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

Award No. 42159
Docket No. MW-42241
15-3-NRAB-00003-130227

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 (Snellton, Inc.) to perform Maintenance of Way work (removal making grade, install concrete tie switches and related duties) between Mile Posts 8.02 and 6.4 on the Clinton Subdivision on January 4, 2012 and continuing through January 7, 2012 (System File B-1252U-102/1566924).

(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 J. Olson, J. Malin and L. Wills shall now each be compensated for twenty-four (24) hours at their respective rates 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 February 2, 2011, the Organization requested specific information and a conference, which was held on February 15, 2011 pursuant to Rule 52, during which the Carrier advised that there was no specific contract in place, but that Service Order #CAL 01311 would encompass equipment supplementation as needed throughout the year, and that there was a past practice of the Carrier contracting out similar equipment support 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 March 23, 2011.

The instant claim was filed on January 23, 2012, and protests the Carrier's use of three contractor employees with two trackhoes and one front end loader to install switches at the cited locations. The claim asserts that (1) no prior notice was

given, (2) the Carrier has the same equipment available to perform this work, or could have rented it as did the contractor, and (3) the Claimants were qualified and available to operate that equipment. It also notes that the work in question is reserved to BMWE-represented employees with the Claimants' classifications pursuant to Rules 9 and 10 of the Parties' Agreement, and the Carrier failed to prove that any contracting exception listed in Rule 52(a) applied, because no special equipment or skill was required. The Organization requests a monetary remedy for this loss of work opportunity.

In its initial denial on March 6, 2012, the Carrier stated that (1) proper notice was given in this case, (2) it was not adequately equipped to handle the work of replacing large main line turnouts with the size of switch panels that needed to be moved and no proper equipment to safely perform the work, (3) it had a recognized past practice of contracting this type of work, and (4) the Claimants were fully employed (performing most of the work being grieved) 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 (1) the blanket nature of the notice preventing the holding of a meaningful conference, (2) that this work is reserved to BMWE-represented employees pursuant to Rule 9 and customarily performed by them, (3) that the switches used were a common size and could have been handled by the Claimants using the Carrier's own, or rented, equipment, and (4) the Carrier's failure to support the existence of any of the exceptions listed in Rule 52(a). The Organization submitted employee statements in support of its positions, and asserted 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) the Rule 52(a) exception of specialized equipment not owned by the Carrier and the fact that it was not adequately equipped to handle the work were present, (3) the Rule 52(b) prior and existing rights as established by its recognized practice of contracting equipment support work justified its right to contract the work in question, (4) that 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 Claimants, and (6) the Berge-Hopkins LOU was inapplicable. The Carrier submitted numerous Manager statements explaining why specialized equipment was needed for this turnout project and why its own equipment was insufficient to handle the weight and size of the switch panels involved, as well as its past practice of contracting similar type work, referencing specific correspondence where examples of such contracting were exchanged.

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 in question, 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 pursuant to Rule 52 or the LOU, citing, e.g. Third Division Award 31280; (2) the work is scope-covered pursuant to the specific unambiguous work reservation language of Rule 9 which encompasses maintenance of roadway and track, as well as 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 the UP property, citing Third Division Awards 29121, 40923, 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 Agreement and make the Claimants whole for the loss of this work opportunity, citing Third Division Awards 28817, 29531, 40080; and Public Law Board No. 6404, Award 33.

The Carrier contends that advance notice of its intent to contract and the Service Order were 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, 40863; and Public Law Board No. 6205, Award 8. It also argues that it was not adequately equipped to handle the work in question and was faced with time demands necessitating prompt action, which is an exception permitted by Rule 52(a), and that it is not required to lease equipment, citing Third Division Awards 40799, 40802,

and 40816; and that it has a well-established mixed practice of contracting equipment support, 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 Parties' Agreement, citing Third Division Awards 27011, 30193, 32310, 32629 and 37365. The Carrier asserts that the Scope Rule does not reserve the work to BMWE-represented employees, relying on Third Division Awards 28789, 29007; and Public Law Board No. 4219, Award 8, and argues that the Organization failed to meet its burden of proof. Finally, the Carrier notes that because the Claimants were 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 under Rule 52(a). The notice in this case is similar in scope to the notice found appropriate in Third Division Award 42156. We adopt the reasoning of that Award herein.

The Carrier justified its right to utilize a contractor to perform the work in question both on the basis of a Rule 52(a) exception as well as its prior and existing rights and practices of contracting similar work under Rule 52(b). The Carrier stressed that it had no access to trackhoes that could handle the weight and size of the large switch panels that needed to be moved to assist its forces and machinery in installing the main line turnouts, and the fact that track time was unavailable to perform this job for a few days requiring a short window for performance, when its own forces were also fully employed on this project. While the Organization asserted that there was nothing extraordinary about the equipment needed for this project, it focused on the fact that the Carrier could have leased it, as had the contractor. As noted in Third Division Award 40802, the equipment ownership exception does not require the Carrier to try to lease equipment for operation by its own forces, who, in this case, were primarily working on this project and being assisted by this additional equipment. The Carrier also relied upon prior Board precedent upholding its practice of contracting similar work; see, e.g. Third Division Awards 30193 and 32310. 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 both an exception to Rule 52(a) as well as its prior and existing right to contract 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 Parties' Agreement.

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.