Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37480
Docket No. MW-36371
05-3-00-3-589

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 (former Chicago &
(North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (DeAngelo Brothers, Inc.) to perform Maintenance of Way and Structures Department work (operate tractor-brushcutters and chainsaws) to cut brush and trim trees on the right of way at crossings between Janesville, Wisconsin and Harvard, Illinois beginning June 7, 1999 and continuing, instead of Seniority District 8 employes J. P. Braun, J. R. Stone and L. D. Heitman (System File 8WJ-7270T/1198784 CNW).

(2) The Agreement was further violated when the Carrier failed to confer with the General Chairman in a good-faith attempt to reach an understanding concerning the work in question as required by Rule 1 and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants J. P. Braun, J. R. Stone, and L. D. Heitman shall now be compensated at their respective straight time rates of pay for an equal proportionate share of the total number of man-hours expended by the contractor's forces in the

performance of the aforesaid brush cutting and tree trimming work beginning June 7, 1999 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.

This case involves a continuing claim protesting the use of contractor forces to clear vegetation from crossings at Janesville, Wisconsin, to Harvard, Illinois, beginning June 7, 1999. The work consisted of cutting weeds, brush and trees on the Carrier's operating property that could potentially restrict the view of the operating property to and from grade crossings.

The Organization alleged during the on-property handling that the Carrier failed to give notice prior to contracting out the work at issue. Moreover, the Organization contended that this was work expressly reserved to the Claimants under the Scope Rule. The work of cutting and clearing of weeds, brush and trees on the Carrier's operating property is a necessary and integral part of right-of-way maintenance. Not only does the Carrier possess the equipment needed to perform the disputed work, the Organization argued, but the Carrier's own policy directive dated October 21, 1998 acknowledged that work of the nature performed herein has been regularly performed by Maintenance of Way forces.

For its part, the Carrier insisted that advance notice was given to the Organization. At the August 29, 2000 conference on this matter, the Carrier provided the service order which demonstrated that a proper contracting notice was

issued on October 29, 1998. On the merits, the Carrier acknowledged that Maintenance of Way forces have performed the disputed work in the past. Nevertheless, the Carrier argued, the work has also been contracted out on many prior occasions so that, at best, a mixed practice exists. In the Carrier's view, there is therefore no basis for the Organization's claim that "all work" of this nature is reserved to Maintenance of Way forces. Moreover, the Carrier submits that the work involved some chemical spraying which is specialized in nature and which the BMWE is not qualified to perform. For these reasons, the Carrier maintains that no violation of the Agreement has been shown.

The Board thoroughly examined the lengthy record in this case. As noted, the Organization maintained throughout the handling of the matter on the property that no notice had been served. After the claim was docketed with the Board, however, the Organization contended instead that the Carrier failed to confer in good faith regarding the notice. The Board is not permitted to resolve the discrepancy between the claim advanced on the property and the claim submitted to the Board. It is well-established that when there is substantial variance between the two, as in this case, the claim must be dismissed. See, e.g., Third Division Awards 28466 and 23892.

Moreover, even if we were to bifurcate the claim and dismiss only Paragraph (2) as being substantially different than the notice claim progressed on the property, we would nevertheless conclude that the Organization failed to meet its burden of proof on the merits. In a case such as this where the Scope Rule is general in nature and does not specifically refer to the disputed work performed, the Organization must establish that BMWE forces have traditionally performed the work as a matter of practice. In Third Division Award 29033, the Board held that the proofs must show that "the employees have continued to do the work with the requisite regularity, consistency and predominance necessary to establish customary and historical performance."

No such showing was made during the handling of the case on the property. While we do not require proof of exclusive performance, there must be something more in the way of probative evidence than a mixed practice. Having failed to establish scope coverage either by an express reservation of work or by practice, the claim must be denied. We note that our conclusions herein are consistent with

many other cases on this same subject. See, Third Division Awards 36090, 31668, 30688 and 30264.

AWARD

Claim dismissed.

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 19th day of April 2005.

LABOR MEMBER'S DISSENT
TO
AWARD 37480, DOCKET MW-36371
(Referee Kenis)

A Dissent is required in this case because the Majority erred in two (2) ways. First, the Majority took it upon itself to dismiss the claim on the misguided assertion that the claim before the Board was materially different from that which was progressed on the property. The claim was filed because the Carrier contracted with an outside concern to perform work reserved to the Maintenance of Way Employes. It was asserted by the Organization that no notice was served and took issue with the allegation raised by the Carrier after conference that it had issued notice. Even if the documents presented by the Carrier were construed as proper notice, the main thrust of the claim was the assignment of an outside concern to perform Scope covered work. There have been virtually hundreds of contracting out of work claims progressed to this Board wherein the Organization asserted throughout the on-property handling that no notice was issued. Never has the Board dismissed a claim presented to it wherein the question was whether or not notice was issued. The Board has the authority to examine the record and make a determination as to the veracity of the evidence presented on the property and it should have done so here. Instead, the Majority in this case bought into the bogus argument as was progressed by the Carrier Member that such discrepancy represented a material change in the claim.

The last letter from the General Chairman pointed out that the notices presented by the Carrier at conference did not apply in this case because they involved situations where specialized equipment not available to the Carrier was cited as a reason for contracting out the work. The correspondence reveals that the General Chairman clearly stated that the case at issue here did not involve the use of special equipment not available to the Carrier. Hence, the Organization's position was that because the Carrier contended that those notices did apply in this case represented bad faith on the Carrier's part. In any event, such was not sufficient reason for the Board to dismiss the claim. Indeed, this very issue was one of the subjects of a recently adopted award involving these same parties and a contracting out of work dispute. In Award **37022**, the Board held:

> "Regarding the Carrier's changed-claim contention, our review of the record confirms that no allegation of a notice violation was stated in the claim as originally filed on November 9, 1999. No such allegation was advanced until the Organization's appeal dated February 28, 2000, which was more than 100 days after the initial claim filing. Despite this delay, careful review of the record shows that the parties did handle the alleged notice violation on the property. It was apparently discussed at the parties' June 9, 2000 conference. Although the Organization's September 7, 2000 letter following the conference reasserts most of the contentions it had been making all along, it did not reassert a notice violation.

> "Moreover, the Organization's December 20, 2000 letter acknowledges that the Carrier provided notice, although it is clear that the Organization did not agree with the Carrier's rationale for contracting the disputed work. While the handling of the alleged notice violation was somewhat unusual, we do not find that it departed sufficiently from the requisite procedure for handling on the property to cause a loss of jurisdiction."

In that case, as it was here, the Organization and the Carrier differed as to whether or not notice was issued. In that case, the Organization filed in Paragraph 2 of the Statement of Claim, an identical charge that the Carrier failed to provide a proper advance written notice and failed to make a good-faith attempt to reach an understanding. Clearly, the Board in Award **37022** did not view such as cause for removing the subject claim from the jurisdiction of the Board.

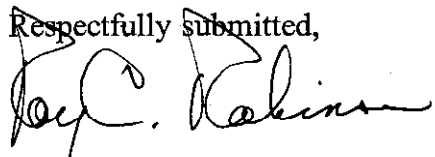
Not content with just one (1) error, the Majority asserted that the Organization failed to meet its burden of proof on the merits. The Scope Rule of this Agreement has been consistently interpreted to reserve **all** work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the railroad to Maintenance of Way employes. Hence, the cutting of brush, trees, weeds and grass on the Carrier's property is quintessential Maintenance of Way work. Moreover, evidence presented during the handling of this dispute on the property proved that the Track Department employes had performed this identical work using Carrier owned machinery in the past. This undisputed fact was never refuted by the Carrier during the handling of this dispute on the property. Again, the Board held in Award **37022**:

> "Award 16 of Public Law Board No. 1844 resolved this controversy in 1977. The Award found the Rule to be a specific reservation of work in the first paragraph subject to the exceptions stated in the second paragraph which permitted contracting of work. In so finding, the Award also found questions about customary, historical and traditional performance to be largely irrelevant in the face of the express language of the first paragraph that states that '...all work in connection with the construction, maintenance, repair of tracks, structures and other facilities used in the operation of the Company . . . on the operating property ...' shall be performed by scope-covered employes."

The above-cited Award **37022** was provided to the Board during the panel discussion of this case, but it was evidently not read by the Majority. If the Board had read and considered

Award **37022**, it could not have come to the conclusion that it did concerning the merits of this case. Assuming, **arguendo**, that the Majority did read and consider that award, it would have been incumbent on it to distinguish the facts of that case with the facts before it in this instance. Because the Majority wrongly decided to dismiss this case, it added insult to injury by adding the ignominious language concerning the merits of the case. Because the Majority erred by dismissing this case and in its interpretation of the Scope Rule, Award 37480 is palpably erroneous and has no precedential value.

Respectfully submitted,



Roy C. Robinson
Labor Member

CARRIER MEMBERS' CONCURRENCE
TO
THIRD DIVISION AWARD 37480, DOCKET MW-36371
(Referee Kenis)

The Majority's award conforms to the on-property record and longstanding arbitral precedent. The Organization's arguments on dissent were fully briefed and presented during on-panel discussions. The Referee obviously found neither facts nor logic in the Organization's skewed views.

Let's start with the Organization's first point of dissent, viz., "Never has the Board dismissed a claim presented to it wherein the question was whether or not notice was issued." The Board did not dismiss the claim on whether notice was issued; the Board dismissed the claim because the Organization submitted a different dispute than the one that was handled on the property. The Neutral Member therefore made the right decision to dismiss the Instant Claim.

The Neutral Member also correctly gave no credence to the Organization's procedural arguments as derived from its misapplication of Third Division Award 37022. The facts in Third Division Award 37022 are not the same as the facts in the Instant Claim. In Third Division Award 37022, the Organization did allege failure to provide advance notice in its Statement of Claim and did discuss failure to provide advance notice during the on-property handling. In contrast, the Organization in the Instant Claim did not allege failure to provide advance notice in its Statement of Claim and did not discuss the "failure to confer" allegation during the on-property handling. These readily apparent material factual differences show that the Neutral Member was right to ignore the Organization's arguments as spun from irrelevant Third Division Award 37022.

The Organization's second point of dissent concerning scope rule analysis ignores longstanding carrier-specific precedent. Third Division Award 37022 is an aberration to the majority view. The longstanding precedent under successive agreements applicable to former Chicago & North Western Railroad assets is that the Organization must provide evidence of past practice that its members have historically, traditionally, and customarily performed the claimed work in the absence of specific language reserving the work. See: Third Division Awards 37363 BMWE v UP (C&NW)(Goldstein)(2005); 31640 BRSG v UP (C&NW) (BMWE Third Party) (Mason) (1996); 21470 BMWE v C&NW (Railer) (1977); 21287 BMWE v C&NW (Eischen) (1976); 13822 BMWE v C&NW (Englestein) (1965); and Public Law Board 2960 (BMWE v C&NW) (Vernon), Awards 175 (1993), 144 (1990), and 139 (1989). Relevant excerpts from the foregoing awards include the following:

"Moreover, after a due study of the facts of record in this case, we find that **the Organization additionally did not carry its burden of proving that, either under Rule 1-Scope, or by past practice, the brush cutting work typically performed by the Claimants involved the additional work of herbicide spraying as was the situation here.** See Third Division Award 36515. Additionally, the Carrier's position that it was not required to piecemeal the project is supported by clear arbitral precedent. See Third Division Awards 20785, 26850 and 30633. **Thus, the Organization failed to prove, by substantial evidence, that the Claimants were entitled to the contracting work in dispute."** Third Division Award 37363.

"Applying the relevant facts to this language [Rule 1(b)], it can be determined at the outset that the work of constructing structures is specifically reserved to the employees. However, the inquiry doesn't end here. There is another relevant question, to wit, whether the specific type of structural construction in this case is 'customarily performed by [the] employees...'. This relates to the first sentence of the second paragraph of Rule 1(b)." PLB 2960, Award 144.

"As for the Grinnell project, we are not convinced that Rule 1 specifically reserves the paving of sidewalks and street approaches to active crossings to Carrier forces. ... ***In short, the language in this respect is ambiguous and to establish that the work was reserved to the Claimants the Organization would have to put forth convincing evidence of a customary past practice."*** PLB 2960, Award 139.

Third Division Award 37022 does not discuss the foregoing eight on-property awards in reaching its decision to rely on Public Law Board 1844, Award 16. Because the language of Rule 1(b) does not specifically address weed control and Third Division Award 37022 does not consider all relevant on-property precedent, the Neutral Member in the Instant Claim was justified to follow the majority view of on-property precedent and conclude that the work was not proven to be reserved to the Organization by history, custom, or practice.

The Organization's dissent is groundless. The Organization Member's categorization of the Neutral Member's chosen language as "ignominious" is nothing more than a blatant attempt to pencil-whip the Referee for refusing to buy into his fanciful spin. Her logical and well-founded analysis and conclusions deserve full consideration and application in all subsequent disputes.

Bjarne R. Henderson

Martin W. Finkelhut

John P. Lange

Michael C. Lesnik

June 22, 2005