

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42221
Docket No. MW-41960
15-3-NRAB-00003-120295**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

**(Brotherhood of Maintenance of Way Employees 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 (Razorback) to perform Maintenance of Way work (remove/ install turnout and related work) at CPZ08 on the Kansas Subdivision on December 10, 2010 (System File D-1152U-204/1550792).**
- (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 National December 11, 1981 Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants T. Akin, R. Creek, L. Doebele, Jr., R. Hoover, M. A. Magnett, M. J. Magnett and J. Novotny shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for four (4) hours at their respective overtime 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 letter dated May 10, 2010, the Carrier notified the Organization of its intent to seek bids for:

“Contractor assistance in constructing and installing switches, switch components, and road crossings on the Kansas and Marysville Sub Divisions between West Yard, MP 6.5 and Marysville, Kansas, MP 148.0. This may include use of contractor operated equipment including, but not limited to, rubber tired loaders, crawler hoes, rubber tired backhoes, and dozers. This is primarily in connection with rail relay and associated turnout and road crossing projects between West Yard and Linwood and between Sullivan and Upland.”

The Parties had a conference on May 25, 2010, at which the Carrier asserted its right to contract the work at issue pursuant to Rule 52(b), that is, there was an existing past practice of contracting such work. The Organization objected that the notice was too vague and that it would require specific proof of any alleged past practice.

Although the work was originally anticipated to be completed by the end of September 2010, the incident giving rise to this claim occurred on December 10, 2010, when the Carrier assigned certain track work to eight employees of Razorback Inc., an outside contractor. Although the work occurred outside the original expected timeframe, it was work that was described in the May 10, 2010, notice. The Organization filed this claim on February 4, 2011. The claim was denied on March 30, 2011, on the basis of past practice under Rule 52(b). The Organization appealed the

Carrier's decision on May 28, 2011. In its denial of that appeal, dated July 26, 2011, the Carrier included defenses based on both Rule 52(b) and Rule 52(a).

Rule 52(a) states:

“(a) By agreement between the Company and the General Chairman, work customarily performed by employees covered under this Agreement may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.” (emphasis added)

The Carrier attached to its July 26, 2011 letter a statement from the local Manager, Gary Dien, who wrote:

“We did utilize Razorback to assist BMW forces to install a complete #15 Turnout at Z008 on the Kansas Sub on December 10th. We do not have this type of equipment available, especially the amount needed for a project of this scope. Notice was served that UP intended

to utilize contractors for installing turnouts on the Kansas Sub.”
(emphasis added)

Dien’s specific statement was corroborated generally by a statement from Russ Lloyd, the Carrier’s Director of Civil Construction, who stated:

“In reference to the use of contract operated equipment to remove and replace switch panels, prepare the track bed, distribute ballast and clean up on former Union Pacific property, I can attest that this has been a common practice for at least the last 10 years that I have been a Director Construction [sic] ... Union Pacific track construction does not have the equipment to perform this type of work.” (emphasis added)

The Organization did not refute those representations.

The Organization’s frustration with the Carrier’s somewhat vague notices is understandable; the contracting process overall would be improved by more attention to detail in the notices on the part of the Carrier, especially to the requirements under the 1981 Berge-Hopkins letter that the Carrier indicate the reason for the contracting. That said, it appears that contracting for the installation of turnouts due to the need for specialized equipment that the Carrier does not own has occurred before, and the Organization has to be aware of this fact. So it cannot have been too surprised when the Carrier indicated its intent to contract out similar work on the project at issue here, or by the reasons given by the Carrier for the contracting out.

Under Rule 52(a), lack of equipment and work such that the Carrier is inadequately equipped to handle are two of the permissible bases for contracting work that is traditionally and regularly performed by Maintenance of Way forces. Both of those are present here, and the Carrier did not violate the Agreement when it contracted the work in question.

AWARD

Claim denied.

Form 1
Page 5

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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 17th day of November 2015.