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

Award No. 42158
Docket No. MW-42239
15-3-NRAB-00003-130213

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 (T & L Construction) to perform Maintenance of Way work (transport equipment and material, distribute track and crossing material and remove waste, ties and other track material) in connection with rehabbing crossing at Mile Post 401 on the Nampa Subdivision on December 6 and 7, 2011 (System File D-1252U-202/1565585).

(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 any 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 H. Brown shall now be compensated for twenty (20) 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 notice dated March 21, 2011, the Carrier advised the General Chairman of its intent to contract out the following work:

> **"Location: Various road crossings on the Huntington, Nampa and Montana Subdivisions.**
>
> **Specific Work: Provide operated equipment for the excavation of road crossings as directed by the extra gang."**

By letter dated March 28, 2011, the Organization requested specific information and a conference, which was held on April 5, 2011 pursuant to Rule 52, during which the Carrier advised that there was a past practice of it contracting out similar equipment support for road crossing work to supplement its forces when needed. The Organization set out its arguments objecting to the contracting and the vagueness and inadequacy of the notice in its letter of July 12, 2011.

The instant claim was filed on January 9, 2012, and protests the Carrier's use of a contractor's employee with a dump truck and excavator to perform a crossing replacement on the claimed dates at the cited location. The claim asserts that the Carrier has the same equipment available to perform this work, and the Claimant was qualified and available to operate that equipment. It also notes that this work is reserved to BMWE-represented employees with the Claimant's classification

pursuant to Rules 9 and 10 of the Parties' Agreement, and the Carrier failed to indicate which contracting exception listed in Rule 52(a) applied. The Organization requests a monetary remedy for this loss of work opportunity.

In its initial denial on February 15, 2012, the Carrier stated that (1) there was no dispute that proper notice was given in this case, (2) it had a recognized past practice of contracting this type of work, and (3) the Claimant was fully employed and suffered no monetary loss on the contracting dates (including receiving overtime) to support the requested remedy.

During subsequent appeals and correspondence on the property, the Organization stressed the blanket nature of the notice preventing the holding of a meaningful conference, the speculative nature of the work and the absence of a link between the notice and the actual work in dispute, that this work is reserved to BMWE-represented employees under Rule 9, and the Carrier's failure to support the existence of any of the exceptions listed in Rule 52(a). The Organization asserted that there was a loss of work opportunity and that a monetary remedy was appropriate.

In its subsequent denial, 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 recognized practice of contracting equipment support as well as road crossing and ballast and cleanup work supported its right to contract this work, (3) the application of stare decisis to this dispute, (4) the Agreement's Scope Rule did not reserve this work to BMWE-represented employees, (5) there was no loss of earnings established by the Organization supporting monetary relief for the Claimant, and (6) the December 11, 1981 Berge-Hopkins 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 reference to the specific work here, or the locations or dates of possible future work or the reason for the contracting, making the holding of a good-faith conference impossible, and did not meet its notice obligation under Rule 52 or the LOU, citing, e.g. Third Division Award 31280; (2) the work is scope-

covered under the specific unambiguous work reservation language of Rule 9, which encompasses maintenance of roadway and track and road crossings, relying on Third Division Awards 14061, 28817, 29916, 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 UP property, citing Third Division Awards 29121, 40923, 40929; (4) Rule 52(a) requires the Carrier to establish an exception to permit contracting out, 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 40080, 29531, 28817; Public Law Board No. 6404, Award 33.

The Carrier contends that the road crossing work in question was encompassed within its March 21, 2011 advance notice of its intent to contract out 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 30063, 33646, 37332, 37490, 40756, 40758, 40857 and 40863; Public Law Board No. 6205, Award 8. It argues that it has a well-established mixed practice of contracting equipment support, road crossing, ballast and cleanup work, and the Board has upheld its right to contract out such work under the prior existing rights and practices language of Rule 52(b) of the Parties' Agreement, citing Public Law Board No. 7101, Awards 2 & 8; Public Law Board No. 5546, Awards 15 and 16; Third Division Awards 27010, 27921, 28619, 30063, 36645, 37644, 40281 and 40861. It asserts that the doctrine of stare decisis applies. Finally, 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 Award 31652.

A careful review of the record convinces the Board that the Carrier met its notice and conferencing obligations pursuant to Rule 52(a). This is not a case where the Carrier issued a blanket notice a substantial period of time prior to the work without any evidentiary link to the specifics of the actual contract, as in Public Law Board No. 7096, Awards 15 and 16 and Third Division Award 40997 relied upon by the Organization. Rather, the notice herein was linked to Service Order HAN 032111, which was furnished to the Organization, specified the work of providing

operated equipment for the excavation of road crossings, and encompassed the Nampa Subdivision, which is the type and location of the work protested herein. We find that the notice was sufficiently specific so as to afford the Organization enough information to take a position on whether the work in question should be contracted out. See, e.g. Third Division Awards 32333 and 37490. The conference was held many months prior to the commencement of the disputed work by the contractor, distinguishing this case from Public Law Board No. 6205, Awards 6, 8, 10, 12 and Public Law Board No. 7096, Award 1. During the conference, the Carrier asserted that due to its extensive mixed practice on the property, the prior and existing rights and practices language of Rule 52(b) applied. Unlike the majority of cases cited by the Organization finding a violation of Rule 52(a) and sometimes the December 11, 1981 LOU based upon the absence of any notice, see, e.g. Third Division Award 29121, we conclude that the Carrier met its Rule 52(a) notice and conference obligations in this 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.

The Carrier justified its right to contract out this road crossing work on the basis of its prior and existing rights and practices of contracting similar work under Rule 52(b), submitting voluminous lists of prior contracts as well as Managers' statements, which were not refuted by employee statements submitted by the Organization. The Carrier relied upon prior Board precedent upholding its practice of contracting out similar work, and the application of the principle of stare decisis; see Public Law Board No. 5546 Awards 15 and 16; Third Division Awards 28619, 27010, 30063, 33645, 37644 and 40861. 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 out equipment support work to transport track and crossing materials under Rule 52(b), which has been previously acknowledged by the Board, see e.g. Public Law Board No. 5546, Awards 15 and 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 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.