Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36090
Docket No. MW-34833
02-3-98-3-522

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig 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 (Tweedy Contractors) to perform Maintenance of Way work (cut weeds and brush) at various road crossings between Mile Posts 250.9 and 165.9 (Waco Junction to Fort Worth, Texas) on the Fort Worth Subdivision on April 1 through 30, 1997 (System File Y97219/1074465 MKT).

(2) As a consequence of the violation referred to in Part (1) above, the Claimants listed below shall each be allowed one hundred seventy-six (176) hours' pay at their respective straight time rates.

M. E. Brooks	J. D. Stiles
D. H. Lemon	B. L. Downs
M. W. Heard	B. F. Swearengin, Jr.
C. E. Sexton	D. C. Tucker
R. H. Steen	E. A. Moore"

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.

Claimant R. H. Steen established and holds seniority as a Track Foreman; Claimants M. E. Brooks, D. H. Lemon, M. W. Heard and C. E. Sexton established and hold seniority as Machine Operators; and Claimants J. D. Stiles, B. L. Downs, B. F. Swearengin Jr., D. C. Tucker and E. A. Moore established and hold seniority as Laborers on District No. 2 in the Maintenance of Way Department for the Missouri-Kansas-Texas Railroad Company (MKT). At the time of the incidents in question, the Claimants were regularly assigned in their respective classes.

The facts of the instant matter do not appear to be in dispute. From April 1 through April 30, 1997, the Carrier assigned and used Tweedy Contractors to perform brush cutting and weed mowing at and around road crossings from Waco Junction to Fort Worth, i.e., between Mile Posts 250.9 and 165.9 on the Forth Worth Subdivision. One Foreman, four Machine Operators and five Laborers, none of whom held seniority or work rights under the Agreement, utilized chain saws, brush axes and four weed mowers to perform the subject work. The contractor performed the subject work for eight hours each day for a total of 176 man-hours.

The Organization takes the position that the Carrier violated the Agreement when it awarded the work in question to an outside contractor. The Organization claims that the Carrier did not provide proper notice to its General Chairman of its intent to contract out the instant work. Further, the Organization claims that the Carrier did not engage in good faith discussions regarding the contracting out of such work. Finally, it claims that the work in question is traditionally performed by the Organization and Organization members should have been assigned to complete this work. As a remedy, the Organization claims that the Claimants should be made whole for all work opportunities lost.

Conversely, the Carrier takes the position that the Organization has the burden of proof and it cannot meet that burden. First, the Carrier contends that it provided sufficient and specific notice to the Organization of the contracting. The Carrier asserts that the Organization in fact admitted that it received such notice. Additionally, the Carrier contends that the contracted work does not belong to BMWE-represented employees under either the express language of the Scope Rule or any binding past practice. Further, according to the Carrier, prior precedent has upheld the Carrier's position in similar cases.

The Organization's allegations regarding inadequate notice are rejected. After a review of all the facts, we find that the Carrier did give proper notice to the Organization.

Thus, we reach the substance of the "scope" issue. In Special Board of Adjustment No. 1016, Award 150, the Board framed the scope issue as follows:

> "In disputes of this kind, the threshold question for our analysis is that of scope coverage. There are generally two means of establishing scope coverage. The first is by citing language in the applicable scope rule that reserves the work in disputes to the Organization represented employees. The second method is required when the language of the scope rule is general. In that event, the Organization must shoulder the burden of proof to show that the employees it represents have customarily, traditionally and historically performed the disputed work. It is well settled that exclusivity of past performance is not required in order to establish scope coverage vis-à-vis an outside contractor."

In the instant case, we carefully reviewed all evidence regarding whether the Organization has proven the work involved belongs to the Organization. First, we note that the work of cutting brush and weeds is not specifically identified in the Scope Rule.

We next turn to whether there is sufficient evidence for the Organization to have proven that it has customarily, traditionally and historically performed the disputed work. In the instant case, while there has been some evidence that the work in question has belonged to the Organization, there has not been enough evidence to allow the Organization to meet its burden of proof. The Organization did present statements from two employees at the conference on January 27, 1998. The statements, however, consisted of nothing more than the fact that the outside contractor was observed working on the Carrier's property. Neither statement had anything to say concerning the basic issue of whether the Organization had the right to perform the work.

Further, other cases have held that brush cutting is not covered by the Scope Rule and is not reserved to members of the Organization. In Third Division Award 13771, the Board held that similar work, the work of cutting the right-of-way around road crossings, did not belong to the Organization:

> "The issue here to be resolved is whether the Scope Rule, above quoted, confers upon the Organization the exclusive right to perform the work done by the contractor. It will readily be seen that the rule is general in nature, and in the absence of a specific reservation of the work in question to the

Claimants, the Organization has the burden of proving the work performed was of a type historically and traditionally performed by Maintenance of Way employees to the exclusion of others. The evidence shows that over the years, the carrier has in fact contracted out the work in question. We also find that the Organization has failed to meet the burden of proving that the work was performed historically and traditionally by the Maintenance of Way forces to the exclusion of all others and for the reasons found, we must conclude that the claim lacks merit for a sustaining award and must be denied."

Based on the evidence in this matter as well as the above-cited precedent, we find that the Organization has not been able to establish scope coverage in this matter. We cannot find that the work of brush and weed cutting is either definitively encompassed within the plain language of the Scope Rule or that the Organization has been able to prove that this work was historically and traditionally performed by members of the Organization.

Thus, having determined that the notice was proper and that the work was not within the scope of the Organization, we find that the Organization has not met its burden of proof and the claim is therefore denied.

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 22nd day of July 2002.