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

Award No. 42080
Docket No. MW-42202
15-3-NRAB-00003-130155

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 Conference

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 (cut weeds and remove brush on the right of way) at Mile Post 10.5 near Portland, Oregon on October 1, 2011 (System File T-1152U-534/1563513).

(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 National Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants M. Hallgren, C. Hatch, and D. Jolly shall now each be compensated for ten (10) hours at their respective straight time rates of pay and for two (2) hours at their respective overtime 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 the following work:

> **"Location: Portland Service Unit – Portland Subdivision, Kenton Line Seattle Subdivision to include all Terminals and Main Tracks Portland to Seattle to Wellsbert Jct.**
>
> **Specific Work: Provide equipment support, including but not limited to backhoes, excavators, trucks, etc., on an as needed basis to assist maintenance of way forces in the performance of their duties. Work may also include, but not limited to road crossing repairs (including asphalt, track removal/replacement), traffic control equipment trans loading, brush cutting/mowing, fence repair/installation, dust control (spraying), right-of-way road grading, removal of yard and right-of-way debris/material and provide necessary equipment support for derailment assistance/cleanup. Any new construction work with port of Portland."**

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 fails 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 BMWE-represented 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, which was filed on November 22, 2011, protests the Carrier's use of three employees of a contractor to cut weeds and brush using weed eaters and excavators at MP 10.5 near Portland, Oregon, on October 1, 2011. It states: "This claim is one of many claims recently filed within the year of 2011 on this territory for the same grieved work," and takes issue with the Carrier's attempt to shuffle the work of right-of-way weed and brush cutting from BMWE-represented employees to whom it belongs under the Agreement to contractors. The claim asserts that the Carrier had the equipment available in the area to perform this work or could have been rented it, and the Claimants were qualified and available to operate that equipment. It requests a monetary remedy for this loss of work opportunity.

In its initial denial on January 10, 2012, the Carrier pointed out that the Organization did not take issue with its receipt of advance notice and the holding of a conference regarding this work, and stated 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. The Carrier included a Manager's statement indicating that there was an "emergency" safety hot line issue, with trees blocking the view of signals from oncoming trains, and that the Claimants were not qualified to perform the work of cutting down the tall and wide trees from 17 feet above ground by operating specialized felling equipment. It also took issue with the continued applicability of the December 11, 1981 Berge-Hopkins Letter (LOU), and argued that the Organization failed to meet its burden of proving a contract violation. Finally, the Carrier contends that the Claimants suffered no monetary loss on the contracting date to support the requested compensation.

During subsequent appeals and 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 its performance. 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 Organization knowledge of such situation and its failure to grieve. The Organization pointed out that the Carrier failed to support its position that any of the exceptions listed in Rule 52(a) existed, because this was not an emergency situation, referencing employee statements that the Carrier had not treated the situation of one track being out of service in Rivergate Yard near the Portland terminal as an emergency, but rather locked it out and had it repaired the following day. It asserted that the Manager's statement was self-serving, noting that funds for contracting transactions come from other than the local budget which fosters the use of contractors, and 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 (referencing documents supporting its more than 70-year practice that were undisputedly furnished to the Organization in 1995-6), that the LOU was inapplicable, and that there was no loss of earnings established by the Organization supporting its claim for monetary relief.

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 41107, 40964, 36966 and 29577; Public Law Board No. 7096, Awards 1 & 15; Public Law Board No. 6205, Awards 6, 8, 10, 12 & 16; (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 and 39301; Public Law Board No. 7096, Award 15; 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 and 40929; (4) the Carrier's mixed practice defense is insufficient without proof of the Organization knowledge and inaction, and does not support its Rule 52(b) prior and existing rights defense; (5) no Rule 52(a) exception has been proven; and (6) 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 Award 39139 and 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, the sufficiency of which has been upheld by the Board, relying on Third Division Awards 47490 and 30063, as well as Public Law Board No. 6205, Award 8, and a conference was held well before the work commenced, in compliance with its Rule 52(a) obligations, citing Third Division Awards 33646, 37332, 37490, 40756, 40758 - 40762 and 40857. The Carrier argues that it has a well-established mixed practice of contracting right-of-way cleaning including mowing and brush cutting, 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 Agreement, citing Public Law Board No. 6205, Award 8; Public Law Board No. 7100, Award 12; Third Division Award 37490. It asserts that the doctrine of stare decisis applies, relying on Third Division Awards 40756, 40758-40762. The Carrier contends 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 referenced in 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, 33467, 32534, 31281 and 28654. 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, citing Third Division Awards 31652 and 31284.

As noted by the Organization, this is one of many claims recently filed concerning this location and weed and brush cutting work contracted in 2011. As such, the instant contracting transaction involves the identical notice and conference covering the contracting of brush cutting and vegetation control work on the Portland Service Unit that was considered by the Board in Third Division Award

42075. For the reasons set forth in detail therein, 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.

We initially note that the Carrier submitted a statement from the Manager indicating that the contested emergency work involved the use of felling equipment (on which the Claimants were not qualified) to cut down high trees that were causing a safety issue on the line. While providing employee statements directly disputing the lack of employee qualification to fell trees, the Organization did not take issue with the nature of the work described by the Manager despite its claim setting forth different activities and equipment, or the fact that it was encompassed within the weed cutting and removing brush aspect of the conferencing notice, which it chose as the subject matter of this claim. Because the Carrier did not defend this contracting transaction on the basis of an exception under Rule 52(a) - either emergency or specialized equipment - we need not address the validity of such justification.

A careful review of the record convinces the Board that the rationale set forth in Award 42075 concerning the issue of whether the Carrier violated the Agreement by contracting brush cutting and vegetation control work also applies in the instant case, and is adopted herein. While finding scope-coverage of this work, which is not a reservation or guarantee of all right-of-way maintenance work to BMWE-represented employees, the Board noted that Rule 52(b) permits the Carrier to contract out in conformance with its prior rights and practices.

The Carrier justified its right to contract the work in question on the basis of its prior and existing rights and practices of contracting similar work under Rule 52(b), relying upon prior Board precedent upholding its practice of contracting similar work – see e.g., Public Law Board No. 6305, Award 8; Public Law Board 7100, Award 12; Third Division Awards 37490, 40756, 40759 and 40762. 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 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; 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.