

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37694
Docket No. MW-37737
06-3-03-3-88

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 Employes
(National Railroad Passenger Corporation (Amtrak) –
(Northeast Corridor

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned and allowed Supervisor Rich Esposito to perform Maintenance of Way work (cutting weeds with gas powered weed eater) at the Elizabethtown Train Station on September 13, 2001 instead of Mr. S. Scicchitano (System File NEC-BMWE-SD-4171 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Scicchitano shall now be compensated four (4) hours' pay at his respective straight time rate 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 protests the assignment of weed cutting work at the Elizabethtown station to a supervisor rather than the Claimant, a furloughed B&B Mechanic. It involves allegations of a violation of the Scope and Work Classification Rules.

The Organization argues that the work of mowing weeds using a gas-powered weed eater falls within those Rules, that employees have historically, traditionally and customarily performed the character of work here involved, and that assignment of such work to a supervisor who holds no seniority under the Agreement violates it, citing Third Division Awards 28185, 30786, 31129, 31356 and 34053. It notes that the facts are basically undisputed, that the Carrier changed its arguments both on the property and before the Board, and that new evidence cannot be considered. The Organization asserts that the Claimant, as a furloughed employee awaiting recall, was available and qualified to perform the disputed work and is entitled to compensation, relying on Third Division Award 31449.

The Carrier contends that there is an irreconcilable conflict in facts requiring dismissal of the claim because it has always denied that Manager Esposito performed the disputed work, citing Third Division Awards 28435, 28794 and 33416. It notes that the Organization failed to sustain its burden of proving that the supervisor actually performed scope-covered work which was reserved exclusively to employees under the Agreement, relying on Third Division Awards 23478, 37005 and 37006. Before the Board the Carrier argues that the work was performed on leased property not within its control. It provided a copy of the lease agreement, and relied on Third Division Awards 25563, 26103, 28310, and 28819 to support its position that the claim should be denied. The Carrier asserts that the Claimant was not shown to be the employee who ordinarily and customarily performed the disputed work, and the Organization did not establish that there was sufficient work to require it to recall him from furlough for four hours.

Initially we note that the Carrier's argument concerning the location of the work on leased premises, which was presented for the first time to the Board, is a new argument which cannot be considered. Despite this fact, a careful review of the record on the property convinces the Board that the Organization failed to sustain its burden of proving that the weed cutting work in issue was actually performed by Manager Esposito at the Elizabethtown Train Station on September 13, 2001. The Organization contended that the work was performed by Esposito in its initial claim. The Carrier responded that it had no knowledge of a supervisor cutting weeds at that location, positing that it may have been done by others without its consent. The Organization

responded that the supervisor was seen doing this work by employees in the area. The Carrier denied that this was factual and that the supervisor had done so, pointing out that the Organization had not met its burden of proof. The Organization repeated its assertion adding that this was not the first time Esposito had been caught doing its work. The Carrier felt that this case was similar to one pending before the Board and offered to hold it in abeyance. The Organization declined the offer and advanced the claim to the Board.

It is clear from this summary of the correspondence on the property that the Board is not faced with an irreconcilable dispute in fact, because no actual facts were offered in support of either party's position. Both were based on assertions that the supervisor was seen doing the work by employees and that he had not done so. When the Carrier disputed the Organization's assertion, which was the underlying factual basis of its claim, it was incumbent upon the Organization to present some proof that the disputed work was performed by the supervisor. It could have presented a written *statement from the employees who had allegedly seen Esposito performing the work*. It chose not to do so. Even though there was no statement from Esposito denying performance of the work, the burden is on the Organization to prove a violation of the Agreement. Thus, even without addressing the issue of whether the disputed work was scope covered or reserved to BMW-employees, we must deny the claim for lack of proof.

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 30th day of January 2006.