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

Award No. 42389
Docket No. MW-41913
16-3-NRAB-00003-120219

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Ames Construction) to perform Maintenance of Way and Structures Department work (stage material, drive piling, assemble new bridge components, install precast bridge caps, back walls, pans and other components and associated duties) at Mile Posts 348.25, 346.23, 344.89 and 349.17 on the Blair Subdivision commencing on October 18, 2010 and continuing (System File D-1052U-724/1546742).

(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 the aforesaid work and when it failed to make a good-faith effort to reach an understanding concerning said contracting 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 D. Bauer, T. Carr, I. Espinosa, A. Kieckhafer, T. D. Matthews, T. N. Matthews, R. Redfield and S. Schlensker shall now each be compensated at their respective and applicable rates of pay for an equal share of the total straight time and overtime man-hours expended by the outside forces in

the performance of the aforesaid work beginning October 18, 2010 and continuing."

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.

On April 15, 2010, the Carrier served notice on the Organization of its intent to contract out certain work on the Blair Subdivision:

"Location:	**Mile Post 344.02 to 349.77, Blair Subdivision**
Specific Work:	**Grading, drainage and bridge construction for Blair Subdivision second main line between Blair and Kennard, Nebraska"**

By letter dated April 20, 2010, the Organization requested additional information and a conference on the proposal, and the Parties met in conference on April 27, 2010. At the conference, the Carrier stated that there was no actual contract in place yet and that the project was "subject to funding." UP also stated that specialized equipment would be required and, in addition, that a past practice of subcontracting similar work brought this project under Rule 52(b) of the Parties' Agreement. By letter dated April 30, 2010, the Organization expressed its disagreement with the Carrier's position.

On October 18, 2010, employees from Ames Construction assembled at MP 348.25 on the Blair Subdivision and began construction of a new bridge structure that would carry the second mainline being constructed by the Carrier. Ultimately, outside employees performed bridge work at Mileposts 348.25, 346.23, 344.89 and 349.17. According to the Organization, the outside forces were working ten hours a day, six

days a week. The Organization filed this claim by letter dated December 17, 2010. By letter dated February 8, February 2011, the Carrier denied the claim. In addition to concluding that the Organization had not met its burden of proof in general, the Carrier stated that "the Carrier has a mixed practice utilizing contractor's forces to perform the type of work disputed in this case." In addition, the Carrier wrote, "even if such [work] were reserved to employees of your craft, the fact remains that the Claimants involved in this case do not possess sufficient fitness and ability to safely and efficiently perform the duties in question. The Claimants obviously cannot perform their assigned duties and perform the duties documented in the instant claim. This would have been physically impossible to accomplish." The Organization again protested, by letter dated March 29, 2011. By letter dated May 16, 2011, the Carrier responded, reiterating its position that there was a recognized past practice of contracting out bridge work. In addition, the Carrier stated that the work fell within the exceptions set forth in Rule 52(a) for "when such work is such that the Company is not adequately equipped to handle the work . . . ." Specifically, according to the Carrier, it "utilized outside forces to provide and operate front end loaders and excavators due to work that the Carrier was not adequately equipped to handle." The letter referenced an attached statement from a local manager, but that letter is not in the record. The Parties having been unable to resolve the dispute through the grievance process, it was submitted to the Board for a final and binding decision. The arguments presented by the Parties to the Board were the same as the ones they raised during the grievance process.

The Board will first address the notice issue raised by the Organization. On April 15, 2010, the Carrier informed the Organization of its intention to contract out "grading, drainage and bridge construction" at specific Mileposts on the Blair Subdivision. The work was part of a larger capacity project to construct a second main line on the Blair Subdivision between Cal Junction, Iowa, and Arlington, Nebraska. During conference, the Carrier indicated that it could not specify exactly when the work would be done, because of funding uncertainties; the work commenced some six months after notice was given. Considering the facts in the record, the Board concludes that the notice was not fatally defective. As this Board has noted previously, one must look at notice issues from a practical standpoint. There is no indication in the record that the April 15, 2010, notice was the Organization's first notice of the entire second main line project. Accordingly, the Board is willing to assume that the Organization knew about the larger project and would, from that knowledge and the specific notice provided by the Carrier on April 15, 2010, have a reasonable sense of the work that was anticipated in the April 15 notice: a new second line would entail either an entirely new bridge structure or considerable construction to retrofit any

existing bridge to accommodate a second track. The fact that the Carrier could not be specific about exactly when the work would be done does not, under the circumstances, undermine the validity of the notice: it is sometimes difficult with large construction projects to estimate timelines with exact specificity. The purpose of the notice provision in the Parties' Agreement is to provide the Organization with sufficient information to determine whether it wants to protest the proposed contracting out. Looking at the record overall, the Board concludes that the April 15, 2010, notice did that, even if it lacked a certain specificity of detail.

The Organization contends that the Carrier violated the Parties' Agreement when it contracted the work. Rule 8, Bridge and Building Subdepartment, states, in relevant part: "The work of construction, maintenance and repair of . . . bridges . . . will be performed by employees in the Bridge and Building Subdepartment." Clearly the Agreement contemplates that bargaining unit members will perform exactly the type of work at issue in this claim. Moreover, the work at issue is work that has historically, traditionally and customarily been performed by B&B force: the record includes site photographs submitted by the Organization that identify bridge work performed by the Carrier's B&B forces at the specific locations at issue here, including construction of entire bridges.

However, Rule 52(b) of the Agreement recognizes the Carrier's right to continue to subcontract work that it has previously contracted out:

> **"(b) Nothing contained in this rule shall affect prior and existing rights and practices 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."**

The Carrier has invoked Rule 52(b) here in defense of its right to contract out the work in dispute. Furthermore, it has submitted a number of prior Board awards recognizing its right under Rule 52(b) to contract out bridge work. (See, in particular, Awards 29007, 29782, 39273 and 40755.) Once that precedent has been established, the Board is constrained by principles of stare decisis to give deference to those prior Awards unless the Organization can demonstrate that the prior decisions relied upon by the Carrier are distinguishable. It is the Organization's responsibility to show the Board exactly why those prior decisions are either factually distinguishable or so fundamentally at odds with other decisions interpreting the language of the

Agreement that they do not warrant deference. For example, in Award 29782 the Board referred specifically to epoxy work that was subcontracted out - the Organization could attempt to distinguish that specific work from that at issue here. (Other Awards were broader in their scope.) In Award 39711, the Organization's dissent pointed out that the Board's interpretation of the language of the Agreement was one that, it believed, had been rejected by a majority of other Awards. The Organization has not, however, met that burden here. The Carrier has submitted evidence that it has previously contracted out bridge work similar to the work at issue in this case and that its right to contract out such work has been recognized in previous Board Awards. Under the circumstances, the claim is denied.

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 5th day of October 2016.