

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41029
Docket No. MW-41237
11-3-NRAB-00003-100077**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 (United Pumping Service, Inc.) to perform Maintenance of Way work (cleaning of right of way) between Mile Posts 182.1 and 185.3 on tracks in the Hinkle Yard beginning on September 4, 2008 and continuing through October 26, 2008 (System File C-0852U-176/1510795).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a 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 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 K. Fernald, J. Minica, B. Blaylock, C. Schuh and K. Gutierrez shall now each be compensated at their respective and applicable rates of pay for an equal and proportionate share of the total man-hours expended by the outside forces in the performance of the**

aforesaid work beginning September 4, 2008 and continuing through October 26, 2008.”

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.

In its claim letter dated September 24, 2008, the Organization protests the Carrier's use of outside forces beginning September 4, 2008, for “. . . yard/track clean-up along with the associated duties . . . cleaning right of way, (yard tracks) along with associated duties between mileposts 182.1 and 185.3 in the Hinkle Yard on the Portland Subdivision (830) within the Oregon Division and Northwest District.” Further describing that work in its September 24, 2008 letter, the Organization states that “[t]his work entailed utilizing a tractor weed mower, a brush cutter and various hand tools such as ‘weed eaters’, shovels and rakes to cut brush and clean right of way.”

In its November 17, 2008 response, the Carrier referred to a notice from the Carrier to the Organization dated January 10, 2008, for contracting vegetation control, which provided the following:

“Subject: 15-day notice of our intent to contract the following work:

Location: Various points across the Union Pacific system.

Specific Work: providing all labor, tools, equipment, and materials necessary to provide vegetation control services along various main lines, branch lines, yard tracks and railroad property through 12/31/08.”

Even though the Organization described the work in its September 24, 2008 letter as “[t]his work entailed utilizing a tractor weed mower, a brush cutter and various hand tools such as ‘weed eaters,’ shovels and rakes to cut brush and clean right of way,” in its January 12, 2009 letter, the Organization asserted that “. . . the work grieved herein involves cleaning of track structure utilizing a vacuum truck, backhoe and hand tools . . . [i]t has nothing to do with vegetation control or brush cutting and is not relevant to the instant claim.”

In its February 13, 2009 response, the Carrier noted the Organization’s specific reference in its September 24, 2008 letter to “[t]his work entailed utilizing a tractor weed mower, a brush cutter and various hand tools such as ‘weed eaters,’ shovels and rakes to cut brush and clean right of way.” The Carrier then asserted that it had considered the claim to be about vegetation control and further asserted that “. . . the Organization has now changed the claimed work as cleaning of track structure using a vacuum truck . . . [t]he work claimed has fundamentally changed and thereby the Organization’s claim must be denied.”

We need not address the Carrier’s argument that the claim should be denied because the Organization changed the nature of the dispute from contracting of vegetation control to contracting of cleaning of track structure.

If the claim is considered as one protesting the Carrier’s contracting of vegetation control, for reasons set forth in Third Division Awards 40756, 40758, 40759, 40760, 40761 and 40762, this claim must be denied. Those Awards denying the Organization’s claims were vegetation control contracting claims involving the same notice involved in this case. Those Awards found that the notice was adequate and that the prior Awards on the property have permitted the Carrier to contract this type of work.

If the claim is considered one of protesting the Carrier’s cleaning of track structure, the claim must also be denied.

With respect to the notice issue, we note that in the claim the Organization does not assert that the work was done without notice. Instead, the Organization asserts in the claim that “the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work. . . .” [Emphasis added] Given that there was a change in the Organization’s description of the work in its September 24, 2008 letter from “[t]his work entailed utilizing a tractor weed mower, a brush cutter and various hand tools such as ‘weed eaters’, shovels and rakes to cut brush and clean right of way” to “. . . the work grieved herein involves cleaning of track structure utilizing a vacuum truck, backhoe and hand tools . . . [i]t has nothing to do with vegetation control or brush cutting and is not relevant to the instant claim” in its January 12, 2009 letter and further given that the Organization asserts in the claim that the Carrier’s notice was not “proper” as opposed to not given at all, the Board cannot fault the Carrier for relying upon the January 10 vegetation control notice and the conference on that notice which followed on January 18, 2008. In this regard, the Board further notes that this record contains the Organization’s January 14 response to the Carrier’s January 10, 2008 notice concerning vegetation control. Under these circumstances the Board is unable to find that the Organization demonstrated a notice violation.

We next turn our attention to the merits of the Organization’s argument that notwithstanding its initial characterization of the claim as a protest concerning the contracting of vegetation control, it was actually protesting the contracting of cleaning of track structure. The Board would deny the claim based on that argument as well. Prior precedent between the parties has permitted similar work to be contracted. See e.g., Third Davison Award 31276 (involving the “. . . general clearing of debris, which has been contracted out in the past . . . [and] given the existence of the past practice, the Organization cannot prevail in this case.”)

The claim lacks merit and, therefore, it must be denied.

AWARD

Claim denied.

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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 23rd day of August 2011.