Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40920
Docket No. MW-40848
11-3-NRAB-00003-090124

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 (Caylor & Genz) to perform routine Maintenance of Way work of weed mowing and cleaning debris from the right of way between Mile Posts 162 and 166 on the Yoder Subdivision of the Nebraska Division beginning on September 17, 2007 and continuing (System File J-0752U-274/1487554).

(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, Claimant S. Gartner shall now be compensated at his respective and applicable Group 16 rate of pay for all straight time and overtime hours expended by the outside force in the performance of the aforesaid work beginning September 17, 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 factual underpinnings of this case are identical to those described in Third Division Award 40918. This case involves the same Service Order No. 36747. The Carrier notified the Organization of its intent to assign outside forces to mow weeds 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 September 17, 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 evidentiary record and arguments are the same as those presented in Award 40918. As a result, the Board comes to the same conclusions. The notice provided by the Carrier was sufficient. Under Rule 9, the work of brush cutting and clearing debris is reserved to employees covered by the Agreement. The Carrier failed to establish by record evidence the existence of a mixed practice concerning the performance of this work.

The assignment of the work in question represents a missed work opportunity. Third Division Award 37315, as well as Public Law Board No. 7096, Awards 14 and 15, establish the remedy appropriate on this property to enforce the

integrity of the Agreement as monetary payment as measured by the time expended by contractor forces.

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