

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35531
Docket No. MW-34697
01-3-98-3-347**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc. (former Louisville and
(Nashville 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 (Dillard Construction Company, subcontracted to Jim’s Tree Service) to perform Track Subdepartment work of cutting and chipping of brush between Mile Posts K-665.0 and K-667.2 on the P&A Seniority District from March 5 through April 1, 1997 [System File 23(8)(97)/12(97-1711) LNR].
- (2) As a consequence of the aforesaid violation, Foreman T. W. Wyrosdick shall be allowed forty-eight (48) hours’ pay at the foreman’s straight time rate and Trackmen D. L. Chandler and J. R. McDonald shall each be allowed forty-eight (48) hours’ pay at the trackman’s straight time rate.”

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.

As Third Party in Interest, the Brotherhood of Railroad Signalmen was advised of the pendency of this dispute and chose to file a Submission with the Board.

The general principles governing resolution of the brush cutting disputes currently under consideration by the Board are set forth in detail in Third Division Award 35529. In sum, (1) the Organization filing the claim has the burden to demonstrate a violation of the Agreement; (2) brush cutting in general along the Carrier's right-of-way is BMW scope covered work; (3) the cutting of brush that interferes with signal or communications lines and related equipment is BRS scope covered work; (4) the cutting of brush under the pole line that does not interfere with signal or communications lines and related equipment falls under BMW Scope Rules; (5) where outside forces are used, the relevant contract provisions governing the use of such forces will be applied and assertions of the need to show exclusive performance of the work will not defeat an Organization's claim; (6) with respect to asserted emergencies, the Carrier has the burden to demonstrate the existence of an emergency, which requires it to show the existence of an unforeseen combination of circumstances that calls for immediate action, but where ordinary track maintenance could have prevented the situation, no emergency exists; (7) where Agreement violations have been demonstrated, adversely affected employees will be made whole at the appropriate contract rate on the basis of lost work opportunities and irrespective of whether the employees were working on the dates of the demonstrated violations; and (8) where violations have been demonstrated, the disputes shall be remanded to the parties for determination of the number of hours attributable to the improperly assigned work taking into account the specific type of work involved, with the Board retaining jurisdiction to resolve disputes over remedies.

In this case, with notice to the Organization, the Carrier contracted the installation of a passing siding at Avalon, Florida, to Dillard Construction who subcontracted the tree/brush undergrowth removal task for the new siding to Jim's Tree Service. Jim's Tree Service utilized one Foreman and two Helpers to remove brush undergrowth for the project on various dates between March 5 and April 1, 1997. The Organization protested subcontracting of the brush cutting. On the property, the

Carrier defended on the grounds that (1) brush cutting work had not been exclusively performed by BMW employees; (2) the Carrier did not have the special type of equipment or expertise for this type of project; and (3) the Claimants were working.

The claim has merit.

First, brush cutting is BMW scope covered work. Rule 1 specifies that BMW employees shall perform "all work in the maintenance of way and structures department." Rule 5 designates ranks in the Track Subdepartment and includes "off-track and on-track brush cutters" and "weed-mower." Moreover, in the past, the Carrier bulletined Brush Cutter Operator positions.

Second, as shown by statements provided by BMW employees, in the past brush cutting work has been performed by those employees.

Third, as discussed in detail in Third Division Award 35529, exclusivity is not a defense for the Carrier in contracting out cases.

Fourth, the Carrier's distinction that this project was new construction as opposed to maintenance does not change the result. Under Rule 1, "... all work in the maintenance of way and structures department" is BMW scope covered work. Further, this is not a case where the Carrier gave notice of contracting out just to avoid a claim without admitting that the particular work was scope covered. This is a case where the Carrier stated in its notification to the Organization that the work was contracted out because it did not have the necessary equipment or personnel to do the work in a timely manner. Implicit in that statement is the recognition by the Carrier if it was of the opinion that it did have the personnel and equipment, the work would have been performed by BMW forces - i.e., a recognition by the Carrier that the work was scope covered.

Fifth, with respect to the Carrier's position that it "... does not have the special type of equipment or the expertise ..." for the work, the Carrier has a burden to show what kind of "special type of equipment" or "expertise" was needed for brush cutting on this project. Perhaps the Carrier's assertion was accurate for other aspects of the project performed by Dillard. But, the other aspects of the track construction project are not before us in this case. This was just brush cutting. Given that BMW employees have long performed brush cutting using "off-track and on-track brush

cutters” and “weed-mower” and the like, the Carrier’s burden in this respect has not been met.

Sixth, Rule 2(e) does not change the result in this case. Rule 2(e) provides an exception to the Scope Rule (Rule 1) in that:

“The railroad company may contract work when it does not have adequate equipment laid up and forces laid off, sufficient both in number and skill, with which the work may be done.”

However, Rule 2(e) must be read along with the December 11, 1981 Letter of Understanding which states that “[t]he carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.” While that letter has been the subject of wide and varied interpretations over the years, there is still a clear obligation on the Carrier’s part imposed by that letter to at least explain its attempts to procure rental equipment or give reasons why rental equipment could not be obtained. Assuming that there was equipment that the Carrier did not have, the Carrier did not explain any attempts to obtain the equipment.

Seventh, the Carrier is correct that it has been held that subcontracted projects need not be piecemealed. See Fourth Division Award 5058 and Awards cited therein. However, that argument - no matter how good it might be - was not raised on the property allowing the Organization to respond to whether the subcontracting of the brush cutting was a piecemealing of the project. Because the argument is a new argument, it cannot now be considered by the Board.

In accord with the principles set forth in these cases, the claim has merit. The Claimants were deprived of work opportunities and will accordingly be made whole for those lost opportunities at the appropriate contract rate. The matter is remanded to the parties to determine the number of hours of work performed by Jim’s Tree Service on this project. The Claimants will be compensated based on those hours.

AWARD

Claim sustained in accordance with the Findings.

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 24th day of July, 2001.