

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40582  
Docket No. MW-39073  
10-3-NRAB-00003-050519  
(05-3-519)**

**The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference**  
**PARTIES TO DISPUTE: (**  
**(Union Pacific Railroad Company (former Southern**  
**( Pacific Transportation Company [Western Lines])**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned outside forces (Jim Dobbas, Inc.) to perform Maintenance of Way and Structures Department work (install culverts) on the Dunsmuir District, Roseville Service Unit in the vicinity of Dunsmuir, California beginning on August 9, 2004 and continuing, instead of System Bridge Gang No. 8029 employees R. Bogosian, J. McCullough, R. Hooley, R. Dupre, J. Londo, R. Thompson, R. Cabral and M. Haugh (Carrier’s File 1409037 SPW).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance written notice of its intent to contract out the work referenced in Part (1) above or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces in accordance with the provisions of Rule 59 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 R. Bogosian, J. McCullough,**

R. Hooley, R. Dupre, J. Londo, R. Thompson, R. Cabral and M. Haugh shall now each ' . . . be paid his proportionate share of all hours worked by the outside contractor from August 9, 2004 and continuing until such time as the violation ceases to exist, which shall be no less than fifty (50) hours identified herein, at their respective rate of pay.\*\*\*'"

**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.

The instant dispute challenges the action of the Carrier when it used the services of a contractor to install a culvert at Mile Post 319.30 on the Valley Subdivision. The Carrier served notice of its intent to contract out certain work on bridges and culverts by letter dated April 2, 2003. The General Chairman requested a conference on the notice which was conducted on April 23, 2003.

A sharp conflict developed over whether culvert installation was reserved to Carrier forces by virtue of the applicable Scope Rule. Although the Organization asserted that the work had been historically, customarily, and traditionally performed by Carrier forces, the assertions were flatly refuted by the Carrier. Indeed, the Carrier asserted that the work was the subject of a mixed practice and, accordingly, was not reserved to its employees by the Scope Rule.

The Organization also asserted that the Carrier's action violated the so-called Berge-Hopkins Letter of Understanding dated December 11, 1981. The Carrier refuted the applicability of the letter to the facts at hand.

We closely reviewed the Rules claimed by the Organization to have been violated by the Carrier. None of them explicitly reserve the type of work in controversy here for performance by Carrier forces. The applicable Scope Rule is a general type of scope Rule.

Where a scope Rule is general, a proof problem arises when, as here, there is a dispute over whether the work has been reserved. Where the past performance issue is thus joined, the burden of proof shifts back to the party seeking to advance the claim. This requires the party to provide actual evidence of past performance. That evidence must establish that the employees have historically, customarily, and traditionally performed the work.

The record before the Board contains nothing but assertions by the Organization without any actual evidence of past performance. In support of its position, the Carrier asserted that, by means of a May 14, 1999 letter to the Organization, it has an extensive history of contracting the type of work in dispute and that the Carrier had previously supplied the Organization with supporting documentation of that contracting history. The Carrier's assertions about the May 14, 1999 letter and supporting documents were not refuted by the Organization on the property.

Given the state of the record, we are compelled to find that the Organization failed to sustain its burden to establish scope coverage. Accordingly, we find that a violation of the Agreement has not been proven.

**AWARD**

Claim denied.

**Form 1**  
**Page 4**

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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 27th day of August 2010.**