

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41105
Docket No. MW-40914
11-3-NRAB-00003-090178**

The Third Division consisted of the regular members and in addition Referee Sherwood Malamud when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago and
(North Western Transportation Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier utilized outside forces (Stralow Blacktop) to perform Maintenance of Way and Structures Department work (cut/remove brush and ditch grading) between Mile Posts 125.0 and 130.0 on the Geneva Subdivision and at Mile Post 4 on the Clinton Subdivision on September 7, 10, 13 and 14, 2007 (System File S-0701C-365/1490590 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b) and Appendix 15.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Sawvell, W. Braden, E. Imel and S. Chavez shall now each “*** be compensated at the applicable overtime rate of pay an equal and proportionate share of the (64) sixty four man hours expended by the Contractor employees on September 7, 10, 13, and 14, 2007.”**

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.

While the Organization's claim is that the Carrier contracted out work of cutting brush and ditch grading in this instance, the Carrier denies the performance of ditch grading by the contractor. Inasmuch as there is no evidence in the record of ditch grading work having been performed, the Board confines itself to consideration of the brush cutting work performed by the contractor on the claim dates.

The Organization claims the Carrier failed to provide the Organization with any notice of the contracting. The Carrier asserts it did provide notice on June 22, 2007 by Service Order No. 36747 that provides as follows:

“This is a 15-day notice of our intent to contract the following work:

Location: various locations on the Railroad's system

Specific Work: the labor, material, equipment and tools necessary to provide vegetation control services along various lines, branch lines, yard tracks, railroad property, etc.”

Rule 1 - Scope governs the determination of this dispute. It reads, in pertinent part, as follows:

“B. Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all

work in connection with the maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common Carrier service on the operating property. . . .

By agreement between the Company and the General Chairman work as described in the preceding paragraph which is customarily performed by employees described, herein, may be let to contractors and be performed by contractor's forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; unless work is such that the Company is not adequately equipped to handle the work; or, time requirements must be met which are beyond the capabilities of Company forces to meet.

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 Brotherhood in writing as far as 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."

The Carrier contends the above quoted language is general in nature. It does not specify the work reserved to BMW-employees. Moreover, brush cutting is not specifically referenced in the language of the Scope Rule. At best, brush cutting is subject to a mixed practice. It is not work customarily performed by employees. The Organization failed to meet its burden to establish by probative evidence that BMW-employees customarily perform brush cutting work with the "requisite regularity, consistency, and predominance." In support of its position, the Carrier cites Third Division Award 37480, which, in turn, cites Third Division Award 29003.

The Board concludes that the Carrier did provide notice of its intent to contract out work, as quoted above. Consequently, this is not a "no notice" case. However, the Organization challenges the sufficiency of the notice. The notice does not set forth the reasons for the contracting out as required in Appendix 15 to the

C&NW Agreement. (See Third Division Award 41044.) This Award follows the rationale of that Award, which held that the notice should reference the reasons for the contracting. Therefore, the Board concludes that the Carrier violated the Agreement.

There is no dispute that the Claimants were fully employed. None of the Claimants were on furlough. As noted in the Award 41044, there are a substantial number of Awards emanating from disputes on the former C&NW property of the UP system which hold that in the absence of loss, a monetary award is inappropriate. See Public Law Board No. 1844, Award 13, as well as Third Division Awards 31036, 31284, and 32352. In accordance with this well established on-property precedent, the Board refrains from providing a monetary award to the Claimants.

AWARD

Claim sustained in accordance with the Findings.

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 18th day of October 2011.