

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37363
Docket No. MW-36543
05-3-01-3-40

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Chicago and
(North Western Transportation Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (operate brushcutter, mower and chainsaws) to cut brush and trim trees on right of way at crossings between St. Paul, Minnesota and Mankato, Minnesota beginning October 3, 1999 and continuing instead of Seniority District 7 employees R. S. Skudlarek, I. R. Alto and T. M. Fogarty (System File 7WJ-7280T/1217566 CNW).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. S. Skudlarek, I. R. Alto and T. M. Fogarty shall now be compensated at their respective straight time rates of pay for an equal share of the total hours of work performed by the contractor's forces in the

performance of the aforesaid brushcutting and tree trimming work beginning October 3, 1999 and continuing.”

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 current claim asserts that, beginning on October 3, 1999 and continuing, the Carrier engaged an outside contractor to clear brush, weeds, and trim trees from its right-of-way at crossings between St. Paul and Mankato, Minnesota, on Seniority District No. 7. The Organization alleges that the work performed by the contractor was contractually reserved to BMWE-represented employees, and should have been performed by the Claimants. According to the Organization, the Claimants were qualified to perform all of the contracted work, which furthermore accrued to them by history and past practice. In support of its position, the Organization relied upon Rules 1, 2, 3, 4, 5 and 7.

In addition, the Organization specifically contended that the brush cutting work subcontracted here violated the December 11, 1981 Berge-Hopkins Letter of Understanding setting forth the parties' commitment to utilize fewer contractors on this Carrier's property, as well as the notice provisions contained in Rule 1(b) paragraph 3, as follows:

“In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood 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, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith."

The Carrier contends that it fully complied with its contractual requirements regarding advance notice and conference, as the evidentiary record clearly sets forth. Thus, prior notice is not an issue here, it emphasizes. The Carrier stresses that after notice was served on October 13, a conference was conducted on November 20, 1998, at the General Chairman's request. At that time, the Organization was informed that the work to be subcontracted involved brush cutting in conjunction with the immediate application of a herbicide that the contractor guaranteed would provide vegetation control for a two-year period. The contractor's employees were licensed, trained and equipped to apply the herbicide while the Carrier and its employees were not. Moreover, according to the Carrier, as a condition of the guarantee, the spraying had to immediately follow the brush cutting. Thus, the Carrier reasoned, rather than piecemeal the work, it opted to subcontract the entire weed control operation.

The Board carefully studied the factual record and the arguments set forth by the parties in support of their respective positions. Based on such review, we find that the record clearly supports the Carrier's contention that on October 13, 1998, it served two 15-day notices regarding (1) "brush cutting (first and second year maintenance)" and (2) "brush cutting (clear cut right-of-way)." The record further reflects that on October 19, the General Chairman sent a written request for a conference to the Carrier, and that on November 20, 1998, a conference was held to discuss those notices, along with others.

The record further establishes that on November 20, 1998, the same date as the conference, the Carrier sent a follow-up letter to the General Chairman documenting the conference and supplying additional comments regarding the work planned pursuant to the various service orders discussed by the parties. With respect to the brush cutting, Service Orders 12100 and 12447, relevant to this particular claim, indicated that the Carrier stated that "it appears that this work will not be performed until 1999." The note associated with Service Order 12447 additionally stated, "This work is vegetation control treatment as described above," referring to a preceding note concerning Service Order 12280, also discussed during the November 20, 1998 conference, which read:

"This work involves the grade crossing safety program and the chemical treatment of cut brush to prevent regrowth. The chemical must be applied immediately after the plant is cut in order for the treatment to be effective. There is an initial application and then, contractually, the Carrier has the ability to call out the contractor to reapply should regrowth occur. Afterwards, the maintenance of normal grass, etc., is done by BMW forces. It is of note that much of this work involves the removal of large trees and brush close to power lines."

In light of the above, we are convinced that, given the current facts and circumstances, the Carrier complied with the notice and conference requirements set forth in Rule 1(b). With respect to the timing of the project, we find that the follow-up letter made it clear that the brush cutting and weed spraying work would not commence until sometime in 1999. Thus, the record does not substantiate the Organization's contention that the Carrier undertook the subcontracting of scope-covered work without providing notice and an opportunity for the Organization to conference the matter.

Furthermore, the Board acknowledges the Organization's on-property assertion that several employees observed the contractor cutting brush, but did not see any contractors spraying vegetation, proof that the scope violation did occur, as alleged. Upon our careful review of the record in search of supporting documentation in that regard, we emphasize that we found none. Specifically, the record is devoid of any probative evidence, such as eyewitness statements or other

documentary information, to support that claim. Thus, we hold that the Organization's assertion that the contractor cut brush but did not apply any herbicides must be rejected for lack of proof.

Moreover, after a due study of the facts of record in this case, we find that the Organization additionally did not carry its burden of proving that, either under Rule 1 - Scope, or by past practice, the brush cutting work typically performed by the Claimants involved the additional work of herbicide spraying as was the situation here. See Third Division Award 36515. Additionally, the Carrier's position that it was not required to piecemeal the project is supported by clear arbitral precedent. See Third Division Awards 20785, 26850 and 30633.

Thus, the Organization failed to prove, by substantial evidence, that the Claimants were entitled to the contracting work in dispute. Given the facts of record, the claim is denied.

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 24th day of February 2005.