

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 32435  
Docket No. MW-31128  
98-3-93-3-5**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(CSX Transportation, Inc. (former Chesapeake  
( and Ohio Railway Company)

**STATEMENT OF CLAIM:**

**"Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned outside forces (Asplundh) to cut and trim brush from beneath the communication lines on the Washington Subdivision from Orange to Charlottesville, Virginia, from October 28 through November 22, 1991 [System File C-TC-8462/ 12(92-285) COS].**
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intent to contract out said work or discuss the matter in conference in good faith prior to contracting out said work as required by the October 24, 1957 Letter of Agreement (Appendix 'B').**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Track Department employees B. R. McGuire and A. L. Nicholas shall each be allowed 160 hours' pay at their respective time and one half 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.

The facts which led to this dispute indicate that beginning October 28 through November 22, 1991, Carrier contracted with an outside contractor (hereinafter referred to as "Asplundh") to perform the work of cutting brush and trees on the Washington Subdivision. Asplundh utilized four of its employees and one hi-rail brush cutting vehicle for eight hours on each of the claim dates.

B. McGuire and A. Nicholas hold seniority as Track Foreman and Trackman respectively, and were assigned as such on the Washington Subdivision when this claim arose. The Organization's claim asserts that Carrier violated Rules 1, 2, 3, 66, 83 and Appendix B of the Agreement when it denied Claimants a work opportunity.

In its denial of the claim, the Division Engineer stated that:

"The Railway Company does not own specialized equipment (Trim Lift Truck). The use of a contractor to clear brush underneath the pole line on the Washington Subdivision was required account of the following:

1. This was an emergency situation which required immediate attention since this is an Amtrak Route and a ground condition existed on signal line wires, effecting the safety of train movements and integrity of the signal system.
2. The Railway Company does not own specialized equipment which will cut brush underneath the pole line when the distance from centerline of track is greater than 20 feet.

Also as information, Mr. McGuire and Mr. Nicholas were working, therefore did not lose any wages."

The Vice General Chairman replied to the Carrier's denial, specifically noting that:

"Mr. McGuire and Mr. Nicholas are claiming 160 hours each at time and one-half, at their pro rata rate, for the 20 days the contractor worked between October 28, 1991 and November 22, 1991. These men are assigned to the Gordonsville section and have been assigned the task of cutting the brush in this area in the past. The brush in this area was not maintained on a day to day basis as prescribed in FRA rule 213.37d -code 37.05. The Carrier waited until the vegetation grew until it got close to the Communication lines then rushed a contractor in to cut the vegetation. CSX has the equipment to perform this task and have done so in the past. There was no reason that Maintenance of Way employees should not have been used this time.

Mr. Zenisek replied under the date of February 27, 1992 stating that the *Railway Company does not own its own specialized equipment (Trim Lift Truck)*. And that this was an emergency condition since this is an Amtrak route and a ground condition existed on signal line wires. Mr. Zenisek also stated that the Carrier does not own specialized equipment which will reach more than 20 feet and the claim was declined. However the Carrier did own a Tree Trim Machine that was more than capable of reaching 20 feet. The Carrier could have either maintained this equipment or leased the equipment but Carrier chose not to. The alleged Emergency condition existed only because Carrier did not maintain its vegetation."

Finally, the Vice General Chairman noted that, at the outset, it was incumbent upon the Carrier to give the General Chairman advance written notice regarding the contracting out of the work in dispute, which it entirely failed to do.

The Carrier maintained that the work in dispute was performed when the Division Engineer was apprised of an "emergency situation" due to brush growing underneath the pole line and fouling signals on the Amtrak territory in Huntington, West Virginia. (In that connection, in its Submission to this Board, the Carrier

maintained that the work in dispute was, in fact, signal work, and not work belonging to BMWWE represented employees. However, that argument is clearly de novo, and will not be considered by the Board.) Finally, the Carrier maintained that even if, arguendo, the work at issue is Scope covered, Claimants were fully employed, and therefore, the monetary portion of the claim should be denied. (The Carrier had no answer for the Organization's failure of notification argument.)

For its part, the Organization asserted that the work which Asplundh performed was not performed as a result of "emergency conditions", and that the work of clearing brush is reserved to Maintenance of Way forces. The Organization further asserted that the Carrier failed to provide the General Chairman with the requisite notice.

Although the Carrier argued that an "emergency condition" existed, it did not dispute the Organization's assertion that the routine cutting and pruning of vegetation along the right-of-way in question normally accrued to Maintenance of Way forces. Nor are we persuaded that the gradual unchecked growth of vegetation in the absence of routine cutting and pruning rises to the level of unanticipated unavoidable urgency normally associated with an "emergency". Finally, there is no defense for the total failure to provide the notice and opportunity for consultation required by the Agreement. Based on the evidence presented on this record, we must conclude that the Carrier did, indeed, contract out Scope covered work and failed to afford the General Chairman with advance written notice regarding said work.

With respect to the monetary portion of this claim, the Carrier raised the "full employment" issue as an affirmative defense, however, it failed to submit evidence in support of that defense. Moreover, given the blatant nature of the dual violation, monetary damages are in order to compensate Claimants for the lost work opportunity and to stimulate compliance with the subcontracting notification and Scope provisions of the Agreement. This claim must be sustained.

### **AWARD**

**Claim sustained.**

**ORDER**

**This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division**

**Dated at Chicago, Illinois, this 21st day of January 1998.**