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

Award No. 42081
Docket No. MW-42204
15-3-NRAB-00003-130158

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 (Reforestation) to perform Maintenance of Way duties of cutting weeds with a weed eater on the right of way near Mile Post 5 in Portland, Oregon on October 10, 2011 (System File T-1152U-536/1564382).

(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, Claimant B. Nelson shall now be compensated for eight (8) hours at his respective straight time rate of pay and for seven (7) hours at his respective overtime rate 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 in the performance of 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 on 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 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 Organization set out its arguments against the contracting in its letter of August 23, 2011 confirming the conference.

The instant claim, which was filed on December 8, 2011, protests the Carrier's use of a contractor employee to perform brush cutting by operating a

weed eater at MP 5 near Portland on October 10, 2011. The claim asserts that the Carrier had the same equipment available to perform this work, and the Claimant was qualified and available to operate that equipment. It requests a monetary remedy for this loss of work opportunity.

In its initial denial on January 18, 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 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 – which supports the finding of stare decisis. The Carrier included a Manager's statement indicating that the work involved cutting and spraying noxious weeds, that the Claimant was neither licensed nor qualified by State or Federal environmental agencies to perform such spraying, and affirming its prior practice of contracting out this type of work. It also took issue with the continued applicability of the December 11, 1981 Berge-Hopkins Letter of Understanding (LOU) and argued that the Claimant suffered no monetary loss on the contracting date to support the requested remedy.

In 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 the existence of any of the exceptions listed in Rule 52(a). 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 and a conference was held before the work commenced, 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 (including documents supporting its more than 70-year practice that had been undisputedly furnished to the Organization) that the LOU was inapplicable, and that there was no loss of earnings established by the Organization supporting its claim for monetary relief.

The positions of the parties with respect to this claim are substantially the same as those set forth in Third Division Awards 42075 and 42078 and are incorporated herein by reference without repetition. 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 those (and other) cases. 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 Claimant was neither licensed nor qualified to perform the weed spraying involved in the instant case. While not directly refuted by the statements submitted by the Organization, because the Carrier did not defend this contracting transaction on the basis of an exception under Rule 52(a) 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 parties' 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 numerous examples of previous contracting transactions over a lengthy time period and 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 37490, 40756, 40759 – 40762. The Carrier's practice evidence was not refuted by the Organization's employee statements indicating that they, too, performed weed cutting 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 weed and brush cutting 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 37490, 40756, 40759 and 40760 – 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.