Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40918
Docket No. MW-40828
11-3-NRAB-00003-090107

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Allen R. Johnston and Company) to perform routine Maintenance of Way work of weed mowing, brush cutting and cleaning the right of way between Mile Posts 4.0 and 6.8 on the Seattle Subdivision and Mile Post 765.2 on the Brooklyn Subdivision of the Oregon Division beginning on August 27, 2007 and continuing (System File C-0752U-167/1486977 UPS).

(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(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants T. Webb, D. Jolly, J. Almanza, M. Stovner, V. Drury, J. Clemons, D. Wilson, M. Hartman and J. Gentry shall now each be compensated at their respective and applicable rates of pay for an equal and proportionate share of the total straight time and overtime hours expended by the outside forces in the performance of the aforesaid work beginning August 27, 2007 and continuing."

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 parties made extensive presentations at the Referee Hearing on November 16, 2010. The Carrier supplemented the record in this case with six Third Division Awards issued by the Board on December 15, 2010, that addressed the issue of the Carrier's use of outside forces to cut brush, mow weeds and clear debris from track right-of-way, as well as, the adequacy of Carrier provided notice for the contracting performed. One of the six Awards was Award 40756.

The Organization supplemented the record with the Dissent it filed on Award 40756. It noted that the Award is based on prior Awards without a review of the facts and circumstances underlying the case decided in Award 40756. The Organization also appended Awards 40812 and 40819 issued on December 15, 2010, to support its position. The Board considered the parties' Submissions and the recent Awards and the Organization's Dissent in considering the contracting and notice issues raised in this case.

Rule 9 and Rule 52 (a) (b) and (d) govern the determination of this case.

"RULE 9 - TRACK SUBDEPARTMENT

Construction and maintenance of roadway and track, such as rail laying, tie renewals, ballasting, surfacing and lining of track, fabrication of track panels, maintaining and renewing frogs, switches, railroad crossing, etc., repairing existing right of way fences, construction of new fences up to one continuous mile, ordinary individual repair or replacement of signs, mowing and cleaning right of

way, loading and unloading and handling of track material and other work incidental thereto will be performed by forces in the Track Sub-department. (Emphasis added)

RULE 52 - CONTRACTING

(a) By agreement between the Company and the General Chairman, work customarily performed by employees covered under this Agreement may be let to contractors and be performed by contractual 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; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of Company forces. In the event the Company plans to contract out work because of one of the criteria described herein, it will notify the General Chairman of the Organization in writing as 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 will 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 therewith.

(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.

* * *

(d) Nothing contained in this rule will impair the Company's right to assign work not customarily performed by employees covered by this Agreement to outside contractors."

Sufficiency of Notice

The Carrier argues it notified the Organization of its intent to assign outside forces to mow and clear debris along the railroad system by written notice dated June 22, 2007. A conference on the matter was held on July 10, 2007. The contractor began work on Service Order No. 36747 on August 27, 2007. The Notice reads as follows:

"Location: various locations on the Railroad's system

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

The Carrier relies on findings made in Third Division Award 37490 on the property to establish that a notice of the type quoted here meets the notice requirements of Rule 52 (a). The Carrier argues that no notice is necessary, because the Carrier has established by arbitral precedent and stare decisis that there is a mixed practice on the property in the performance of this work. The findings made in Award 37490 and Public Law Board No. 6205, Award 8 remove this work from the category of "work customarily performed" by employees that should be subject to a notice requirement.

The Carrier argues in the alternative that under Rule 52 (b) because there is a mixed practice on this property, it may assign this work to outside forces or to its employees in accordance with this mixed practice. The Carrier submitted Exhibit H that documents its contracting history relative to a variety of categories of work. Mowing appears at reference D-411, two index cards that list mowing performed by contractors prior to 1929. The Carrier references this evidence in part to establish the existence of a mixed practice for the performance of "mowing" on this property.

The Carrier relies on Award 37490 to establish that the work of weed mowing and debris clearance on track right-of-way is subject to a mixed practice. The Board found in Award 37490 that both the Organization and the Carrier failed to present any

probative evidence in support of their respective positions as to whether the Carrier or outside forces performed this work. Because the Organization bears the burden of proof in these matters, the Board denied the claim. In dicta, the Board did rely on the conclusion in PLB 6205, Award 8 to find the existence of a mixed practice. The Awards issued on December 15, 2010, were not presented on the property in the processing of the grievance. Those Awards cannot serve as a basis for fact finding in this case. The Board refrains from drawing any inference concerning mixed practice. The Board need not address the question whether the Carrier was obligated to provide notice, in this case. It did so.

The Board turns to the notice the Carrier did provide to the Organization. The Organization denies that the June 22, 2007, notice covers the work at issue within the Oregon Division of the Northwest District. However, even if the Board were to consider that the notice covered this work, the notice is insufficient to meet the requirements of Rule 52. The Organization reasons, as follows. Rule 52 (a) requires that the Carrier provide the Organization with notice of its intent to contract work performed by BMWE-represented employees. Arbitral precedent and the Berge/Hopkins Letter of Understanding detail the information that a notice should provide; the dates when the proposed contracting will commence and end; and the work that will be contracted out. Under Rule 52(a) the notice should state the reason(s) why the work is contracted out, with specific reference to the exceptions that serve as the basis for contracting out work customarily performed by Carrier forces.

The Organization argues that general notices lack specificity and do not provide the information necessary for the General Chairmen to respond to, agree to the contracting out, or argue why Carrier forces should be assigned the work. This notice lacks a start and end date. The Carrier did not specify the location of the work either in the notice or at the conference.

The Carrier responds. Frequently, the Carrier knows that from time to time and from location to location it will need to contract out debris clearing work. It does not know the precise details when and where it will be necessary to contract out work, when the Carrier issues the notice.

The Organization argues that Rule 9 reserves the work in question to its members. Rule 9 is not a general work reservation clause. It is specific; maintenance work is reserved work to be performed by BMWE-represented employees. The Rule was so interpreted in Third Division Award 14061. With the re-adoption of the Rule;

its interpretation was re-adopted, as well. See Third Division Award 29916. If the Carrier contemplates contracting out work, it must provide notice under Rule 52 (a).

The Board considered these very same arguments over the years. The Carrier included in its Submission the testimony of the Carrier signatory, Hopkins, and the testimony of Powers, the Organization's witness before Presidential Emergency Board No. 219 concerning the continuing effect or lack thereof of the Berge/Hopkins Letter of Understanding on the contracting issue. In its presentation at the November 16, 2010 Referee Hearing, the Carrier included Third Division Award 30063 in which the Board quoted with approval from Third Division Award 28622, as follows:

> "Pursuant to Rule 52 (a), the parties have agreed that 'work customarily performed by employees' can be contracted out in certain enumerated circumstances provided that the required advance notice is provided. Whether or not Carrier ultimately prevails on the merits of the dispute, it is our conclusion that it may not make a predetermination on the subject by ignoring the notice requirement when there is a valid or colorable disagreement as to whether the employees customarily performed the work at issue. . . ." (Emphasis added)

The requirement that the Carrier provide notice to the Organization remains intact, particularly, where the work in question is mowing weeds and keeping track right-of-way clear of debris. Rule 9 identifies this maintenance work as the work of employees in the Track Sub-department of the Carrier. In terms of the language of Award 28622, the employees have a colorable claim to the work. The Carrier had to provide notice to the Organization under Rule 52 (a). It did so.

Here, the Carrier provided notice on June 22, 2007. The issue in this case is the sufficiency of the notice. The notice provided is one that attempts to cover the Carrier's entire system. The Carrier provided the notice more than 15 days before the contractor began to perform the work. In Third Division Award 40756, the Board approved such system-wide notices provided more than 15 days in advance of the work to be performed, with an opportunity for a conference to be held prior to letting the contract, and within a few months of the contractor beginning to perform the involved work. The Carrier provided notice on June 22, 2007. The matter was conferenced on July 10, and the work began on August 27. The Organization's objection to the notice is denied. The information the Organization argues should be in the notice pursuant to the Berge/Hopkins Letter of Understanding should be the subject matter of the

conference. The Board held such notices sufficient. It does so here for purposes of stability.

Contracting Out

Should the work of mowing and clearing debris from the Carrier's right-of-way, maintenance work, have been performed by Carrier forces? Has the Carrier established the existence of a "mixed practice" on this property, and is this defense sufficient to defeat a claim of the Organization to perform reserved work?

The Carrier does not assert that one of the exceptions listed in Rule 52 (a) applies in this case. The Carrier submits that under prior Awards on the property a mixed practice has been established. Both outside contractor and Carrier forces have been used to mow and clean track right-of-way. The Carrier concludes that the work at issue, here, is therefore, not customarily performed by Carrier forces.

The Carrier's evidentiary Submission presents no lists of prior contracting at a particular location or District. Rather, it relies on findings made in other cases to establish a mixed practice.

The Organization in its Dissent to Third Division Awards 40756, 40759 and 40761, issued on December 15, 2010, after the Referee Hearing in this case, argues that NRAB Awards are not binding on subsequent cases. Awards provide guidance in subsequent cases, nothing more. The 7th Circuit describes the system in place at the NRAB in Brotherhood of Maintenance of Way Employees v. Burlington Northern Rail Road Co., 24 F.3d 937 (7th Cir. 1999), as follows:

> "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."

The Organization argues in its Dissent that the Board followed prior Awards even though the evidence and arguments in Award 40756 differed from those prior Awards.

The Organization need not establish the work in question (mowing and maintaining track right-of-way) is scope work, where the Rule specifically references mowing as maintenance of the right-of-way as work covered by the Rule. See Third Division Award 28817. The Carrier submits that it may contract out this work, because it has a prior right to do so, through a mixed practice which continues in effect under Rule 52 (b).

In Third Division Award 29033, the Board stated, "After 1960, the record convinces us that the employees have continued to do the work with the requisite regularity, consistency, and predominance necessary to establish customary and historical performance. We conclude, therefore, that the Organization has established that the disputed work is covered by the Scope Rule."

The Organization argues that the mixed practice argument represents the Carrier exclusivity argument in a new form. The Organization reminds the Board that it is well established through some 38 Awards dating back to 1957 to the present that address this issue, that exclusivity pertains to resolving competing claims to work by classes/crafts of Carrier employees. The exclusivity argument does not pertain to contracting out cases. The Board agrees that exclusivity is a factor not applicable to contracting cases. However, mixed practice does apply to contracting cases.

The Board further stated in Award 29033:

> "Carrier contends that it has customarily and historically used contractors to perform the disputed work without protest from the Organization, and it listed examples of such purported activity. The Organization, however, says it had no knowledge of such instances, and our review of the record reveals no affirmative evidence that the Organization was given actual notice of the listed instances. We are, therefore, forced to infer from the numbers that the Organization simply must have known and acquiesced in the contracting out. The listing shows instances over 20 years for an average of less than nine instances per year on its system and just over once per year in each of the states it operated. Given the nature of the work and the size of Carrier's extensive system in several states, we do not find these numbers to be preponderant evidence that the Organization had actual knowledge of the contracting out and did not protest it."

On this property, there is a line of authority that establishes that mowing and clean-up maintenance work along the Carrier's right-of-way is reserved work under Rule 9. See Third Division Award 28817. After finding the applicability of Rule 9, the Board in Award 28817 stated:

> "Because this Rule is specific in stating that tie renewal, cleaning right of way and loading, unloading and handling of track material is to be performed by forces in the Track Department, we find the work to be exclusively reserved to employees within the scope of the Agreement. It is not necessary for the Organization to demonstrate it has been historically performed by covered employees to the exclusion of others where the rule clearly includes such work."

Also see Third Division Award 37315.

The work should be assigned to Carrier forces, unless there is a practice in place on this property of contracting out this work. Because it is work reserved to BMWE-represented employees, the Organization need not establish a practice of performing this work. The burden shifts to the Carrier to establish a practice of contracting out this work to the point that it is customarily performed by contractors, and it is governed by the language of Rule 52 (d). The Carrier does not attempt to justify its action under this section of Rule 52 (d). Rather, it contends that it has established the existence of a mixed practice, where it uses both Carrier and outside forces to perform this work.

The Carrier submits that Rule 52 (b) supports its action. A practice is in place and was recognized in Public Law Board No. 6205, Award 8. That claim was sustained based on untimely notice. However, PLB 6205 found the Carrier had established a mixed practice. It produced evidence of 32 instances in which this work had been contracted out in the past.

In Third Division Award 37490, the Board concluded that:

> "On the record before us, the lack of probative evidence does not provide a proper basis for answering the question of who has customarily performed the type of work in dispute. Moreover Award 8 of Public Law Board No. 6205 specifically recognized that the same Carrier here had successfully established a mixed-practice with respect to the work in dispute which, therefore, brought the work within

> the '. . . prior and existing rights and practices. . .' exception found in Rule 52 (b).
>
> In disputes of this kind, it is well settled that the Organization bears the burden of proof to establish scope coverage and/or reservation of the work. On the record before us, we must find that the Organization's evidentiary burden has not been satisfied."

In Public Law Board No. 5546, Award 14, the Carrier argued stare decisis, but also presented a 37-page exhibit with each page listing at least 12 instances in which clearing tie butts and debris was contracted out.

In Third Division Award 30063, the Board made a finding about contracting out removal of ties and debris based on a showing of 43 instances of contracting out tie removal over a 30 year history. The Board inferred that the Carrier established a long history of contracting out this work.

To review, Awards 28817 and 37315 hold that the work in question (clearing debris from the Carrier's right-of-way) is reserved under Rule 9 to employees covered by the Agreement. In Award 37315, while acknowledging a line of authority that reaches a different conclusion, the Board cites a long line of authority on this property that finds clearing debris to be reserved work. Because these Awards represent a line of authority rather than one case, these Awards are not palpably erroneous and for purposes of stability should be followed.

The Board made its finding of a practice in place on this property of contracting out clearing debris, mowing, and brush cutting on the basis of an evidentiary record in Award 30063 and Public Law Board No. 5546, Award 14. The Carrier provided evidence during on-property handling of the claim of many instances of contracting out. So many instances of contracting out that the Board concluded there existed a practice of contracting out such reserved work with such frequency that without objection from the Organization it acquiesced to such contracting. Acquiescence is the key inference necessary to the finding of a practice in these contracting cases.

The Carrier's post-Hearing submission of Awards issued by the Board on December 15, 2010, add arbitral authority to the Carrier's position on mixed practice. In Third Division Award 40756, the Board concluded:

> "Prior Awards on the property have permitted the Carrier to subcontract this type of work. See Third Division Award 37490 (mowing weeds, tree cutting, brush cutting and related general cleanup work). See also, Public Law Board No. 6205, Award 8 (although sustaining the claim for failure to conference under Rule 52 within the 15-day time period prior to beginning the work, nevertheless holding that '. . .we find that Carrier sustained its burden of establishing a mixed practice on this property of renting equipment and manpower to perform weed, grass and brush cutting related work. . .'); as well as Public Law Board No. 7100, Award 12 ('. . .Carrier has successfully established a 'mixed practice' of using contractors and employees covered by the Agreement to perform the work in dispute [controlling vegetation]').
>
> Based on other Awards between the parties, the type of notice given by the Carrier in this case, albeit blanket, has not been shown to violate the notice requirements of Rule 52."

The above cited Awards are not palpably erroneous and for purposes of stability must be followed.

With the exception of Award 40756, the findings in Award 30063, PLB 5546, Award 14, and PLB 6205, Award 8, of the existence of a practice of the Carrier contracting out clearing track right-of-way debris are based on an evidentiary record presented in each of those cases. In Award 29033, the Board's analysis led to the opposite conclusion, i.e., that Carrier forces performed this work.

In the instant case, the Carrier asks the Board to make a factual finding of the existence of a practice of contracting out work of clearing debris from track right-of-way over the entire system based on the fact finding efforts of Awards 40756 and 30063, as well as PLB 6205, Award 8. The Carrier contends stare decisis requires no less. The Organization reminds the Board that each case stands on its own and the decision should be based on the factual record made by the parties on the property, citing to Brotherhood of Maintenance of Way Employees v. Burlington Northern Rail Road Co., 24 F.3d 937 (7th Cir. 1999).

In Award 29033, the Board concluded based on an independent review of the evidence that:

> "The listing shows instances over 20 years for an average of less than nine instances per year on its system and just over once per year in each of the states it operated. Given the nature of the work and the size of Carrier's extensive system in several states, we do not find these numbers to be preponderant evidence that the Organization had actual knowledge of the contracting out and did not protest it."

Yet, in Award 30063, the Board reached the opposite conclusion based on the number of instances similar to those reviewed by the Board in Award 29033. Stare decisis may require that the Board follow a legal principle, for example, that Rule 9 establishes maintenance work as reserved to employees. However, following a factually based conclusion where the notice involves the Carrier's entire system should require some detailed information, such as (1) the number of instances clearing debris is assigned to Carrier forces (2) the number of instances it is assigned to outside forces in a year (3) when outside forces were used, was notice provided to the Organization? The information provided by (3) would establish the key factor to the establishment of a practice/mixed practice in a contracting case, i.e., Organization acquiescence. Instances of contracting without Organization knowledge and in the absence of notice does not provide evidence of the existence of a practice.

In this case, the record is devoid of such information. Several of the Awards relied upon by the Carrier do not discuss the presence of evidence of Organization acquiescence. The lack of evidence prevents the Board from finding the existence of a practice of contracting out maintenance work of clearing debris with the frequency to support a finding of a mixed practice. The analysis presented from the fact finding of other forums suggests the evidence was convincing in those cases. Mixed practice is a matter that occurs over time. The factual record underlying one finding, particularly, when it relates to the Carrier's entire system, rather than a District, may change over several years based on the contracting conduct of the Carrier and acquiescence of the Organization.

Because the Carrier bears the burden of proof to establish the existence of a mixed practice and it failed to do so in this case, the Board concludes that the disputed contracting out violated Rule 9. The Carrier does not argue that any of the exceptions listed in Rule 52(a) apply in this case. Similarly, the Carrier does not contend that Rule 52(d) applies. It failed to establish the practice/mixed practice that would countenance the contracting out of reserved work. The Board concludes that the contracting out violated Rule 9.

Remedy

The Carrier notes that the Claimants were fully employed and suffered no loss. The Third Division has noted many times that without an appropriate remedy, the Carrier could violate the Agreement with impunity. See Third Division Award 37315, as well as Public Law Board No. 7096, Awards 14 and 15. The Claimants lost a work opportunity. They should be compensated for the loss. The Board concludes that the appropriate measure of the remedy is the number of hours worked by the contractor's forces in the performance of the claimed work.

AWARD

Claim sustained.

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 24th day of March 2011.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 40918 - DOCKET MW-40828

and

THIRD DIVISION AWARD 40920 – DOCKET MW-40848

(Referee Sherwood Malamud)

The Majority's conclusions with respect to the instant claims failed to recognize and respect the precedent set by past arbitrators. We anticipate that the Majority's ill-advised action will create further turmoil and unwittingly add fuel to BMWE's burning desire to recapture work that has historically been contracted out system-wide on Union Pacific Railroad Company property. Consequently, we are compelled to register our vigorous dissent so that future readers of these Awards will recognize the injustice which the Majority sanctioned. It goes without saying that no future decision makers should be tempted to reach similar unwarranted conclusions.

The sole basis for the Majority's decision to sustain these claims is its finding that the Carrier did not establish the practice/mixed practice that would not countenance the contracting of reserved work. In support of the Carrier's position, the Carrier Member referenced prior on-property Awards that clearly established the Carrier's practice with respect to brush cutting on a system-wide basis. It is simply inexcusable for the Majority to effectively ignore six Awards (40756, 40758, 40759, 40760, 40761 and 40762) which were adopted on December 15, 2010, due to the fact that they were adopted after the instant cases were argued on November 16, 2010. (For the sake of brevity, suffice to say that such action is clearly contrary to NRAB policy and procedures.) The afore-mentioned Awards not only decided factually similar cases, they involved the very same issues presented in the instant cases. The Majority's decision to reject the consistent precedent preserved by the above-mentioned Awards does a disservice to the parties and will undoubtedly create further unrest, in stark contrast to the purpose and intent of the Railway Labor Act. In Third Division 34204, Referee Edwin H. Benn, who has decided countless contracting claims involving the parties to these disputes, outlined the principle as follows:

> **"This is, for all purposes, the same dispute that was decided by the Board in Award 33507. We cannot say that Award 33507 is palpably in error. As such, and for purposes of stability, we cannot decide this case de novo, but we are required to defer to that prior Award. To do otherwise would be an invitation to chaos and would result in encouraging parties after receiving an adverse decision to attempt to place a similar future dispute before another referee in the hope of obtaining a different result."**

Nothing in the instant case records gives any rational basis to deviate from the previous Awards which are considered authoritative on the practice, if not *stare decisis*. In that connection, one well-recognized commentator on the arbitration process made the following important distinction:

> **"Giving authoritative force to prior awards when the same issue subsequently arises (*stare decisis*) is to be distinguished from refusing to permit the merits of the same event or incident to be relitigated (res judicata). Where a new incident gives rise to the same issue that is covered by a prior award, the new incident may be taken to arbitration but it may be controlled by the prior award."**

See Elkouri & Elkouri, How Arbitration Works, 421-22,4th ed., 1985).

The Majority inappropriately disregarded the long-established precedent between the parties sanctioning the Carrier's right to contract out brush cutting work even though it has a long-established practice of doing so in the past. By way of analogy, if this new precedent is allowed to stand, then the Organization's long-established precedent of prevailing in failure to provide notice and meet conference obligations cases would also be open to a similar fate of being disregarded. This would render the structure of Rule 52 entirely useless. In Third Division Award 32862, the Board held:

> **". . . [O]ur function is to enforce language negotiated by the parties. In Article IV and as a result of negotiations, the parties set forth a process of notification and conference in contracting disputes. The Carrier's failure to follow that negotiated procedure renders that negotiated language meaningless."**

Remarkably, although the Majority not only recognized prior Awards which referenced the parties' long-established practices but also acknowledged the presence of Carrier Exhibit "H" which listed instances of weed mowing being performed by contractors prior to 1929, it surprisingly rejected that long-standing precedent. Contrary to the philosophy espoused by these decisions, Awards emanating from Section 3 tribunals are controlling and are to be followed unless palpably erroneous. Precedent on this property between these parties clearly documents a consistent long-standing past practice of contracting out brush cutting work, i.e., the type of work here in dispute. Moreover, that precedent clearly documents the Organization's acquiescence as concerns the claimed work. It is inconceivable how the Majority can dispute the practice exits given the previous arbitral precedent that repeatedly recognized it. At the very least, the Majority was obligated to take judicial notice of the precedent. Awards of this Board have held that such is so even if the Arbitrator would have decided the case differently in the first instance.

The Majority clearly did not understand the work and issues inherent in the instant cases. That such is so is evidenced by the fact that the Majority referenced Third Division Awards 28817 and 37315 as if they somehow show that brush cutting is exclusively reserved to BMWE-represented employees. Awards 28817 and 37315 address the clean up and removal of scrap ties, which is not the same as brush cutting work.

Moreover, the argument that picking up scrap ties and brush cutting constitutes similar work was never advanced on the property; nor was it orally argued before the Board on November 16, 2010. The Majority created this argument *sua sponte* which creates mischief for all concerned. Given the Majority's illogical conclusions, Carrier representatives could not be criticized for citing brush cutting Awards to demonstrate a past practice of removing scrap ties from the right-of-way. The Majority's findings defy common sense.

Furthermore, Rule 9 is a work classification Rule - not a Scope Rule. Rule 9 lists types of work that BMWE-represented employees may perform. Countless Awards prior to these have solidly upheld the Carrier's Rule 52(b) right to contract

out work that otherwise might be considered scope-covered work but for the existence of a mixed practice. Additionally, the BMWE's reliance on Third Division Awards 28817 and 37315 conveniently overlooks nearly 200 Awards which recognize that the parties' Classification of Work Rules, Seniority Rules and Scope Rule do not confer exclusive work rights to all maintenance-of-way work. Awards both prior to and following the Awards referenced by the Majority have adopted the recognized Rule 52(b) analysis. For example, Third Division Award 33420 held:

> "The Board has carefully studied the Organization's allegations, its extensive correspondence and Award support, as well as the Carrier's denials with the following conclusion. There is no proof in this record that the work was Scope protected. There is a lack of proof that the work belonged exclusively to the employees or violates Rule 1 (Scope) of the Agreement. On the contrary, the Rule language does not direct the Board to that conclusion and nor is there evidence to deny prior subcontracting. The Board has also considered the Organization's position with regard to Rules 8, 9, and 10, but concludes they are not on point with proof of any Carrier violation in this instant case. (Emphasis added)

In this same vein, the Organization's previous attempts to employ Rule 8's definitional aspects (which are identical in nature to Rule 9 argued by the Organization) and to redefine the nature of the parties' Scope Rule have been rejected by another Section 3 forum. Award 8 of Public Law Board No. 4219 held:

> The Parties have cited conflicting authority as to whether the Scope rule in the Agreement is a general one as opposed to a specific position and work rule. Obviously Rule 1, standing alone, is a general scope rule. It does not even undertake to define what work is reserved to members of the Organization. It refers to Rule 4 . . . which lists the various positions encompassed by the Agreement and divides them into seniority groups, but Rule 4 similarly fails to define the work reserved to those positions. To fill this gap the Organization invokes Rule 8, which classifies the duties allocated to the Bridge and Building Subdepartment. However, Rule 8 does not guarantee certain work to the Organization. Instead, its purpose is merely to describe what portion of the work belonging to the Organization is to be allocated to B&B forces. If the work described in

> **Rule 8 is not otherwise reserved to the Organization, Rule 8 has no effect. (Emphasis added)**

Because the purpose of work classification Rules is to identify the type of work that may be performed by employees within each Sub-department specified in Rule 4 it is understandable that numerous decisions have consistently held that each such work classification Rule is to be interpreted in the same manner as other classification Rules when confronting the Organization's "exclusivity" attacks. However, the Third Division's findings, as well as those of other arbitration panels on the property, have firmly established that the parties have a general Scope Rule -- regardless of BMWE's alternative allegations that Rule 9 is an exclusive Rule.

Equally ironic is the fact that the Carrier was disadvantaged when the Majority faulted the Carrier for allegedly failing to prove the long-standing mixed practice in each case - again, but then allowed the Organization's exclusivity argument to prevail based on prior Awards which did not even resolve brush cutting claims. The Majority's unexplained rationale for treating the parties' respective burdens of proof differently was not only wrong, but clearly inequitable.

One of the oft-stated purposes of arbitration is to provide consistency in the work place so as to promote harmonious labor/management relations. To ignore and/or cast aside arbitral precedent which has clearly and unmistakably recognized the long-standing mixed practice with regard to brush cutting on this property does a dis-service to the process and the parties to these disputes. Unfortunately, the Majority's Awards disobeyed these principles. Without a doubt, the Majority's Awards are palpably erroneous and cannot be considered as precedent in any future cases. Because they clearly create unwarranted chaos, we must render this vigorous dissent.

Brant Hanquist
Brant Hanquist

Michael C. Lesnik
Michael C. Lesnik

March 24, 2011