PUBLIC LAW BOARD NO. 7101
CASE NO. 2

PARTIES TO THE DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(and
(
(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 (McGuire & Hester Construction Company) to perform Maintenance of Way work (remove ballast from road crossings, between road crossings and adjacent tracks in preparation for new road crossing installation) at Mile Post 35.0 on the Mococo Line in Martinez, California on July 5 and 6, 2001 instead of the employes assigned to System Gangs 8536 and 8539 (Carrier's file 1286874).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out work referenced in Part (1) above or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces in accordance with Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the Claimants assigned to Gangs 8536 and 8539 on July 5 and 6, 2001 shall now ' ... each be paid seventeen (17) hours of overtime at their respective rates of pay for the hours worked by the McGuire & Hester Construction Company on those same dates. Payment shall be in addition to any compensation they may have already received.

The Carrier has declined this claim."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement; this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the Hearing held.

All Claimants have established and hold seniority on their respective classes in the Maintenance of Way Department. On the pertinent dates, Claimants were regularly assigned to positions on Gangs 8356 and 8539 working compressed 4-day work weeks, scheduled from 6:00 a.m. until 4:00 p.m. Monday through Thursday, with Friday, Saturday and Sunday designated as rest days.

On July 5 and 6, 2001, the Carrier allegedly assigned outside forces (McGuire & Hester Construction Co.) to perform alleged Maintenance of Way and Structures Department work, specifically, the removal of ballast from road crossings and between road crossings and adjacent tracks in preparation for a new road crossing installation at Mile Post 35.0 on the Mococo Line in Martinez, California. The Contractor employed one foreman, one assistant foreman, machine operators for a backhoe, end loaders, a swing loader, drivers for 2 dump trucks, 10 laborers and welders to remove ballast from road crossings and between road crossings and adjacent tracks. The Contractor's employees worked approximately 17 hours each over the course of the two days.

The Organization contends that the Agreement was violated when the Carrier assigned McGuire & Hester Construction Company the work of removal of ballast from road crossings and between road crossings and adjacent tracks in Martinez, California on July 5-6, 2001. The Organization claims that it was improper for the Carrier to contract out the above-mentioned work, which is work that is properly reserved to the Organization.

According to the Organization, the Carrier had customarily assigned work of this nature to the Carrier's Maintenance of Way Employees. The Organization further claims that the work in question is consistent with the Scope Rule. According to the Organization, the Carrier's Maintenance of Way Employees were fully qualified and capable of performing the designated work. The work done by McGuire & Hester Construction Company is within the jurisdiction of the Organization and therefore Claimants should have performed said work. The Organization argues that because Claimants were denied the opportunity to perform the relevant work, Claimants should be compensated for the lost work opportunities.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that the work contracted out was that of removing ballast from road crossings and between road crossings and adjacent tracks, which the Carrier claims does not belong to the Carrier's BMWE represented Employees under either the express language of the Scope Rule or any binding past practice.

We first note that at the Arbitration Hearing, the parties stipulated that the Notice issue was not in question. Therefore, we find that we need not reach that issue.

Next, we reach the question of whether the work in question has been traditionally and customarily performed by the Organization. In Special Board of Adjustment No. 1016, Award 150, the Board framed the scope issue as follows:

> "In disputes of this kind, the threshold question for our analysis is that of scope coverage. There are generally two means of establishing scope coverage. The first is by citing language in the applicable scope rule that reserves the work in disputes to the Organization represented employees. The second method is required when the language of the scope rule is general. In that event, the Organization must shoulder the burden of proof to show that the employees it represents have customarily, traditionally and historically performed the disputed work. It is well settled that exclusivity of past performance is not required in order to establish scope coverage vis-à-vis an outside contractor."

In the instant case, we have carefully reviewed all evidence regarding the question of whether the Organization has proven that the work involved belongs to the Organization. First, we note that the work of removing ballast from road crossings and between road crossings and adjacent tracks in preparation for a new road crossing installation is not specifically identified in the Scope Rule.

We next turn to whether there is sufficient evidence for the Organization to have proven that it has customarily, traditionally and historically performed the disputed work. In the instant case, while the Organization has presented some evidence to show that the work in question belongs to the Organization, that evidence is insufficient for the Organization to meet its burden of proof. See Public Law Board No. 6537 above. See Also Third Division Award 37365 (Goldstein), Public Law Board No. 4402, Award No. 20, Case No. 20, Award No. 28, Case No. 28; Public Law Board 6537, Award No. 1.

Based on the evidence in this matter as well as the above-cited precedent, we cannot find that the work of removing ballast from road crossings and between road

crossings and adjacent tracks in preparation for a new road crossing installation is definitively encompassed within the plain language of the Scope Rule or that the Organization has been able to prove that this work has historically and traditionally been performed by members of the Organization.

Thus, having determined that the Notice was proper and that the work was not within the scope of the Organization, we find that the Organization has not met its burden of proof and the Claim is therefore denied.

The Claim is denied.

AWARD

Claim denied.

Steven M. Bierig
Chairperson and Neutral Member

Dominic Ring
Carrier Member

Roy Robinson
Organization Member

Dated at Chicago, Illinois this 24th **day of** Feb **2009.**