AWARD NO. 20
CASE NO. 20

SPECIAL BOARD OF ADJUSTMENT NO. 1130

PARTIES TO DISPUTE	)	**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**
	)	
	)	**UNION PACIFIC RAILROAD COMPANY (FORMER MISSOURI 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 (Tweedy Construction) to perform Maintenance of Way machine operator work (operate tractors to mow weeds) between Mile Post 251 Midland, Kansas and Mile Post 358, Hennessey, Oklahoma beginning August 30 through October 12, 1998 to the exclusion of Central Division Machine Operators T. L. Carr, C. S. Harris and J. D. Newton (System File MW-99-30/1166413 MPR).

2. The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance notice of its intent to contract out said work or make a good-faith effort to reduce the amount of contracting, as provided in 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, Machine Operators T. L. Carr, C. S. Harris and J. D. Newton shall now each be compensated for one hundred sixty (160) hours' pay at their respective straight time rate of pay and each shall be compensated for eighty (80) hours' pay at their respective time and one-half rate of pay.

OPINION OF BOARD

By notice dated August 3, 1998, the Carrier advised the Organization of its intent to contract out certain work including "... remove brush, mow, and cleanup on right-of-way ...." By letter dated August 7, 1998, the Organization requested conference be held. By letter dated August 14, 1998, the Carrier agreed to meet in conference. Conference was ultimately held on October 20, 1998, without resolution. The Carrier

contracted the work. This claim followed.

For reasons discussed in *Award 10* of this Board, because of the November 7, 1997 Implementing Agreement, the treatment of mixed practices for contracting out disputes on the Carrier as opposed to other predecessor properties shall govern.

Further, for reasons discussed in *Award 10* of this Board, the Carrier's argument that the Organization must demonstrate that covered employees must perform the disputed work on an exclusive basis is rejected. The disputed work — operation of mowing equipment — is classic maintenance of way work and falls "within the scope of the applicable schedule agreement" as contemplated by Article IV.

For reasons discussed in *Award 13* of this Board, we find the Carrier's notice met its obligations under Article IV. The notice specifies the location and identifies the type of work to be performed and further identifies the equipment to be used. The Organization was sufficiently put on notice of the Carrier's intentions in order to allow the Organization to adequately discuss the matter in a conference.

With respect to the particular work in dispute, the evidence shows that in the past the Carrier has contracted out this type of work.[1] The evidence further shows that covered employees have also performed this type of work. Given that demonstrated mixed practice and as we discussed in *Award 10*, the well-developed body of decisions involving the Carrier requires a finding that the Carrier did not violate the Agreement when it contracted out the disputed work. *See e.g., Third Division Award 30264* (involving "weed mowing work"):

> Numerous decisions of the Board have held that the Carrier has the right under Article IV to contract out work where advance notice is given and the Carrier has established a mixed past practice of contracting out similar to that involved in the dispute. The record in this case demonstrates a mixed practice on this property with respect to the work in question. It has been performed by members subject to the Agreement in the past but has also been contracted out by the Carrier in the past. We thus conclude that the Carrier did not violate the Agreement when it contracted out the work.

See also, Third Division Award 30688 (involving contracting of work "to cut brush"):

> This is one of a great many instances involving this Carrier and the Organization in dispute as to

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1 *See* Carrier's Exhs. F, L.

> the assignment of work to outside forces. The Board does not question that Maintenance of Way forces have performed this work in many prior instances. However, the Carrier also provided evidence that the work in question had been contracted to outside firms frequently over many years. ...
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> * * *
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> Here, the record shows there is a "shared or mixed practice" over the years as to brush cutting and closely related work. On this basis and having met the requirement of notice and conference, the Carrier's action cannot be found in violation of the Agreement.

This claim therefore lacks merit.

Third Division Award 30162 and the awards following that award (*Third Division Awards 30164* and *30166*) cited by the Organization do not require a different result. The lead award (*Award 30162*) involved a case where "... the Carrier contracted out brush cutting ... *without advance notice to the Organization*" [emphasis added].[2] Here, the Carrier met its notice obligations. A careful distinction must be drawn between those cases where the Carrier fails to meet its notice obligations — which results in the fashioning of full make whole relief for lost work opportunities because of a frustration of the negotiated notice and conference provisions of Article IV — and those cases such as this where the Carrier meets its notice and conference obligations. *See Third Division Award 32862*:

> We recognize that the result in these cases where no notice is given may be anomalous. It may well be under Article IV that had the Carrier given notice, (and because of lack of skills of the employees, need for specialized equipment, etc.), the Carrier may have been able to contract the work. However, in failure to give notice cases, even though the Carrier may have ultimately been able to contract the work, even employees who were working could be compensated only because notice was not given. We are very conscious of that result. But, our function is to enforce language negotiated by the parties. In Article IV and as a result of negotiations, the parties set forth a process of notification and conference in contracting disputes. The Carrier's failure to follow that negotiated procedure renders that negotiated language meaningless. This Board's function is to protect that negotiated process. ...
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> From the handling of the hundreds of claims presented to this Board between the parties on the issue of contracting work, we are also cognizant that the notice, objection by the Organization and conference procedure often is a pro forma exercise which ends up in a literal battle of word processors and copy machines as the parties posture themselves on the issues and put together the voluminous records in these cases. Our function is not to make certain that the process is a meaningful one — that is the obligation of the parties. Our function is to enforce the language the parties agreed upon. The Carrier's course of action now is a straight forward one

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[2] *Third Division Award 30162* relied upon *Third Division Award 29033* — also a failure to furnish notice case.

> — simply give notice where the work arguably falls "within the scope of the applicable schedule agreement". If it does so, the Carrier will not be faced with the kind of remedy imposed in this case because it failed to give notice.

See also, Award 10 of this Board at note 1.

The Carrier met its notice and conference obligations. A mixed practice concerning the contracting of this work in the past has been shown. The claim must be denied. *Third Division Awards 30264, 30688, supra.*

AWARD

Claim denied.

Edwin H. Benn
Neutral Member

Carrier Member

Organization Member

Chicago, Illinois

Dated: 8-15-02