Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37490
Docket No. MW-36085
05-3-00-3-118

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin 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 (Owen Tree Company) to perform routine Maintenance of Way work of cleaning the right of way (mowing weeds, tree cutting, brush cutting and related general clean up work) on the Idaho Division beginning on November 4, 1998 and continuing (System File J-9852-84/1175350).

(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, Idaho Division Track Subdepartment employes D. LeFevre, P. M. Cantu and T. B. Smith shall now each be compensated for an equal proportionate share of the total number of man-hours expended by the outside forces in the performance of the work in question at their respective straight time rates and time and one-half rates of pay and each shall be allowed any and all lost credits or benefits."

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 October 15, 1998, the Carrier issued notice of its intention to hire a contractor to "cut brush" as needed in the State of Idaho. The notice contained disclaimer language regarding the scope coverage of the work. According to the record, the actual work consisted of cutting brush, weeds, and trees followed by chemical treatment of the affected areas.

The General Chairman protested the notice because its "blanket" nature lacked meaningful details about the planned work. He requested a telephone conference after the missing detail information was provided to him. His response also asserted that the planned work was the type of work customarily performed by Maintenance of Way forces and was also reserved to such employes by Agreement language. No such conference is shown by the record.

The Carrier implemented its planned contracting of the work. The instant claim was filed thereafter on December 30, 1998. It challenged both the propriety of the notice as well as the merits of the contracting. It sought damages on behalf of employees who were alleged to have been furloughed at the time of the work. Although the claim asserted customary and traditional past performance by Carrier forces, the claim qualified this assertion by twice noting that the work was "similar" to work the employees had done.

The Carrier's responses on the property directly refuted the Organization's assertions about scope coverage and reservation of the work by Agreement language. Instead, it asserted that the kind of work involved was customarily and traditionally performed by outside contractors. The Carrier also challenged the alleged furlough status of the Claimants and provided payroll records showing that they were employed during the claim period.

Neither party provided meaningful evidence in support of their positions on the merits of the scope coverage question. Two photographs of the contractor's work provided by the Organization are of such poor quality that they do not display any useful information. A statement also provided speaks only to the Carrier's ownership of some mowing and brush cutting equipment, but does not describe the extent of its use.

The parties cited prior Awards on both sides of the scope coverage and work reservation question. The Scope Rule itself is general and although Rule 9 does mention "mowing and cleaning of right of way," there is a split of prior decisions as to whether the Rule represents a reservation of work or only a classification Rule that does not reserve work.

Both parties also rely on Rule 52 in support of their positions. It reads, in pertinent part, as follows:

"RULE 52 – CONTRACTING

(a) By agreement between the Company and the General Chairman, work customarily performed by employes 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 employes, 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 representatives 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.

(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.

* * *

(d)Nothing contained in this rule shall impair the Company's right to assign work not customarily performed by employes covered by this Agreement to outside contractors." (Emphasis added.)

Although the serving of a contracting notice under Rule 52(a) has become a "safe harbor" procedure for situations where Carrier forces have merely performed the same type of work in the past, by its explicit terms Rule 52(a) only requires such notice where it is shown that the employees have customarily performed the work. This observation appears to be confirmed by Rule 52(d).

On the record before us, the lack of probative evidence does not provide a proper basis for answering the question of who has customarily performed the type of work in dispute. Moreover Award 8 of Public Law Board No. 6205 specifically recognized that the same Carrier here had successfully established a mixed-practice with respect to the work in dispute which, therefore, brought the work within the ". . . prior and existing rights and practices . . ." exception found in Rule 52(b).

In disputes of this kind, it is well settled that the Organization bears the burden of proof to establish scope coverage and/or reservation of the work. On the record before us, we must find that the Organization's evidentiary burden has not been satisfied.

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 19th day of April 2005.