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

Award No. 42251
Docket No. MW-41945
16-3-NRAB-00003-120259

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference**
(Union Pacific Railroad Company (former Missouri 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 (Bayou City Rail Construction Company) to perform Maintenance of Way Department work (remove ballast retainers on deck bridges ahead of tie gangs) between Mile Posts 316.46 and 284.20 on the Angleton Subdivision beginning on February 8, 2011 and continuing through February 18, 2011 (System File UP952PA11/1549129 MPR).

(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 or make a good-faith effort to reach an understanding and reduce the amount of contracting as required by Rule 9 and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants M. James, L. Montegut, J. Sewell and D. Freeman shall now each be compensated for seventy (70) hours at their respective straight time rates of pay and for thirty (30) hours at their respective time and one-half 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 January 17, 2011, the Director of Bridge Maintenance served a 15-day notice on the General Chairmen of the Organization in five different states of the Carrier's intent to contract out described project work on bridges at 86 listed mileposts on the Angleton Subdivision. The work was described in the notice as follows:

> **"Specific Work: project work consisting of changing entire decks including all tie and guard timbers, installing new walkways, lining bridges for proper FRA compliance, when required changing shims, sills, caps, braces, tightening bolts, changing ballast retainers, backwalls and other incidental bridge work. As indicated above some bridges may require stringer replacement as well as bent work such as posting piles, changing bracing framing existing bents."**

The notice also contained the following protective language:

> **"Serving of this 'notice' is not to be construed as an indication that the work described above necessarily falls within the 'scope' of your agreement, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMWED. In addition to a practice of this work being performed by outside concerns the Carrier does not have sufficient manpower to perform this work in a timely manner."**

The notice included a Labor Relations telephone number in the event the Organization desired a conference in connection with the notice.

By letter dated January 25, the Organization requested a conference to discuss the letter of January 17, 2011, among a group of many similar notices received by the Organization. The Organization's letter stated that each of the 15-day notice letters received concerned the ". . . intent to contract out work that has customarily and historically been performed by the Carrier's Maintenance of Way employees. . . " but that the letters ". . . do not comport with the procedural requirements of our Current Agreement and therefore, do not fulfill the advance notice requirements contained therein." The notices, the Organization stated, ". . . are silent in regard to any specifically contemplated contracting transaction, fail to identify the specific work to be contracted, fail to specify the dates and specifically locations it contemplates assigning the contractor(s) to work and fail to specifically identify any valid reasons for contracting out work of the nature addressed (so far as the nature of the work can be ascertained)." The "vague, blanket notices," the Organization's letter continued, did not meet contractual notice requirements, and claims had consistently been sustained by Arbitrators based on such deficient blanket notices.

Further the Organization's January 25, 2011, letter stated:

> **"Insofar as any specific work can be identified within the purported notices, such work has customarily and traditionally been performed by the Carrier's employees within the Maintenance of Way Department and is not simply within the Scope of the Current Agreement, but is work that is a primary subject of the Agreement. Moreover, BMWE represented employees are fully capable of performing the work and have customarily and historically done so whenever assigned to that work by the Carrier. Consequently, such work is reserved to BMWE members by custom and practice and cannot be contracted out unless the Carrier can show that one or more implied exceptions which might permit contracting out are present. Moreover, even where work may have been contracted out historically under certain circumstances, the Carrier now has a contractual obligation to assert good faith efforts to reduce the incidence of subcontracting and increase the use of its Maintenance of Way Forces, including the procurement of rental equipment."**

The Organization's letter requested that a conference be held prior to the work being assigned to or performed by an outside contractor so the Parties might ". . . make a good faith attempt to reach an understanding concerning the contemplated transaction(s)."

By letter dated February 28, 2011, the Organization submitted the instant claim to the Carrier on behalf of four named Claimants because the ". . . Carrier contracted out the Maintenance of Way work forces in removing Ballast retainers on deck bridges ahead of tie gangs on the Kingsville division in violation of, but not limited to the Scope Rule and Rules 1, 2, 9, and 20." The letter stated, "Beginning on February 8, 2011 and continuing thru February 18, 2011, Contractors from Bayou City Rail Construction Co. were contracted out to remove Ballast retainers from bridge decks starting from MP 316.46 thru MP 284.20 on the Angleton Subdivision. All Claimants hold rights in their respective classification on the Kingsville Division. The Claimant[s] are fully qualified and experienced . . . " the letter continued, ". . . in removing ballast retainers and would have performed this work had the carrier assigned them to do so."

The Scope Rule, as well as Rules 1, 2, 9, and 20 were violated, the letter stated. The letter also complained that the violation was compounded when the Carrier ". . . failed to provide a proper advance notice of intent to contract this work and when it failed to make a good faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as required by Rule 9 (Article IV of the 1968 National Agreement) and the National December 11, 1981 letter of Agreement."

The Carrier replied to the claim by letter dated April 27, 2011. The letter stated that the Carrier served a proper 15-day notice with the General Chairmen detailing the specific work in question and that the notice was conferenced between representatives of the Parties on January 27, 2011. The Carrier, the letter stated, ". . . has a strong mixed practice of utilizing contractor's forces to perform the type of work disputed in this case." The Claimants, the Carrier asserted, ". . . do not possess sufficient fitness and ability to safely and efficiently perform the duties or operate the equipment in question." Further, the Carrier's letter stated, ". . . the Carrier has customarily and traditionally utilized outside forces to perform the type of work you describe in this case; and we understand that outside forces have historically performed such service without protest from your Organization."

In addition, the Carrier's letter continued, ". . . such work is not covered by the scope of the Agreement," and even if ". . . such work were reserved to employees of your craft, the fact remains that the Claimants involved in this case weren't actually deprived of a work opportunity." The Organization's reliance on the December 11, 1981, Berge-Hopkins Letter of Understanding was misplaced, the Carrier's letter proceeded, because ". . . [t]his letter was changed through the course of national negotiations and is no longer a living document." In exchange for the Berge-Hopkins Letter of Understanding to be an enforceable document, the Carrier added, ". . . the Organization was to have delivered certain rule changes that were not accomplished." The claim, the Carrier concluded, was ". . . declined in its entirety."

The Organization, by letter dated May 4, 2011, appealed the Carrier's denial of the claim. Rules 2 and 20 were violated, the Organization stated, when the Carrier determined that it had need for additional B&B positions, but failed to bulletin them. The 15-day notice was both improper and vague, the Organization stated, because it did not specifically identify the work to be contracted out, the reasons therefor, the contractor who was going to perform the work, the number of contractor employees who would perform the work, the kind of equipment to be used, nor the amount of equipment. The failure to identify the work with precision, the Organization stated, ". . . precluded the opportunity to hold good-faith discussions of any proposed contracting transaction purportedly related to the January 17, 201[1] letter." Concerning the qualifications and availability of the Claimants to perform the work, the Organization described the work in detail and judged it to be "a rather simple procedure." The Claimants, the Organization asserted, had, without dispute, performed such work in the past and presently performed such work. The Organization disputed the need to accomplish the work with a contractor, arguing that bridges are maintained at regular intervals and that therefore ". . . the need for replacing bridge retainers is readily foreseeable well in advance and the work is readily planned." Any issue as to availability, the Organization asserted, was created by the Carrier when it decided to assign the Claimants to perform other work rather than the work here involved. The Carrier's right to determine staffing levels, the Organization declared, carried with it the responsibility to have sufficient resources available to meet its obligations under the Agreement.

The Carrier replied to the Organization's appeal by letter dated June 20, 2011. It argued, first, that the Organization had not met its burden of proof regarding the number of hours worked by the contractor's employees and had not

shown that the Claimants were deprived of work by the contracting assignment. Second, the Carrier asserted, the notice provided was timely and "was clear and concise" regarding the type of work to be performed and the locations where the contemplated work would be performed. Similar notices had been furnished for years, the Carrier stated, and it cited on-property Awards that purportedly had upheld such notices as proper. A third argument made by the Carrier was that the Scope Rule relied on by the Organization "is a very general rule and makes no mention of the work" detailed by the Organization and that for the Organization to prevail it had to demonstrate that the Claimants had "performed such work historically, customarily and exclusively."

The Carrier, in its June 20, 2011, letter, cited a number of Awards which it stated demonstrated the Carrier's "on-property practice of contracting bridge work." In addition, the letter continued, the Carrier provided the Organization with a letter dated May 26, 1999, which described the ". . . Carrier's extensive past practice of subcontracting various type[s] of work on-property including 'Bridge Maintenance' and 'Bridge Work.'" The Carrier ". . . has an extensive past practice of subcontracting out this specific type of work on the former Missouri Pacific territory, and at best . . . " it asserted, ". . . the Organization can only show a 'mixed practice.'" For the Organization to prevail in its argument that the Carrier could use only its own employees to perform the disputed bridge work, the Carrier argued, the Organization had to cite specific supporting contract language and had failed to do so.

Regarding the December 11, 1981 Berge-Hopkins Letter of Understanding, the Carrier incorporated its previous remarks about that letter into its June 20, 2011 letter. It also enclosed a copy of an April 17, 2003 letter from the National Railway Labor Conference Chairman at that time on the subject of the Berge-Hopkins LOU. The Carrier added that the Organization's alleged failure to satisfy its obligation under the Berge-Hopkins LOU ". . . to explore ways of achieving more efficient and economic utilization of the work force . . ." had deprived the letter of the status of a contract.

On August 12, 2011, the Parties discussed the claim in conference without resolution. In a letter dated November 17, 2011 to the General Chairman, the Carrier noted that the claim had been conferenced and reiterated its position stated in earlier letters. By letter dated February 16, 2012, the Organization confirmed that a conference had been held and replied to the Carrier's letters of November 17 and June 20, 2011, arguing the following points: (1) the work involved was identical

to that which is customarily performed by employees, including the Claimants, within the scope of the Agreement; (2) the Carrier has not contended that it lacked any equipment or sufficient manpower to perform the work; (3) the Organization had previously provided a signed statement verifying both the hours and location of the work claimed; (4) the Organization was now providing statements from the Claimants verifying that they witnessed the work being performed on the days in question and showing that there was a long history of the Claimants performing such work; (5) the notice was both vague and improper, and the specific information requested by the Organization in its pre-conference letter was not provided; (6) there is no dispute that the Carrier hired the contractor named in the claim to perform the work of removing ballast retainers on bridges during the dates claimed and that the Carrier had a gang of qualified Bridge employees headquartered at Angleton, Texas, that normally perform such work and could have performed it had the Carrier so chosen; (7) the Party asserting a controlling practice has the burden of establishing the existence of a binding practice, and the elements of a binding practice are that it is clear, longstanding, consistent, and acquiesced in by both Parties; (8) none of the past work listed by the Carrier in support of its position is identical or similar to the work at issue in this case; (9) it is not clear that the Organization had knowledge of Maintenance of Way work assigned to outside contractors; (10) the Organization cannot be said to have acquiesced in contracting out work of which it had no knowledge; (11) many of the examples listed of work allegedly contracted out by the Carrier represented work planned by the Carrier for the future and ". . . cannot serve as evidence that any work was actually contracted out in connection with that 'Service Order;'" (12) ". . . many of the listings that do identify specific locations and/or specific work, list locations that are not on the Carrier's operating property or involve locations under the jurisdiction of other collective bargaining agreements . . .;" (13) the Carrier has failed ". . . to identify contracting transactions where special arrangements were made and agreement was reached to allow specific work to be contracted; fails to identify bona fide emergency situations . . .; fails to identify purported instances where the Carrier failed to notify the General Chairman in advance; and also fails to identify the numerous instances where claims were filed by the Organization."

The Organization asserted in its February 16, 2012, letter that the remaining examples of prior bridge work contracted out by the Carrier were perhaps ". . . a handful of incidences of contracting out of any specific type of work . . . spread over a period of many years . . . " and that this did not approach ". . . proof of a consistent practice, especially given that it is undisputed that BMWE-represented employes have customarily and historically performed such work on a consistent

basis over the life of [the] Agreement." Further, the Organization argued, even if it were to be assumed that the Organization had acquiesced in the contracting out of work identical or similar to the work in question, a Party who acquiesces in a practice in violation of the clear language of the contract may withdraw its acquiescence at any time and insist on observance of the contract. Any hypothetical acquiescence, the Organization contended, had clearly been withdrawn ". . . by virtue of the numerous conferences of Carrier notices wherein we have attempted to convince UP to assign our members to perform the work and wherein we have clearly objected to the assignment of such work to outside contractors." This is further shown, the Organization asserted, by the numerous claims filed over the issue of contracting out similar work. The Organization also reiterated its arguments based on the December 11, 1981 Berge-Hopkins Letter of Understanding.

The first issue to be determined is whether the Carrier complied with the notice requirements of Rule 9, which reads as follows:

> **"(a) In the event the Carrier plans to contract out work within the scope of this Collective Bargaining Agreement, Carrier will notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.**
>
> **(b) If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier will promptly meet with him for that purpose. A good faith effort will be made to reach an understanding concerning said contracting, but if no understanding is reached the Carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.**
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> **(c) Nothing in this Rule will affect the existing rights of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.**
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> **(d) (1) The amount of subcontracting, measured by the ratio of adjusted Engineering Department purchased services (such**

> **services reduced by costs not related to contracting) to the total Engineering Department budget for the five-(5) year period 1992-1996, will not be increased without employee protective consequences. In the event that subcontracting increases beyond that level, any employee covered by this Agreement who is furloughed as a direct result of the increased subcontracting will be provided New York Dock level protection for a dismissed employee, subject to the responsibilities associated with such protection.**
>
> **(2) Existing rules concerning subcontracting which are applicable to employees covered by this Agreement will remain in full effect."**

The Organization argues that the Carrier failed to provide a reason that it intended to contract out the work and that this was a violation of the Agreement. Rule 9 does not state that the written 15-day notice must contain the reason for contracting out the work. The Organization, however, relies on the December 11, 1981 Berge-Hopkins Letter of Understanding which, among other things, states that ". . . [t]he parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to . . ." and that ". . . the advance notices shall identify the work to be contracted and the reasons therefor." The Board, without passing on the disputed issue of the continued viability of the Berge-Hopkins LOU, notes that the Carrier provided its reasons for contracting out the work when it included the following sentence in its 15-day notice dated January 17, 2011:

> **"In addition to a practice of this work being performed by outside concerns the Carrier does not have sufficient manpower to perform this work in a timely manner."**

The Organization further argues that the notice was deficient because it was a blanket notice and not an advance notice of the specific contracting out transaction involved here. In its Submission the Organization cites Third Division Awards 41052 and 41054, as well as Award 14 of Public Law Board No. 7099 in support of that argument. In Award 41052, the notice stated, in relevant part:

> **". . . Location: Various points across the Union Pacific system**
>
> **Specific Work: operate trucks and lowboy trailers to assist in hauling and or moving misc. equipment, material and supplies on the Union Pacific system through 12/31/08 . . . ."**

In Award 41054, the Board stated that it was ". . . a companion to Third Division Award 41052, which dealt with a nearly identical dispute." Although the Award did not give the wording of the 15-day notice, it is safe to assume that it was substantially the same as in Award 41052. In Case 14 of Public Law Board No. 7099, the Carrier's 15-day notice was very similar to the notice in the other two cases: the "intent to contract the following work" at "various points across the Union Pacific system:"

> **"Operate trucks and lowboy trailers to assist in hauling and or moving misc. equipment on the Union Pacific system for calendar year 2005."**

The Board does not believe that the three cases relied on by the Organization involved 15-day notices similar to the notice in this case. In the three cases, no specific location was designated where the work was to be performed. Nor were the equipment, material, and supplies that might be hauled or moved identified. In the instant case, by contrast, the 86 locations where the bridge maintenance work was to be performed were specifically identified by milepost. In addition, the kind of maintenance work to be performed was clearly described. For these reasons, the Board finds that the Awards relied on by the Organization to contest the validity of the 15-day notice in this case are readily distinguishable.

The Organization has also focused on the language of Rule 9, which, in paragraphs (a) and (b), uses the singular "contracting transaction" as opposed to the plural "contracting transactions." For example, in its appeal letter of May 4, 2011, the Organization – after noting that the Agreement uses the singular number "contracting transaction" – asserts, ". . . In contrast, the letter dated January 17, 201[1] . . . merely advised that UP intended to enter into an unspecified number of contracting transactions for some unspecified bridge work."

The record is completely silent as to whether one or more contracts were entered into for the performance of the work in question. If it is the Organization's position that there was more than one, it has the burden to prove that fact. In the

present case it has not sustained that burden. The Board notes further that the 15-day notice in this case was addressed to five General Chairmen in five different states. It may well be that the work contracted out within the jurisdiction or territory of each of the General Chairmen was covered by a single separate contract. In the Board's opinion, that would comply substantially with the literal language of Rule 9 in terms of a "contracting transaction." For example, the instant claim covers only a portion of the mileposts listed in the Carrier's January 17, 2011, 15-day notice letter, and all work was performed by a single contractor, Bayou City Rail Construction Company. The record is silent whether that contractor performed only the work involving the ballast retainers, or also the other project work performed at the named mileposts. There is no basis in the record for assuming that the project work within the General Chairman's jurisdiction or territory described in the January 17, 2011 notice letter was let by more than one contracting transaction.

In addition, the Board notes that the Carrier cited several Awards on the notice issue involving a single notice where the claim was denied and where it appears from the Award that probably more than one contract was let for performance of the disputed work. See, for example, Third Division Awards 40756, 37490, and 29306. Those cases, however, did not specifically discuss the question of what significance, if any, is to be attached to the fact that the contract language uses the singular "contracting transaction" and not the plural "contracting transactions." The Board finds that the record evidence in the instant case does not establish any violation of the notice requirements of Rule 9 of the Parties' Agreement. Because it is not necessary to do so for purposes of this case, the Board does not pass on the question of whether the use of the singular "contracting transaction" in Rule 9 requires that more than one 15-day notice be given for related project work that might require the hiring of more than one contractor to perform all of the project work involved.

The Organization argues that work of the kind here involved is reserved to and is customarily performed by Carrier forces. The Scope Rule, as well as Rules 1 (Seniority Datum) and 2 (Seniority Rights), the Organization asserts, clearly reserve work of the character involved here to BMWE-represented forces. In addition, the Organization contends, the Claimants and other Maintenance of Way employees have customarily and historically performed work identical to that which was assigned to the outside contractor in this instance. It notes that it provided signed statements from the Claimants attesting to their historical performance of such work. The past and current utilization of Carrier forces to perform such work

together with cited Agreement Rules, the Organization maintains, places beyond question that such work is reserved to BMWE-represented forces. The Organization attached Third Division Awards 4833 and 4888 to its submission as typical of the Awards holding ". . . that the character of work reserved to the various classes of employes covered by the Scope of the Agreement is that which they have traditionally and historically performed."

The Organization argues that ". . . [t]o assign work of this character to other than those employes holding seniority in the B&B Sub-Department under this Agreement would be to defeat the very intent and purpose of the collective bargaining process." It is fundamental, the Organization contends, ". . . that work of a class belongs to those for whose benefit the contract was made and that delegation of such work to others not covered thereby is in violation of the Agreement." Otherwise, the Organization asserts, the Agreement would be virtually meaningless. In the present case, the Organization argues, the Carrier, instead of assigning outside forces to perform the work, could have assigned qualified and willing Maintenance of Way forces by rearranging their work schedules or during overtime hours.

The Carrier, on its part, argues that ". . . a well-established past practice of utilizing outside forces to perform bridge maintenance and construction . . . " that ". . . is recognized and supported by Rule 9 of the parties' Agreement and has been affirmed by numerous arbitral awards . . ." permitted the contracting out that the Organization contests in this proceeding. There is a well-established mixed practice, the Carrier asserts, of contracting out bridge maintenance and construction, including the removal, repair, and installation of ballast retainers. The Carrier cites a number of Awards which have upheld the Carrier's right to contract out work covered by a mixed practice.

The lynchpin of the Organization's argument is its contention that work covered by the Scope Rule and customarily and historically performed by BMWE-represented employees is reserved to them and that to permit the contracting out of such work would defeat the purpose of the Agreement and render it virtually meaningless. The Board finds it difficult to understand how the Organization can maintain that argument where Rule 9 of the Agreement expressly recognizes the right of the Carrier to contract out work. What work could Rule 9 be referring to other than work covered by the Scope Rule? In fact, the Scope Rule itself states, "These rules govern the hours of service and working conditions of all employees herein named in the Maintenance of Way Department and sub-departments thereof

. . . .” “These rules” includes Rule 9. In this connection see Third Division Award 30282 between these same Parties where the Board, after finding that the contracted out work was “arguably scope-covered,” upheld the right of the Carrier to contract out the work and denied the claim.

That Rule 9 recognizes the right of the Carrier to contract out work within the scope of the Agreement is evident from the following language in Rule 9. Paragraph (a) of the Rule states that if the Carrier plans to contract out work “within the scope of this Collective Bargaining Agreement,” it must notify the General Chairman in writing of its intention to do so. Paragraph (b) of Rule 9 permits the Carrier to proceed with contracting out the aforementioned work if the Parties are unable to reach an understanding concerning the contracting. Paragraph (c) states that nothing in Rule 9 affects the existing rights of either Party in connection with contracting out. Paragraph (d) states that the amount of subcontracting will not be increased over the amount of contracting for the five-year period 1992-1996 without employee protective consequences. It is a fair assumption that in each of the years from 1992-1996 there was a substantial amount of contracting out.

The applicable Agreement of the Parties became effective on January 1, 2011. As of that date, the weight of arbitral authority regarding contracting out under said Agreement and its predecessors held that where a mixed practice existed, the Carrier had the right to contract out the work in question. See, for example, Third Division Awards 28654, 30282, and 40756. Under these circumstances, it is apparent that the Organization knew, or should have known, that by entering into the present Agreement there was no room for the argument that the Scope Rule and Rules 1 and 2, read together, prohibited the Carrier from contracting out work covered in the Scope Rule where there was a mixed practice whereby, in addition to having the work performed by BMWE-represented employees, such work was also contracted out.

The critical question in this case is whether a practice exists whereby work of the kind here in question has been previously contracted out. The Organization argues that in order to establish a binding past practice it must be shown that the practice is (1) clear, (2) longstanding, (3) consistent, and (4) acquiesced in by both Parties. Similar criteria are listed in Elkouri and Elkouri, <u>How Arbitration Works</u> (Sixth Edition, 2003, Alan Miles Ruben, Editor-in-Chief) (hereinafter Elkouri and Elkouri) at pp. 607-608. In the chapter Custom and Past Practice, under the

heading Evidence Required to Establish a Binding Past Practice, the text, citing Celanese Corp. of Am., 24 LA 168, 172 (Justin, 1954), states as follows:

> **"When it is asserted that a past practice constitutes an implied term of a contract, strong proof of its existence ordinarily will be required. Indeed, many arbitrators have recognized that, 'In the absence of a written agreement, "past practice," to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties.'"**

Elkouri and Elkouri, however, distinguishes between a past practice used to provide an implied term of the contract and past practice used to indicate the proper interpretation of contract language. Regarding the latter situation, the text states as follows:

*** * ***

> **"As has been noted, to establish a binding past practice as an implied term of the contract, 'the way of operating must be so frequent and regular and repetitious so as to establish a mutual understanding that the way of operating will continue in the future.' Put somewhat differently, 'the practice must be of sufficient generality and duration to imply acceptance of it as an authentic construction of the contract.' Accordingly, a 'single incident' has been held insufficient to establish a 'practice.'**
>
> **In contrast, for purposes of interpreting ambiguous language, relatively few past instances have been required to establish a binding practice. This is especially so when the incidents giving rise to the issue rarely occur. However, it is obvious that an asserted past practice provides no guide where the evidence regarding its nature and duration is 'highly contradictory.' Where such conflict exists, the arbitrator will be inclined to rely entirely on other standards of interpretation. Conversely, where the parties handle issues on an ad hoc basis, depending on the circumstances of the case, at least one arbitrator has ruled that the parties have created an established past practice of determining issues on a case-by-case basis.**

> **To be given interpretive weight, past practice need not be absolutely uniform. Arbitrators have held the 'predominant pattern of practice' to be controlling even though there had been scattered exceptions to the 'clearly established pattern . . . .'" (Elkouri and Elkouri, pp. 625-626, footnotes omitted).**

In the instant case it is clear that the Agreement between the Parties permits contracting out. What is not clear, however, from the language of the Agreement, is the intention of the Parties regarding the circumstances under which contracting out is to be permitted. The present case, therefore, in the Board's opinion, falls into the category where the past practice is consulted not for the purpose of establishing an implied term of the contract, but for the purpose of interpreting ambiguous language.

In this case the identical work described in the claim – "remove ballast retainers on deck bridges ahead of tie gangs" - was included in a 15-day notice dated June 2, 2010, of an intention to contract out construction and maintenance work on bridges that was sent by the Carrier to the same five General Chairmen as the January 17, 2011 notice, which is the subject of the instant claim. The June 2, 2010 notice expressly included "changing ballast retainers" among the work tasks to be performed, and the description of the entire work to be contracted out was verbatim the same as the work to be let as described in the present January 17, 2011 notice. The June 2, 2010 notification included bridge work to be performed at 106 different mileposts.

There is no indication in the June 2, 2010 notice that an "emergency" was involved; and there is no evidence in the record that the work was not actually performed by one or more contractors. Once the Carrier introduced into the record a copy of the June 2, 2010 notice covering work of the same kind as here in dispute, and which notice appeared regular on its face, the burden shifted to the Organization to come forward with evidence to show that there was some reason to believe that such work was not actually previously contracted out, or that there was some distinguishing circumstance involved which should cause the Board to disregard the previously contracted out work as evidence of a past practice. No such evidence was introduced into the record.

In addition to the evidence that identical work was previously contracted out by the Carrier without objection on the part of the Organization, the Carrier introduced evidence regarding past practice in the form of prior Third Division

Awards between these same Parties involving contracting out of bridge work. In Award 29007, the Board denied the Organization's claim on the basis that many phases of bridge construction and repair work had customarily and historically been performed both by contractors and by BMWE-represented employees. The Board did not engage in an analysis to determine if the exact same bridge work had previously been contracted out. The Organization, the Board remarked, was required to present "proof of more than a mixed practice." The evidence in the record shows that since 1991 the Carrier has continued to contract out a great deal of construction and repair work on bridges in addition to such work being performed by Maintenance of Way forces.

In Third Division Award 30282 involving these same Parties, the claim was that the Carrier violated the Agreement when it ". . . assigned outside forces . . . to perform bridge repair work on Bridge 346.8 at Calico Rock, Arkansas, beginning December 21, 1987 . . . ." The Board held, first, that ". . . the scope rule does not specifically, clearly, or unambiguously reserve the work to B&B forces." The Board further stated:

> **". . . Second, the purpose of Article IV [the predecessor to Rule 9 in the May 17, 1968, National Agreement] was not to prohibit contracting out, but to require notice and to require good-faith efforts toward using Carrier forces. Article IV specifically stated it was not intended to affect the existing rights of either party. In this regard we note a history of using outside contractors for major bridge work which predated Article IV. Article IV preserved this right when exercised in a reasonable manner. There is nothing in the record which convinced us that this right under these circumstances was improperly exercised. We note in this regard the scope of the project and the full employment of the Claimants. Accordingly, the claim is denied."**

In the instant case, also, the Claimants were fully employed. Taking all relevant factors into account, the Board is not convinced that the Carrier acted in bad faith or unreasonably on the facts of this case when it decided to exercise its right in a mixed practice situation to contract out the work in question. The existence of a mixed practice in the instant case is established both by the fact that work identical to the disputed work was previously contracted out by the Carrier without objection by the Organization and by a long history extending over many years wherein diverse kinds of bridge construction and repair work have been

contracted out in addition to the same kinds of work being performed by BMWE-represented employees. Accordingly, the claim will be denied.

The Organization also relies on the provision in the Berge-Hopkins Letter of Understanding which states, "The carriers assure you that they will assert good-faith efforts to reduce the incidents of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees." None of the cases cited to the Board decided on the basis of the existence of a mixed practice has held that the Berge-Hopkins LOU required a different result. Again, without passing on the disputed issue of whether that letter of agreement is still in effect between the Parties, the Board is likewise of the opinion that the LOU would not alter the result where there is an established mixed practice for contracting out such work such as in the instant 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 29th day of February 2016.