

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37006
Docket No. MW-36792
04-3-01-3-364

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation
((Amtrak) – Northeast Corridor

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned Supervisor R. Esposito and five (5) employees from the Maintenance of Equipment Department to perform Maintenance of Way work (operate grass mowing equipment) at the Parksburg Train Station on May 9, 2000, instead of Messrs. R. Dambach, D. Fulton, S. Hamby, S. Longenderfer, B. Rhodes and N. Shauley (System File NEC-BMWE-SD-4049 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants R. Dambach, D. Fulton, S. Hamby, S. Longenderfer, B. Rhodes and N. Shauley shall now each be compensated for eight (8) hours' pay at their respective straight time 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.

This claim raises the issue of whether the Carrier's assignment of the operation of grass mowing equipment to a supervisor and employees of another craft who constituted the Keystone Safety Committee violated the Scope and Work Classification Rules of the Agreement. There is no dispute that this group cut grass, emptied trash receptacles, and did other janitorial work at the Parksburg Station on the claim date.

The Organization focused on the grass cutting on the property and argued that it constituted "station maintenance" falling within the Scope Rule. Before the Board the Organization also posits that mowing grass and general clean up is generally recognized as routine right-of-way maintenance work falling within the Classification of Work Rule and Side Letters No. 1 & 2, expressing the intention to continue performing this clean-up and brush cutting work with BMW members, and that a past practice to the contrary cannot negate this clear contract language. The Organization contends that BMW-represented employees have customarily and historically performed this work, noting that the Carrier had bulletined a Harrisburg Line gang dedicated to it in the past. It asserts that the Board rejected the Carrier's defense against assignment of scope-covered work to a "safety committee," citing Third Division Awards 30160, 30161, 31081, 31133, 31269, 31564, 31565, 35565, as well as to supervisory personnel, citing Third Division Awards 28185, 30786, 31129, 31356, and 34053. The Organization notes that abandoned claims have no precedential value, citing Third Division Awards 12942, 14296, 14506, 14903, 16018, 17180, 20041, and 30719. The Organization asserts that this represents a loss of work opportunity for the Claimants, who should be compensated regardless of the fact that they were working on the claim date.

The Carrier contends that the Organization failed to sustain its burden of proving that the work in dispute is reserved to it by Agreement or practice. It notes that the Organization never claimed exclusivity on the property, did not take issue with its assertion that grass cutting at Parksburg and other locations has been performed by contractors for more than 18 years, or that other janitorial work is customarily done by all crafts and non-Agreement employees in their assigned work areas, negating any contention that the work is reserved to BMW-represented employees, relying upon Third Division Awards 23478, 23549 and 24059. The Carrier notes that the Organization had filed a claim in a similar grass cutting dispute in June 1998 and did not progress it after it was denied, which can be considered as an acknowledgment that the work is not reserved exclusively to it, relying on Third Division Award 23549. The Carrier argues that the Organization impermissibly broadened the scope of its claim from only grass cutting to general clean up work, did not show which percentage of the disputed work fell into each category, or whether cutting grass was a preponderance of the work on the day in issue, making its claim excessive. It notes that the Claimants had no loss of earnings associated with the disputed work, and argues that they are not entitled to any monetary remedy.

A careful review of the record convinces the Board that the Organization failed to meet its burden of proving that the Carrier violated the Agreement by assigning the May 9, 2000 grass cutting and other janitorial work at Parksburg Station as it did in this case. Initially we note that while the claim mentioned the use of grass mowing equipment, it is clear that the Carrier addressed the work assignment in dispute on the property as not only mowing grass, but also the additional janitorial functions, and argued that neither aspect was reserved to employees under this Agreement. The Organization has not shown that BMW-represented employees customarily and historically performed the work in dispute. A reference to the fact that at one time the Carrier bulletined a gang to do grass cutting work is insufficient to rebut the Carrier's assertion that for the past 18 years all grass cutting at these unmanned stations has been performed by contractors. The record also contains unrebutted assertions that grass cutting and janitorial work on this property has been performed by many crafts and individuals outside of the coverage of this Agreement at various locations. It appears from a review of the correspondence on the property and the Carrier's Submission to the Board that it is not relying upon the assignment to the Keystone Safety Committee as a justification

for by-passing the scope coverage of the Agreement, as in the cases cited by the Organization, but rather, the fact that the work was not encompassed within the scope of the Agreement. As an aside we note that Side Letter No. 1 refers specifically to general right-of-way clean-up work and brush cutting, not mowing grass, and Side Letter No. 2 relates to work historically performed by BMW members prior to January 5, 1987, a showing missing in this case. Because the Carrier is not limited by the Agreement or practice in its assignment of mowing grass and janitorial work at the Parksburg station, the claim must fail.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 18th day of May 2004.