

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36511
Docket No. MW-35729
03-3-99-3-707**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(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 (Ashley Tree Service) to cut brush on the right of way at locations between Mile Post 23 in Angola, New York and Mile Post 80 in Harborcreek, Pennsylvania beginning February 2, 1998 through February 9, 1998 (System Docket MW-5233).**
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman prior written notice of its plan to contract out the work referenced in Part (1) above, as required by the Scope Rule and Attachment 4.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants C. J. Malta, J. L. Braley, G. Tate, Jr., R. A. Gailey and S. V. Gabon shall now each be allowed thirty-two (32) hours' pay at their respective straight time rates of pay and five (5) 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.

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.

On February 10, 1998, the Organization filed the instant claim, alleging that from February 2 through February 9, 1998, the Carrier used outside forces from Ashley Tree Service, along with a Signal Maintainer, to cut brush along the right-of-way in various locations on the Chicago line from Mile Post 80 in Pennsylvania to Mile Post 23 in New York. The Organization contends that the Claimants, who were furloughed at the time, should have been used to perform work encompassed within the scope of the Agreement. In addition, the Organization argues the Carrier failed to provide advance written notice as required under the Agreement.

In its claim denial, the Carrier asserted that the disputed work was performed because the brush interfered with Conrail's signal system. The Carrier contended that there was no violation of any provision of the Agreement on the claim dates inasmuch as the Claimants had no demand right to cut brush from around signal equipment located on the right-of-way. In addition, the Carrier contended that the brush removal was performed on an emergency basis after train crews reported poor visibility of certain signals.

In Third Division Award 35530 the Board addressed a similar case in which a carrier contracted brush cutting work and then defended against the BMW's claim by arguing that the work involved emergency brush cutting under signal lines or along pole lines. Therein, the Board stated:

"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 will 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."

We find the foregoing analysis equally applicable to the case at hand. Based on these enumerated factors, the Board finds that a sustaining Award is in order.

First, it is well established at this point that general brush cutting work traditionally falls within the scope of the BMW Agreement. Third Division Awards 35702, 35530, 27185, 27014 and 27012; Awards 43 and 66 of Special Board of Adjustment No. 1016. Indeed, Attachment 4 of the governing Agreement states as follows:

"Without prejudice to the positions in the past with respect to such contracting and with the understanding that the following will not apply in the event the CAT agreement is terminated as a result of notice served by the Brotherhood, the Company will:

* * *

Brush Cutting

1. Consider brush cutting to be subject to the second paragraph of the Scope.
2. Contract brush cutting only if the work cannot be accomplished by employees represented by the BMW E because:
 - a. it requires special expertise not possessed by employees in the seniority district (such as, but not limited to, the removal of large trees which requires professional expertise); or
 - b. manpower is not available (including furloughed employees in the involved seniority district) and such work cannot reasonably be delayed until such employees would be available; or
 - c. the Company does not possess, or cannot reasonably obtain, necessary specialized equipment.
 - d. When the Company believes that either a., b. or c. applies, it will serve a notice under the Scope.”

Second, while there is no dispute that Signalmen also perform the work when brush interferes with the signal system, the Carrier did not successfully show that the brush cutting work actually performed by the outside contractor in this case was so narrowly tailored. True, the Carrier utilized a Signal Maintainer to work with the contractor’s employees. Based on the bid proposal submitted by the outside contractor, it appears that the Signal Maintainer was used to protect certain signal equipment during the brush cutting work. However, the evidence does not establish that the brush cutting work was entirely signal related. On the contrary, the Organization challenged the Carrier’s assertions about the location of the brush cutting work by submitting photographs which show that there was no signal equipment anywhere near long

stretches of area where the brush had been removed. The Carrier failed to counter this evidence.

We note, too, that the Brotherhood of Railroad Signalmen, after notification of the pendency of this dispute as Third Party in Interest, filed a Submission with the Board. In its Submission, the BRS stated that "Carrier's affirmative defense in this case should fail for lack of proof of its assertions. . . . Based solely on the record submitted by BMW, it does not appear that all, or even some of the brush removed by the Contractors was interfering with the signal system."

Because the record supports the conclusion that the outside contractor performed work that was at least in part BMW scope covered, the Carrier was required to provide advance notice to the General Chairman. The Scope Rule states:

"In the event the Company plans to contract out work within the scope of this Agreement, except in emergencies, the Company shall notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. 'Emergencies' applies to fires, floods, heavy snow and like circumstances."

The Carrier asserted that there was an emergency, but the bid proposal was submitted by the outside contractor on December 10, 1997 and the work did not begin until February 2, 1998. We are persuaded that ordinary track maintenance forces could have been utilized in that intervening time period. Under the circumstances, the Carrier failed to establish the existence of an emergency exempting it from the prior notification requirements under the Scope Rule.

Additional arguments were raised by the Carrier in its Submission and before the Board. The Carrier asserted that BMW employees do not possess the expertise to remove large trees. Further, the Carrier argued that five BMW employees were not needed because only four contractor employees were used. These arguments would have received due consideration had they been raised on the property. In fact, these are precisely the kinds of matters that the parties themselves could have addressed in a conference had notice been provided to the Organization before the work was contracted out. As the record stands, however, these arguments come too late.

Concluding as we do that the claim has merit and that advance notice should have been given, we will sustain Parts 1 and 2 of the claim. The matter is remanded to the parties to determine the number of hours of work performed by the contractor attributable to scope-covered BMW work and excluding the hours of brush cutting where the brush interfered with signals or related equipment. The Claimants will be compensated for 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 23rd day of April 2003.