Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40966
Docket No. MW-40990
11-3-NRAB-00003-090287

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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) to perform Maintenance of Way work (cutting brush, mowing weeds and associated clean up) along the right of way between Mile Posts 146 and 173.5 on the Seattle Subdivision beginning on November 5, 2007 and continuing through December 1, 2007 (System File D-0752U-226/1493837).

(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 S. Braddock, F. Castorena and D. Wilson shall now each be compensated at their respective and applicable rates of pay for an equal and proportionate share of the seven hundred fourteen (714) man-hours expended by the outside forces in the performance of the aforesaid work."

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 letter dated June 22, 2007, the Carrier advised the General Chairman that it intended to contract out ". . . the labor, material, equipment and tools necessary to provide vegetation control services along various mainlines, branch lines, yard tracks, railroad property, etc. . ." at various locations on the Carrier's system. The Organization responded by letter dated June 25, 2007, objecting to the contracting, the vagueness of the notice, and requesting specific information to be furnished at a conference to be held prior to any work being assigned to a contractor. The conference was held on July 10, 2007.

The instant claim was filed on December 14, 2007, asserting that three contractor employees performed brush cutting and weed mowing work, which has been customarily performed by BMWE-represented employees and is reserved to them under Rule 9, using recognized maintenance-of-way equipment between November 5 and December 1, 2007. It contended that no prior notice was given and none of the exceptions listed in Rule 52 applied.

In its initial denial, the Carrier attached its June 22 notice and made reference to the July 10, 2007, conference, arguing that it met its Rule 52(a) obligations and that the Organization did not show that work was performed on the claim dates or reserved to BMWE-represented employees. The Carrier asserted that prior precedent establishes a strong mixed practice of contracting this type of work, and that Third Division Awards 29306 and 34019 govern this dispute, which

should be dismissed on the basis of the principle of stare decisis. It also noted that the Claimants were fully employed, suffered no loss of earnings, and were not entitled to compensation.

In its March 17, 2008, appeal, the Organization argued that the blanket notice was improper and in violation of Rule 52 and the Carrier's obligation to engage in good faith discussion and to comply with its commitment to reduce the incidents of subcontracting set forth in the December 11, 1981 Letter of Understanding, which is still valid. It noted that the Awards relied upon by the Carrier dealt with weed spraying involving specialized equipment and certification for use of chemicals that were not applicable in this case. Finally, the Organization rejected the Carrier's full employment defense to the appropriateness of a monetary remedy for this lost work opportunity.

The Carrier's May 9, 2008, denial reiterates the validity of the notice and the fact that the work of vegetation control was typically contracted, pointing to evidence of past practice previously furnished in specific correspondence. The Carrier also averred that the December 11, 1981, Berge/Hopkins Letter of Understanding did not create any separate rights or supersede the Rule 52 past practice exception, and was not valid because the Organization never lived up to its reciprocal commitments that were conditions precedent to such understanding. Finally, the Carrier asserted that the Claimants had no loss of earnings associated with this contracting and were not entitled to monetary compensation.

As noted above, the parties' positions were detailed in their correspondence on the property. Suffice it to say that the Organization relies upon the following arguments in support of its claim: (1) the Carrier's blanket notice was vague and did not meet the criteria of Rule 52, citing Third Division Awards 29306 and 34019 (2) the work reservation language of Rule 9 encompasses this type of work under the heading of maintenance of roadways and track, as shown by the fact that the Carrier has brush cutter gangs; and (3) that a monetary remedy is appropriate to make the Claimants whole for the loss of this work opportunity, citing Public Law Board No. 7099, Award 14.

The Carrier contends that it met its notice and conference obligations under Rule 52(a) maintaining that the sufficiency of its notice has been confirmed in

numerous cases including Third Division Awards 30063, 30185, 30287, 30869, 31170, 32333 and 32534. The Carrier argues that the Agreement Rules do not address brush cutting, which falls under the general Scope Rule, it has historically contracted vegetation control, the Board has acknowledged the mixed practice on the property, and has upheld its right to contract such work under the prior and existing rights provision of Rule 52(b) citing Third Division Award 37490, as well as Public Law Board No. 6205, Award 8. It submits that the principle of stare decisis should be followed herein, relying on Third Division Awards 39294 and 39006. Finally, the Carrier argues that the Agreement does not permit the award of damages or monetary compensation in the absence of a proven loss of earnings, noting that the precedent relied upon by the Organization arose in the context of a Rule 52(a) notice and/or conferencing violation.

A careful review of the record convinces the Board that the Carrier complied with Rule 52(a) by serving proper advance written notice of its intention to contract out the vegetation control work in dispute, and meeting in conference in an attempt to reach an understanding prior to the date when the contracting transaction took place. See Third Division Awards 30063, 30185 and 30869. These facts distinguish this case from those relied upon by the Organization. See e.g. Public Law Board No. 7099, Award 14.

With respect to the merits of the contracting, although the Carrier did not include the voluminous records of past practice of contracting similar work submitted in prior cases in this record, it made reference to, and incorporated, those files and the information included in them in its May 9, 2008, denial, as well as citing precedent confirming that a mixed practice of contracting the disputed work has been established. We accept the finding of Public Law Board No. 6205, Award 8 that the Carrier has established a mixed practice on this property of contracting the provision of equipment and manpower to perform weed, grass and brush cutting related work, and that it is permitted to rely upon the "prior and existing rights and practices" language of Rule 52(b) to justify the contracting of this work. See also, Third Division Award 37490. Because the Carrier met its notice and conferencing obligations under Rule 52(a) and the language of Rule 52(b) has been found to permit the Carrier to contract out work of this nature, and in accord with the principle of stare decisis (Third Division Award 39006) we conclude that the

Organization failed to meet its burden of establishing a violation of the Agreement in this case.

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 14th day of April 2011.