Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40760
Docket No. MW-41240
10-3-NRAB-00003-100093

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

(Brotherhood of Maintenance of Way Employes 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 (A. R. Johnston & Company) to perform Maintenance of Way work (cutting brush and associated right of way cleaning duties) between Mile Posts 5.6 and 15.50 on the Portland Subdivision on August 28, September 2, 3, 4, 5, 6 and 27, October 2, 3, 4, 5, 6, 8, 9, 10 and 11, 2008 (System File C-0852U-182/1512346).

(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 S. Braddock, T. Webb, D. Jolly, M. Stovner and D. Wilson shall now each be compensated for one hundred sixty (160) hours at their respective and applicable rates 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.

By notice dated January 10, 2008, the Carrier advised the Organization:

"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."

A conference was held on January 18, 2008, but the parties were unable to resolve the Organization's objection to the Carrier's stated intent to contract the work. The subcontracted work commenced in August 2008. This claim followed.

This is the same type of work and notice discussed in Third Division Award 40756. Here, notice was given by the Carrier and a conference was held. Further, the disputed work was performed within the notice period specified by the Carrier and not less than 15 days after the notice was given as required by Rule 52. For the reasons discussed in Award 40756, supra, prior Awards on the property have permitted the Carrier to subcontract this type of work and have found that the type

of notice given by the Carrier in this case does not violate the notice requirements of Rule 52. Consequently, this claim must be 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 15th day of December 2010.

LABOR MEMBER'S DISSENT
TO
AWARD 40756, DOCKET MW-41234, AWARD 40758, DOCKET MW-41236
AWARD 40759, DOCKET MW-41238, AWARD 40760, DOCKET MW-41240
AWARD 40761, DOCKET MW-41266, AWARD 40762, DOCKET MW-41269
(Referee Benn)

INTRODUCTION

It is transparently clear that the decision of the Majority in Award 40756 was based entirely on prior awards without any regard for the fact that the evidence and argument in the instant case was substantially different than the evidence and argument advanced in the cases decided by those prior awards. Indeed, the Majority immediately launched into a discussion of "Prior Awards on this property", without any mention, much less a discussion and analysis of the argument and evidence in this case. This may have been convenient and expedient, but it was inconsistent with the Board's obligation to consider the evidence and argument in each case.

The value of treating like cases alike is well established. However, it is equally well established that arbitration awards are not binding in subsequent cases. Rather, prior awards may provide guidance, but they must be examined not only to determine if their reasoning is sound, but also to determine if they truly involve like cases with similar facts, evidence and argument. Simply put, neither labor arbitrators in general, nor the NRAB in particular, follow the principle of issue preclusion. Indeed, no less an authority than the United States Court of Appeals for the Seventh Circuit has ruled that the principle of issue preclusion does not apply at the NRAB but, rather, each side is permitted to try again with better arguments and evidence:

> "*** When multiple grievances pending at the same time depend on resolution of a single issue, the parties often designate one of the grievances as a 'lead case' whose resolution controls the others. Such a designation would be unnecessary if the first case to be decided had preclusive effect automatically. 'Lead case' designation informs the parties that they must assemble all of their evidence and make their best arguments in a single forum; the absence of such a designation implies that the parties need not concentrate their artillery but may make investments proportional to the stakes. ***
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> **Because this was not a 'lead case,' the Board permits each side to try again, with better arguments and evidence. It applies not principles of preclusion but an approach very much like the 'law of the case': the Board feels free to disregard an earlier decision that appears 'palpably erroneous' in light of the evidence and arguments in the second arbitration.** E.g., *Brotherhood of Maintenance of Way Employees–Burlington Northern, Inc.,* Award No. 22374 (3d Div.–Sickles 1979), at 2. ***" (Emphasis in bold added) *[Bhd. of Maint. of Way Employees v. Burlington N. R.R. Co., 24 F.3d 937 (7th Cir. 1999)]*

The Majority erred in Award 40756 by blindly following prior awards even though the evidence and arguments in this case were substantially different than the evidence and arguments presented in the cases decided by those awards. Future Referees should not compound this error by blindly following Award 40756 without carefully analyzing the arguments and evidence in the cases that are before them.

RULE 52(B) AND "MIXED PRACTICE"

The Majority relied heavily on the findings in prior awards that the Carrier had established a "mixed practice" of using contractors and employes covered by the Agreement to perform the work of mowing and cleaning the right of way and, therefore, the Carrier was permitted to contract out this work pursuant to Rule 52(b). But what the Majority failed to do was even consider, much less discuss and analyze, the Organization's evidence and argument which proved that the Carrier's so-called "mixed practice" argument was not only irrelevant under the terms of the Agreement, but factually wrong.

While no one disputes that Rule 52(b) preserves prior and existing practices,[1/] it also expressly preserves prior and existing rights and the Organization has conclusively established that it had prior and existing contract rights to perform mowing and right-of-way cleaning work pursuant to the clear and unambiguous language of Rule 9 and its predecessors. Although past practice may be used to fill in gaps in contract language, it can not be used to contravene the clear prior and existing rights that reside in Rule 9 (as well as Rule 8) and were expressly preserved in Rule 52(b). In short, the Organization has developed new argument and documentary evidence concerning the meaning and relationship of the plain language in Rules 9 and 52[2/] that renders the past practice asserted by the Carrier in this case to be completely irrelevant. The Majority's failure to even consider that argument and evidence resulted in an award that is palpably erroneous and should not be afforded any deference by future Referees.

Assuming that past practice was relevant despite the express reservation of work in Rule 9 (which it is not), the Carrier would have been obligated not simply to assert a past practice, but to present probative evidence that such a practice existed at the time Rule 52(b) was negotiated. Moreover, the Carrier would have been obligated to prove that the practice occurred for reasons other than the exceptions permitted by the Agreement and that it had all the requisite elements of a binding practice (i.e., that the practice was clear, long standing, repeated consistently and known at all requisite levels of the Organization). It simply did not do so in this case.

[1/] Although there can be no dispute that Rule 52(b) preserves prior practices, there is a considerable dispute over precisely what practices were preserved and what constitutes evidence of such a practice. Glossing over this important contract term with the phrase "mixed practice" is not sufficient to prove the elements of a binding practice.

[2/] The documentary evidence that Rules 8, 9 and 52 mean precisely what the Organization says they mean consists of both written admissions against interest by the Carrier and the documented bargaining history of these rules. *See* Third Division Awards 14061 (1965), 28817 (1991), 29916 (1993), the Fishgold Award (2003) and the Newman Award (2006). In particular, see the Fishgold Award at Pages 7-10 and 14, and the Newman Award at Pages 29-31. The Fishgold and Newman Awards arose in the context of threatened strikes and related litigation and were "party pay"arbitrations where the parties, in the words of the 7th Circuit "must assemble all of their evidence and make their best arguments in a single forum" and those awards fully support the Organization's position on the meaning of Rules 8, 9 and 52.

Finally, it is important to recognize that the Majority's unfounded assertions concerning a purported "mixed practice" are really nothing but another way of asserting the UP's own forces have not performed mowing and right-of-way cleaning work to the exclusion of all others. However, as the Majority should certainly know, it is now well established by literally dozens of awards, including awards on this property, that the so-called exclusivity test applies only to jurisdictional disputes between different classes or crafts of a carrier's own employes and does not apply to contracting out disputes. *See* on property Award No. 14 of PLB No. 7099 and Newman Award at Pages 31 and 35.

The logic for rejecting the application of the "exclusivity" or "mixed practice" test to contracting out disputes on this property is particularly compelling in light of the fact that the parties themselves expressly stipulated that Rule 52(a) applies to work "customarily" performed by employes covered by the Agreement. A school boy knows that "customarily" does not mean "exclusively". Moreover, applying the so-called exclusivity test to contracting out disputes is not only contrary to the black letter of Rule 52(a), but also in direct conflict with the spirit and intent of that provision as a whole. Unlike class or craft disputes where a class or craft of employes claims a right to perform certain work to the exclusion of all other employes, Rule 52(a) does not contemplate (and BMWE does not claim) an exclusive reservation of work as against contractors.

Instead, Rule 52(a) provides that work customarily performed by Scope covered employes may be contracted for the reasons expressly set forth in the rule (e.g., special skills, special equipment, special material and emergency time requirements). In light of these exceptions, it's safe to say that virtually any work customarily performed by employes within the Scope of the Agreement may have been contracted out at some time in the past and, therefore, none of this work would have been exclusively performed by Scope covered employes. In other words, applying the exclusivity or "mixed practice" test as the seminal test for the application of Rule 52(a) destroys Rule 52. Indeed, applying the exclusivity or "mixed practice" test would destroy the entire collective bargaining agreement because it drains all work from the Agreement and all terms and conditions of the Agreement attach to the performance of that work.

THE BLANKET NOTICE

Just as the Majority began its discussion of work reservation by alluding to "Prior Awards on the property", it launched its discussion of the notice, "Based on other Awards between the parties" without any reference to the evidence and argument advanced in this particular case. Moreover, both the prior awards on which the Majority relied and the Majority's decision in Award 40756 are bereft of any reason or rationale for finding the blanket notice sufficient to meet the Carrier's contractual obligations under Rule 52(a). Indeed, there is no explanation at all as to how the blanket notice could possibly be in compliance with either the black letter or the spirit of Rule 52(a) and the related December 11, 1981 Letter of Agreement. Nor was there any attempt by the Majority to distinguish the notice awards on which it relied from the many more fully reasoned awards which have found blanket notice insufficient to meet advance notice obligations, including carefully reasoned awards on this property.

The notice and good-faith meeting obligations in Rule 52(a) are simply the local codification of the notice and good-faith meeting obligations negotiated nationally in Article IV of the 1968 National Agreement. Since the inception of this language in 1968,

arbitrators have repeatedly looked to the clear language which required notice and discussion of a specific "contracting transaction" and held that blanket notices were inconsistent with this clear language. *See* Award No. 7 of PLB No. 2529 and Third Division Awards 25103, 25141 and 25667. There is absolutely no reason why this same national language should be interpreted differently on UP than on every other railroad in the nation. And, those arbitrators who have carefully examined the clear language in Rule 52(a) have similarly condemned blanket and pro forma notices on this property. *See* Third Division Award 29121 and Award No. 14 of PLB No. 7099 which, unlike the notice awards relied upon by the Majority in this case, carefully explain their rationale based on the clear language of Rule 52(a) and the December 11, 1981 Letter of Agreement. Indeed, Award No. 14 of PLB No. 7099 rejected a blanket notice that was conceptually identical to the notice involved in Award 40756 when it held:

> **"We first determine whether the Carrier's December 14, 2004 notice satisfied its requirements under Rule 52. Rule 52 provides, in relevant part:**
>
> **(a) .... 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 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 herewith.**
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> **(b) Nothing contained in this rule will 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.**
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> **(Emphasis added)**
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> **As we read Rule 52, it is our understanding that this rule requires notice to the General Chairman for *each instance* where the Carrier intends to contract out work customarily performed by Maintenance of Way forces. Given that the purpose of the Rule is to provide a framework for good faith discussions over the Carrier's intention to contract out such work, it makes no sense that the Carrier could satisfy its obligation under Rule 52 with the type of blanket notice it provided to the organization on December 14, 2004. Accordingly, we**

> **"find and conclude that the Carrier failed to abide by its obligations under Rule 52 prior to assigning the challenged work to Scarcella Brothers Contracting."** (Emphasis in bold in added) *(Award No. 14 of PLB No. 7099)*

Rule 52(a) permits contracting out of work customarily performed by Maintenance of Way employes where the work involves special skills, special equipment, special material or emergency time requirements. In this case, Union Pacific did not assert the application of any of the criteria expressed in Rule 52(a) which permit contracting. Indeed, Union Pacific could not identify any of these criteria as being applicable in the instant case because Union Pacific did not identify any specific vegetation control work that it intended to contract out. Rather, in the purported Rule 52(a) notice dated January 10, 2008, Union Pacific simply notified BMWE that it intended to contract out unspecified vegetation control work using unspecified equipment and materials at unspecified locations somewhere on the Union Pacific system on unspecified dates during the calendar year 2008. Consequently, the blanket January 10, 2008 notice was clearly at odds with the fundamental purpose of Rule 52(a) which is to provide for good-faith discussions concerning the exception criteria set forth in the rule to a specific "contracting transaction". These discussions simply can not occur in the absence of Union Pacific's identification of the particular work and the special skills, special equipment, special material or emergency purportedly associated with that work. Thus, UP's January 10, 2008 notice was not simply at odds with the black letter of Rule 52(a), but undermined the entire intent and spirit of the rule.

CONCLUSION

No less an authority than the United States Court of Appeals for the Seventh Circuit has recognized that the principle of issue preclusion does not apply at the NRAB but, rather, each side is permitted to try again with better arguments and evidence. The Majority erred in Award 40756 by blindly following prior awards on the work reservation and notice issue even though the evidence and argument in this case were substantially different than the evidence and arguments in the cases decided by those awards. Future Referees should not compound this error by blindly following Award 40756 without carefully analyzing the evidence and arguments in the cases that are before them.

The findings in Award 40756 were applied in Awards 40758, 40759, 40760, 40761 and 40762, so this dissent applies with equal force and effect to those awards.

Respectfully submitted,

Timothy W. Kreke
Labor Member