derailment assistance/cleanup. Any new construction work with Port of Portland."**

The conference was held on June 7, 2011 pursuant to Rule 52, during which the Carrier advised the Organization that there was a past practice of it contracting out similar rail delivery work to supplement its forces when needed. The

Organization set forth its arguments in opposition to the contracting and the vagueness and inadequacy of the notice in its letter of August 23, 2011.

The instant claim was filed on December 7, 2011, and protests the Carrier's use of a contractor employee and vehicle to pick up, haul, unload, and deliver rail to a work site on the main line near Portland on October 9, 2011. The claim asserts that the Carrier had the same equipment available to perform the work in question, and the Claimant was qualified and available to operate that equipment. It requests a monetary remedy for this loss of work opportunity.

In its initial denial on January 17, 2012, the Carrier stated that it had a strong mixed practice of contracting this type of work, which permits the use of the contractor on this occasion under the prior and existing rights and practices language of Rule 52(b). The Carrier included a Manager's statement indicating (1) the urgency of the project, (2) the sensitive area near a retirement community, (3) that the Claimant did not have a Class A CDL, which was necessary to operate the equipment needed to transport the rail, (4) that all of the Carrier's qualified drivers were busy with their assigned duties, and (5) affirming its prior practice of contracting out this type of work. It also took issue with the continued applicability of the December 11, 1981 Berge-Hopkins Letter of Understanding (LOU), and argued that the Claimant suffered no monetary loss on the contracting date to support the requested remedy.

During subsequent appeals and correspondence on the property, the Organization stressed (1) the blanket nature of the notice, (2) that the work in question is reserved to BMWE-represented employees pursuant to Rule 9 and provided employee statements confirming its performance. It pointed out that the Carrier failed to support the existence of any of the exceptions listed in Rule 52(a). The Organization asserted that the Claimant was a qualified boom truck Operator who had hauled rail in that equipment in the past, and maintained that there was a loss of work opportunity and that a monetary remedy was appropriate.

In its subsequent declination, the Carrier made clear its position that (1) proper advance notice was provided and conference held before the work commenced, (2) Rule 52(b) prior and existing rights as established by its mixed practice of contracting the hauling of rail and other materials supported its right to

contract the work in question, (3) the Rule 52(a) exception of the Carrier not being adequately equipped to handle the work applied because there was a limited number of semi-trucks on the system to move much equipment, (4) there was no loss of earnings established by the Organization supporting monetary relief and (5) no proof that the Claimant was qualified to operate the semi-truck, and (6) the LOU was inapplicable.

As noted above, the Parties' positions were detailed in their correspondence on the property. Suffice it to say that the Organization relies upon the following facts and arguments in support of its claim: (1) the Carrier's blanket notice, which did not provide the dates of the work or the reason for the contracting, did not meet its notice obligation pursuant to Rule 52 or the LOU, citing Third Division Awards 41107, 40964, 38349, 36966, 36964; Public Law Board No. 6205, Awards, 6, 8, 10 12 & 16; and Public Law Board No. 7099, Award 14; (2) the work is scope-covered under the specific unambiguous work reservation language of Rule 9, which encompasses loading, unloading, and handling of track material, relying on Third Division Awards 14061, 29916, 28817, 37315, 39301; Public Law Board No. 7096, Awards 1 and 12; Special Board of Adjustment (Loram Rail Handling case); Special Board of Adjustment (Pre-plated Tie Dispute); (3) the Carrier's failure to engage in a good-faith effort to reduce the incidence of contracting violated its LOU obligation, which applies on the UP property, citing Third Division Awards 29121, 40923 and 40929; (4) Rule 52(a) requires the Carrier to establish an exception to permit contracting, which it failed to prove; and (5) a monetary remedy is appropriate to preserve the integrity of the Parties' Agreement and make the Claimant whole for the loss of this work opportunity, citing Third Division Awards 28817, 29577, 36516, 36964, 36966, 38349, 39139, 40965, 41107; Public Law Board No. 7096, Awards 14 & 15; Public Law Board No. 7101, Award 9.

The Carrier contends that the track and roadbed work in question was encompassed within its May 16, 2011 advance notice of its intent to contract sent to the General Chairman, and a conference was held well before the work commenced, in compliance with its Rule 52(a) obligations, citing Third Division Awards 32333, 33646, 37332, 37490, 40756, 40758, 40857, 40863; Public Law Board No. 6205, Award 8; Special Board of Adjustment No. 1130, Award 13. It argues that it has a well-established mixed practice of contracting equipment support work, and the Board has upheld its right to contract such work under the prior existing rights and

practices language of Rule 52(b) of the Agreement, citing Public Law Board No. 5546, Awards 15 & 16; Third Division Awards 40861, 30063, 28619 and 27010. It asserts that the doctrine of stare decisis applies. The Carrier contends that it was not adequately equipped to handle the work, an exception listed in Rule 52(a) permitting contracting. It argues that the LOU does not apply on this property and did not eliminate or place any further limitations on the Carrier's right to contract out this type of work under Rule 52, as recognized by the Board in dealing with the contracting issue, relying on Third Division Awards 28654, 28943, 31281, 32534, 33467, 37854, 40799 and 40802. Finally, the Carrier argues that the Claimant was not qualified to perform the work, creating an irreconcilable dispute of material fact undermining the Organization's ability to meet its burden of proof. Additionally, the Carrier notes that because the Claimant was fully employed, the Agreement does not permit the award of damages or monetary compensation in the absence of a proven loss of earnings, citing Third Division Awards 31652 and 31284.

A careful review of the record convinces the Board that the Carrier met its notice and conferencing obligations pursuant to Rule 52(a). The instant contracting transaction involves the identical notice and conference that was considered by the Board in Third Division Awards 42075 and 42078. For the reasons set forth in detail therein, we conclude that the Carrier met its Rule 52(a) notice and conference obligations in the instant case, and that the Organization failed to establish a lack of good faith on the Carrier's part in violation of the LOU. See, e.g. Third Division Awards 28654, 28943, 31281, 32534, 33467 and 37854.

With respect to the issue of whether the Carrier violated the Agreement by contracting this equipment support work, there can be no doubt that Rule 9 – Track Subdepartment, specifically mentions loading, unloading and handling track material, and that the work in question falls within the scope of the Parties' Agreement. The Carrier does not dispute that BMWE-represented employees perform this type of work, and, the notice itself indicates that contractors will be utilized, in part, ". . . to help the Carrier forces in the performance of their duties . . . ." Under such circumstances, the Organization need not show historical or customary performance. See, e.g. Third Division Award 22817. However, this is not a reservation or guarantee of all right-of-way maintenance work to BMWE-represented employees, because Rule 52(a) permits the Carrier to contract out such work if one of the four listed exceptions applies – special skills or equipment, when

the Carrier is not adequately equipped to handle the work, or when emergency time requirements create situations beyond the capacity of its own forces - and Rule 52(b) permits the Carrier to contract out in conformance with its prior rights and practices. In this case the Carrier relied upon both grounds.

First, during its on-property denials, the Carrier included a statement from the involved Manager asserting that all Carrier Drivers were busy on their assigned duties and that there were a limited number of semi-trucks on the system, and asserting that the Claimant did not possess the requisite CDL to drive the necessary equipment. It relied upon the fact that the Carrier was not adequately equipped to handle the work, which was of an urgent nature in a sensitive area. The Organization rebutted this assertion by presenting statements indicating that different type of vehicles, including boom trucks which the Claimant was qualified to operate, have hauled rail at other times, and could have done so on this occasion.

The Carrier primarily justified its right to contract the transport of the rail in question on the basis of its prior and existing rights and practices of contracting similar work under Rule 52(b). It relied upon prior Board precedent upholding its practice of contracting similar work; see Public Law Board No. 5546, Awards 15 & 16; Third Division Awards 27010, 28619, 30063, and 40861. The Carrier's practice evidence was not refuted by the Organization's employee statements indicating that they, too, performed this type of work, a position that is not disputed here. The Board has held that once the Carrier establishes a mixed practice of contracting out similar work, it is entitled to rely on Rule 52(b) to justify its present similar contracting transaction. See Third Division Awards 30063 and 33646.

Because the Carrier complied with the notice and conferencing requirements of Rule 52(a), and established its prior and existing right to contract equipment support work to transport rail and other track materials under Rule 52(b), which has been previously acknowledged by the Board, see e.g. Public Law Board No. 5546, Awards 15 & 16; Third Division Awards 27010, 28619, 30063, and 40861, we find that the Organization failed to meet its burden of proving a violation of the Parties' Agreement in this case.

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 26th day of August 2015.