Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42075
Docket No. MW-42190
15-3-NRAB-00003-130140

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division –**
(IBT Rail Conference
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(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.P.W.) to perform Maintenance of Way work (cut weeds and brush and related work) on the right of way at Mile Post 1.75 in Portland, Oregon and around the Diesel Locomotive Shop in the Albina Yard on August 31 and September 1, 2011 (System File T-1152U-529/1562805).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out the aforesaid work and when it failed to make a good-faith effort to reach an understanding or to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52 and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants M. Hallgren, C. Hatch, M. Stovner and M. Hartman shall now each be compensated for fourteen (14) hours at their respective straight time 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 15-day notice dated May 16, 2011, the Carrier advised the General Chairman of its intention to contract out specific work "on an as needed basis" including to help Carrier forces perform their duties including road crossing repairs, traffic control equipment trans-loading, brush cutting/mowing, fence repair/installation, dust control (spraying), right-of-way grading, removal of yard and right-of-way debris/materials in the Portland Service Unit, Portland Subdivision, Kenton Line Seattle Subdivision, to include all terminals and main tracks from Portland to Seattle to Wellsberg Junction. The Organization responded by letter dated May 23, 2011 regarding Service Order No. ORT 051611, objecting to the contracting, the vagueness of the notice which it contended failed to include the commencement date and reasons for contracting, requesting specific information to be furnished at a conference to be held prior to any work being assigned to a contractor, asserting that employees have customarily performed this work, and asking under which Agreement Rule the notice was served. The conference was held on June 7, 2011 pursuant to Rule 52, at which time the Carrier advised the Organization that there was a past practice of it contracting out similar brush cutting and vegetation control work to supplement its forces when needed.

The instant claim was filed on October 2, 2011, and protests the Carrier's use of four employees of a contractor to cut weeds and brush using weed eaters near the Diesel Locomotive Shop in Albina Yard in Portland on August 31 and September 1, 2011. The claim asserts that Rule 9 reserves the work of right-of-way maintenance – including mowing and brush cutting – to BMWE-represented employees who have customarily performed such work, and that the Carrier failed to provide evidence that the reason for the contracting fell within one of the exceptions listed in Rule 52(a) permitting such contracting. The claim also alleges that the Carrier's vague and blanket notice did not satisfy its obligations pursuant to Rule 52 and the December 11, 1981 Berge-Hopkins Letter of Understanding (LOU) for prior written advance notice, that the notice issued months earlier and relied upon by the Carrier did not cover this

work, and that it failed to explain why it could not schedule its employees to perform this work, which it is obligated to do under the LOU in order to reduce the incidence of contracting.

In its initial denial on December 14, 2011, the Carrier stated that the Organization did not show that the work was reserved to BMWE-represented employees by Agreement or customary and historical performance, that it had a strong mixed practice of contracting brush cutting, mowing and right-of-way cleanup which permits it to subcontract this work under the prior and existing rights and practices language of Rule 52(b) – a right recognized by the Board – citing Public Law Board No. 6305, Award 8 and many Third Division Awards including 40756 and 30063, and arguing that the issue of its ability to contract out this type of work is stare decisis. The Carrier included a Manager's statement indicating that this was an emergency contract made by the Diesel Shop due to the vegetation growing up and around the fuel risers and building requiring the spraying of chemicals to kill weeds which is regulated by State and Federal law, and which the Claimants are not qualified to apply. It also took issue with the continued applicability of the LOU. Finally, the Carrier contends that the Claimants suffered no monetary loss inasmuch as they were fully employed on the contracting dates.

During subsequent appeals and in correspondence on the property, the Organization stressed the blanket nature of the notice, that this work is reserved to BMWE-represented employees under Rule 9 and provided employee statements confirming performance by its members. It noted that the Carrier cannot prove a past practice of contracting merely by listing other instances where similar work was allegedly contracted, without showing the individual circumstances for each contract and which Rule 52 exception applied in each case. The Organization pointed out that the Carrier had the necessary equipment in the area and failed to support its contention that any of the exceptions listed in Rule 52(a) existed, because this was not an emergency situation and could have been handled by reassigning the Claimants to clear the area around the Diesel shop. It maintained that there was a loss of work opportunity and that a monetary remedy was appropriate.

In its subsequent denial, the Carrier made clear its position that proper advance notice was provided, Rule 52(b) prior and existing rights as established by its mixed practice of contracting brush cutting and vegetation control work supported its right to contract this work (providing documents supporting its practice back to the 1960's

previously furnished to the Organization in 1995-6) and that stare decisis should be determinative in denying this claim.

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 facts and arguments in support of its claim: (1) the Carrier's blanket notice which did not provide the dates of the work or the reason for the contracting did not meet its notice obligation under Rule 52 or the LOU, citing Third Division Awards 41105, 41102, 41052, 40997, 40965, 26762, 25677, 25103, 24242, and Public Law Board No. 7096, Award 15; (2) the work is scope-covered under the specific unambiguous work reservation language of Rule 9 which encompasses right-of-way maintenance including mowing and brush cutting, relying on Third Division Awards 14061, 28817, 29916, 37315, 39301; Public Law Board No. 7096, Awards 1 and 12; Special Board of Adjustment (Loram Rail Handling case); Special Board of Adjustment (Pre-plated Tie Dispute); (3) the Carrier's failure to engage in a good-faith effort to reduce the incidence of contracting violated its LOU obligation, which applies on the UP property, citing Third Division Awards 29121, 40923, 40929; (4) Rule 52(b) prior and existing rights refers to rights prior to 1973 when Rule 52 was adopted, citing Third Division Award 28817, and the Carrier's mixed practice defense is insufficient without proof of individual circumstances in each case to support this contracting transaction; and (5) a monetary remedy is appropriate to preserve the integrity of the Agreement and make the Claimants whole for the loss of this work opportunity, citing Third Division Awards 41107, 40965, 39139, 38349, 36966, 36964, 36516, 29577, 28817; Public Law Board No. 7096, Awards 14 & 15; Public Law Board No. 7101, Award 9.

The Carrier contends that this brush cutting and vegetation control work was encompassed within its May 16, 2011 advance notice of its intent to contract sent to the General Chairman and a conference was held well before the work commenced, in compliance with its Rule 52(a) obligations, citing Third Division Awards 40960, 40863, 40758, 40756,, 37490, 37332, 33646, 32333; Public Law Board No. 6205, Award 8; Special Board of Adjustment No. 1130, Award 13. It argues that it has a well-established mixed practice of contracting right-of-way cleaning including mowing and brush cutting – a practice proven by documentation furnished to the Organization in the mid-1990's (and again provided here in 33 pages of prior service contracts) – which was never disputed on the property, and the Board has upheld its right to contract such work under the prior existing rights and practices language of Rule 52(b) of the parties' Agreement, citing Public Law Board No. 6205, Award 8; Third Division Award 37490. It asserts that the doctrine of stare decisis applies, relying on Third Division Awards

40756, 40758-40762. The Carrier asserts that the Organization failed to meet its burden of proving the reservation of mowing and weed cutting work or to challenge the mixed practice of contracting established by the record. It contends that the LOU does not apply on this property and did not eliminate or place any further limitations on the Carrier's right to contract out this type of work under Rule 52, as recognized by the Board in dealing with the contracting issue, relying on Third Division Awards 40802, 40799, 37854, 33467, 32534, 31281, 28943 and 28654. Finally, the Carrier argues that because the Claimants were fully employed, the Agreement does not permit the award of damages or monetary compensation in the absence of a proven loss of earnings, citing Third Division Awards 31652 and 31284.

A careful review of the record convinces the Board that the Carrier met its notice and conferencing obligations under Rule 52(a). This is not a case where the Carrier issued a blanket notice a substantial period prior to the work being performed without any evidentiary link to the specifics of the actual contract, as in Public Law Board No. 7096, Awards 15 & 16 and Third Division Award 40997 relied upon by the Organization. Rather, brush cutting and mowing work was specifically included in the notice and the area of the Portland Service Unit, Portland Subdivision, was sufficiently specific so as to give the Organization enough information to take a position on whether the work in question should be contracted. See e.g., Third Division Awards 37490 and 32333. The Diesel Locomotive Shop in Albina Yard fell within the noted area. The conference was held more than two months prior to the commencement of the disputed work by the contractor, distinguishing this case from Public Law Board No. 6205, Awards 6, 8, 10, 12 and Public Law Board No. 7096, Award 1. During the conference, the Carrier asserted that due to its extensive mixed practice on the property, the prior and existing rights and practices language of Rule 52(b) applied. Unlike the majority of the cases cited by the Organization finding a violation of Rule 52(a) and sometimes the LOU based upon the absence of any notice, (see, e.g., Third Division Award 29121), we conclude that the Carrier met its Rule 52(a) notice and conference obligations in the instant case, and that the Organization failed to establish a lack of good faith on the Carrier's part in violation of the LOU. See e.g., Third Division Awards 28654, 28943, 31281, 32534, 33467, and 37854.

With respect to the issue of whether the Carrier violated the Agreement by contracting this mowing and brush cutting work, there can be no doubt that Rule 9, Track Subdepartment, specifically mentions maintenance of roadway and track including "mowing and cleaning right-of-way" and that the work in question falls within the scope of the Agreement. The Carrier does not dispute that BMWE-

represented employees perform this type of work, and the notice itself indicates that contractors will be utilized, in part, "to help the Carrier forces in the performance of their duties. . . ." Under such circumstances, the Organization need not show historical or customary performance. See e.g., Third Division Award 22817. However, this is not a reservation or guarantee of all right-of-way maintenance work to BMWE-represented employees, because Rule 52(a) permits the Carrier to contract out such work if one of the four listed exceptions applies - special skills or equipment, when the Carrier is not adequately equipped to handle the work, or when emergency time requirements create situations beyond the capacity of its own forces - and Rule 52(b) permits the Carrier to contract out in conformance with its prior rights and practices. In this case the Carrier relied upon both grounds.

First, along with its initial denial on the property, the Carrier included a statement from the Manager contending that this was "emergency work" contracted by Diesel shop management due to vegetation growing up around fuel risers and the building, and asserting that the Claimants were not licensed to do the necessary spraying. This Rule 52(a) exception was not asserted by the Carrier during the contracting conference, nor proven on the record. As a consequence we find that the Carrier failed to establish any Rule 52(a) justification for the contracting in this case. See e.g., Third Division Award 38349.

However, the Carrier primarily justified its right to contract the involved brush cutting work on the basis of its prior and existing rights and practices of contracting similar work under Rule 52(b). It not only relied upon prior Board precedent upholding its practice of contracting similar work, see e.g., Public Law Board No. 6305, Award 8; Public Law Board No. 7100, Award 12; Third Division Awards 30063, 33646, 37490, 40756, 40759, 40760, 40761, 40762, but also presented documentation on the property establishing that it contracted out this type of work from the 1960's through 2007, thereby establishing a mixed practice justifying its entitlement to contract out the work in dispute herein. The Carrier's practice evidence was not refuted by the Organization's employee statements indicating that they, too, performed this type of work, a position that is not disputed here. The Board does not agree that the Carrier's reliance on a mixed practice of contracting brush cutting and mowing work to support its prior and existing rights argument under Rule 52(b) is akin to it insisting on the Organization establishing exclusivity to prove a violation. The Board has held that once the Carrier establishes a mixed practice of contracting out similar work, it is entitled to rely on Rule 52(b) to justify its present similar contracting transaction. See Third Division Awards 30063 and 33646.

Because the Carrier complied with the notice and conferencing requirements of Rule 52(a) and established its prior and existing right to contract brush cutting and mowing work under Rule 52(b) – which has been previously acknowledged by the Board, (see e.g., Public Law Board No. 6305, Award 8, as well as Third Division Awards 40756, 37490, 33646 and 30063) – we find that the Organization failed to meet its burden of proving a violation of the Agreement.

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 19th day of March 2015.