

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35702  
Docket No. MW-33575  
01-3-96-3-1048**

**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 Employes**  
**(Consolidated Rail Corporation**

**STATEMENT OF CLAIM:**

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

- (1) The Agreement was violated when the Carrier assigned outside forces to cut trees and brush and clean the right of way on the Richmond Branch in Philadelphia, Pennsylvania beginning November 28, 1994 and continuing (System Docket MW-4020).**
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman prior written notice of its intent to contract out the work described in Part (1) above as required by the Scope Rule.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. E. A. Troy, D. A. Sabo, K. A. Wunderlick, L. T. Downing, W.A. Cropper, E. Benjamin and J. D. Butler shall each be compensated for eight (8) hours per day at their respective straight time rates for the time expended by the outside forces performing the work in question beginning November 28, 1994 and continuing until the violation ceases.”**

**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.

In this claim the Organization protests the Carrier's decision to contract out brush and tree cutting and cleaning of the right-of-way along its Richmond Branch in Philadelphia, Pennsylvania, beginning November 28, 1994, without providing the General Chairman any notice or opportunity for discussion. Under date of January 20, 1995, the General Chairman submitted the instant claim that, "beginning November 28, 1994 and continuing," the Carrier assigned or otherwise allowed outside forces to perform Maintenance of Way work cutting trees and brush and cleaning the right-of-way along the Richmond Branch of the Philadelphia Division. The claim specified that the Carrier failed to provide any prior Notice of Intent to subcontract or opportunity for conference prior to entering into the contract and that seven employees of the outside forces, none of which held seniority under the Agreement, worked eight hours per day, five days per week in the performance of the above-described maintenance work.

In the first, second and third step denials on the property, the Carrier advanced an escalating array of affirmative defenses, including that specialized equipment and manpower was required, that "hazardous materials" were involved, that the work was not "continuing," that no notice was required because the Scope Rule was "general," that the cleanup was mandated by the City of Philadelphia, that the work could not be "piecemealed," that the project was an "emergency" and that the Claimants were "fully employed." At no point in handling of this claim on the property, however, did the Carrier ever deny that it subcontracted the tree cutting and clean up work without first providing Notice to the General Chairman or opportunity for conference. The Carrier's belated attempt to advance for the first time in its presentation to the Board extensive documentation not previously raised on the property, in support of a de novo theory that an October 1993 Notice and conference concerning an entirely different subcontract covered its obligation in the instant subcontracting transaction, is rejected as untimely. The Carrier's asserted affirmative defenses, all of which could have and should have been raised in the notice and conference, are not only unsupported by evidence

presented on the property, but are obviated by the proven failure to provide notice and opportunity for conference. See Third Division Awards 18287, 18365 and 22917.

Based on all of the foregoing, for reasons set forth more fully in on-property precedent in Public Law Board No. 3781, Award 7; Special Board Adjustment No. 1016, Awards 9, 10, 11, and 82 and in our decision in Third Division Award 30970, we shall sustain Part 2 of the claim based on the Carrier's proven unmitigated violation of the notice and conference requirement. Consistent with the on-property precedent in the cited Special Board of Adjustment No. 1016 decisions, the Carrier is directed to compensate the Claimants as requested in Part 3 of the claim following a joint check of the Carrier's records to confirm the dates and amount of tree/brush cutting and right-of-way cleanup performed by the employees of the outside contractor, for the period commencing November 28, 1994 until completion of the improperly subcontracted work.

**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 19th day of September, 2001.

**Carrier Members' Dissent  
to Award 35702 (Docket MW-33575)  
Referee Eischen**

**There is a presumption in handling disputes submitted to arbitration and that is that the parties have established the basic facts of the matter in their on property handling.**

**In this case the Organization submitted a claim assertion that beginning on November 28, 1994 a contractor was used to cut trees and brush along the Richmond Branch in the Philadelphia seniority district.**

**In the Carrier's letter dated March 14, 1996, that is, more than 15 months after the original claim, it was noted that:**

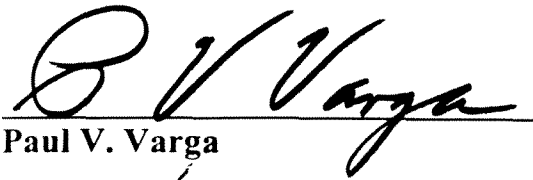
**"...not one shred of evidence has been presented to document  
any work allegedly done...."**

**During this extended time period there was no identification of the contractor employed, no indication of what work might have been performed beginning on November 28, 1994, no identification of the number of employees and or what equipment was used. In fact, during this entire period of time nothing beyond the initial assertion was ever provided by the Organization to substantiate that work was contracted out and performed by a contractor beginning on November 28, 1994 and continuing. It was and is self-evident that the Organization failed to meet its burden of proof in this record, see Third Division Awards 27853, 29062, 27629, SBA 1016 Award 24, PLB 4402 Award 33. On this basis, the claim should have been denied.**


**That the Carrier was equally deficient in rebutting with facts the Organization's assertions puts the cart before the horse. It is the Organization's burden to substantiate its claim. That was never done. Instead, the Majority focuses on the deficiencies of the Carrier's responses, which should have been better, and concludes that such was insufficient.**

**The reality appears to be that no brush cutting and clean up was done on the Richmond Branch beginning November 28, 1994. Such work had been routinely contracted out in the past; See Third Division Awards 24143, 27626, 30088, 30515, 31669, 32341, SBA 1016 Award 29.**

We Dissent.

A handwritten signature in cursive script, reading "P V Varga", written over a horizontal line.

Paul V. Varga

A handwritten signature in cursive script, reading "M Fingerhut", written over a horizontal line.

Martin W. Fingerhut

A handwritten signature in cursive script, reading "Michael C. Lesnik", written over a horizontal line.

Michael C. Lesnik

LABOR MEMBER'S RESPONSE  
TO  
CARRIER MEMBERS' DISSENT  
TO  
AWARD 35702, DOCKET MW-33575  
(Referee Eischen)

The Dissent of the Carrier Members is truly confusing. According to the Carrier Members' Dissent, the Majority apparently disregarded the phrase "... not one shred of evidence has been presented to document any work allegedly done....", thereby casting doubt on the validity of the initial claim. As it was pointed out by the Carrier Members, this refutation came more than fifteen (15) months after the initial claim was filed. In those intervening months the Carrier based its denial of the initial claim by contending that, "Investigation has revealed that the area in question was the site of very large and overgrown trees...." (Denial letter dated March 17, 1995). Then again in its September 27, 1995 denial of appeal the Carrier contended, "\*\*\* However, as stated in the Division Engineer's denial, Conrail does not possess the necessary equipment or personnel qualified to remove the trees....". As it is shown in the above, the Organization was not required to respond to the Carrier's inane assertion that "... not one shred of evidence has been presented to document any work allegedly done....". The Carrier had already admitted the work was performed by an outside contractor thereby relieving the Organization of the necessity of presenting any evidence that the work was performed. Moreover, the Carrier never raised the issue of identifying the contractor, the number of contractor employees performing the work or what equipment was used at the initial denial or second level of handling as the Carrier Members' Dissent now complains. The Carrier's bi-polar response to the appeal has been carried over to the Dissent, when the Carrier Members state: "The reality appears to be that no brush cutting and clean up was done on the Richmond Branch beginning

Labor Member's Response  
Award 35702  
Page Two

November 28, 1994. Such work had been routinely contracted out in the past...." (Emphasis added).

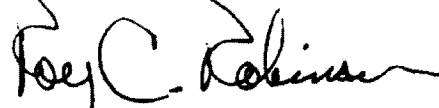
If such work was not performed to begin with, how can the Carrier allege a past practice of contracting such work.

The Carrier cannot have it both ways. It cannot be allowed to assert in its submission that the work involved here was:

1. a large scale environmental clean-up project,
2. the work involved required special skills not possessed by the Claimants,
3. the Carrier was not required to "piecemeal" a portion of the work and,

then allege that no work was performed. Such reasoning is confusing and borders on the absurd. The Majority's findings in this case are correct and sound. The Dissent is nothing more than a thinly veiled attempt to shroud the Carrier's blatant violation of the Agreement. The award is correct in every respect and I Concur with the findings.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson", with a stylized flourish at the end.

Roy C. Robinson  
Labor Member