Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37315
Docket No. MW-36363
04-3-00-3-545

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 (Woodsky) to perform routine Maintenance of Way work of cleaning right of way of ties and debris between Mile Post 389 and Mile Post 419.50 on the Nebraska Division beginning on April 17, 1999 and continuing (System File W-9952-159/1200380).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work and failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Roadway Equipment Operators L. E. Loya, T. B. Micek, Truck Drivers D. L. Callan and S. P. Wetz shall now each be '*** allowed an equal proportionate share of the man hours worked by the outside contracting force as described in this claim, at their respective Roadway Equipment Operators and Truck Operators Straight Time and Overtime rates of pay as compensation for the violation of the Agreement for hours worked by the outside contracting force in cleaning the Right of Way of scrap ties and debris."

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 February 2, 1999, the Carrier served notice of its intent to utilize outside forces to perform right-of-way cleaning work. Specifically, the Carrier stated that, at various locations throughout the system, contractor forces would be used to pick up and dispose of used secondhand railroad ties behind system production tie gangs. The Organization took exception to the Carrier's position. A conference was held to discuss the matter, but the parties did not reach an agreement.

On June 15, 1999, the Organization filed the instant claim, alleging that the Carrier improperly contracted with an outside company, Woodsky, to clean the right-of-way of scrap ties and wood debris in conjunction with a tie renewal program between Mile Post 389.00 and Mile Post 419.50 beginning on April 17, 1999. The Organization contends that the work at issue is reserved to the Maintenance of Way Roadway Equipment Operators and Track Subdepartments under Rules 9, 10, 13 and 16 of the Agreement. It further contends that the Carrier did not establish that any exceptional circumstances existed that would have permitted the work to be contracted under Rule 52. Moreover, the Organization contends that the February 2, 1999 notice given by the Carrier was deficient in that it amounted to a "blanket" notice with little in the way of specific information.

The Carrier contends that the scrap ties that were removed were sold under a sales order to an outside contractor on an "as is, where is" basis. Therefore, the Carrier asserts, there can be no claim under the Agreement because title to the property vested in the contractor.

Furthermore, the Carrier argues that the claim was untimely filed. According to the Carrier, the project began before April 17, 1999 and thus the Organization's June 15, 1999 claim was well beyond the 60-day time limit permitted under the Agreement.

The Carrier also argues that the Scope Rule is general in nature and therefore the burden was on the Organization to prove that the work in question has been historically and customarily performed by BMWE-represented employees before a finding may be made that the work was reserved exclusively to them. In the Carrier's view, the Organization cannot meet that burden in light of the long practice of contracting out such work.

The Board first considers whether the Carrier affirmatively established that the work in question was performed on an "as is, where is" basis. Our review of the record shows that, despite the Organization's requests for a copy of the contract during the claim handling process, the Carrier did not furnish a copy of the "Contract for Work or Services" until the same day that the Organization filed its Notice of Intent to the Board on August 31, 2000. Although technically admissible, the probative value of the Carrier's evidence is indeed limited. As the Board explained in Third Division Award 37022:

> ". . . When one party submits new evidence or raises new argument so late in the claim-handling process that the other party is effectively denied the opportunity to respond, it is well-settled that such evidence or argument should receive little, if any, weight. In other words, the party who resorts to such tactics essentially forfeits the value that the evidence or argument might add to the record on its behalf. . . ."

In this particular case, there is an added reason for discounting the weight of the evidence submitted by the Carrier. The "Contract for Work or Services" dated May 1, 1998 does not, on its face, appear to be material or relevant to the dispute at hand. It lists the parties to the Agreement as the Carrier and RTI Railroad Materials, whereas the instant claim alleges that Woodsky was the contractor hired to perform the work at issue. Moreover, the contract specifies that work involving the removal of road ties would be performed in six states, but Nebraska, where the work at issue took place, was not one of the states listed. Overall, the Board

concludes that the Carrier failed to establish that the ties were the property of a purchaser rather than the Carrier.

That being said, we next consider the Carrier's assertion of untimeliness. As the party raising this affirmative defense to the claim, the Carrier had the burden to establish that the Organization's claim was outside the 60 day time limit provided in the Agreement. Careful examination of the record indicates that the Carrier failed to meet its evidentiary burden. The Carrier asserted that the date the contractor began picking up the used ties was "significantly prior to April 17, 1999," but there is no evidence to substantiate that broad assertion. Therefore, the Carrier's threshold procedural objection to the claim must be denied.

The final preliminary issue we must address before reaching the merits centers on notice. The Carrier did give notice on February 2, 1999 of its intent to contract out right-of-way cleaning work. Although the Organization objected to the lack of specificity of the advance notice, we find that sufficient information was provided by the Carrier to enable the Organization to adequately determine whether it believed this was work that should be performed by its members. A conference was held on the matter at which time the parties had an opportunity to discuss the issue. Accordingly, we conclude that the Carrier complied with notice and conference requirements in this particular case.

Turning to the merits, the Board notes at the outset that the parties exchanged a considerable amount of evidence and argument on this subject after the Notice of Intent was filed by the Organization. Once the Notice of Intent has been filed, however, the record is considered closed. Therefore, our consideration of the record is limited to the arguments and evidence exchanged by the parties prior to the submission of the Organization's Notice of Intent.

After careful review, the Board finds that, while there is no unanimity of opinion, it is clear that the vast majority of Awards on this property have recognized that the work at issue is reserved to the Organization by rule and practice. See Third Division Awards 28817, 29561, 30005, 30528, 31037, 31042, 31044, 31045 and 32327. In the absence of a controlling "as is, where is" Agreement, BMWE-represented employees were entitled to perform the work.

The Carrier argues that no monetary remedy should be awarded becuase the Claimants were fully employed at the time of the claim. To accept that argument,

however, would permit the Carrier to continue to violate the Agreement with impunity. The Claimants suffered a lost work opportunity and they shall be compensated for that loss. See Third Division Awards 37022, 32327, 30528, 30005 and 29561.

## AWARD

Claim sustained.

## ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of December 2004.