

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38010
Docket No. MW-37106
06-3-01-3-693

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it utilized outside forces to perform Maintenance of Way work (cutting brush) between Mile Posts 517 and 519 at Sioux City on the Dakota Division on September 6, 7 and 8, 2000 (System File T-D-2166-B/11-00-0617 BNR).
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance written notice of its plans to contract out said work as required by the Note to Rule 55 and Appendix Y.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Group 2 Machine Operator L. D. Nelson shall be compensated twenty-four (24) 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.

The Organization submitted a claim on October 4, 2000 stating that the Carrier utilized an outside contractor on the Dakota Division, specifically on Line Segments 0554, 2003 and 0199 to cut brush. The Organization asserted that brush cutting was customarily and contractually the work of employees in the Roadway Equipment Sub-department. It alleged violation of Rules 1, 2, 3, 6, 55 and the Note to Rule 55, which states in part:

“By agreement . . . work . . . customarily performed by employees described herein, may be let to contractors and be performed by contractors’ forces. However, such work may only be contracted provided that . . . special equipment not owned by the Company, or . . . beyond the capacity of the Company’s forces.”

The Organization argued that the Rules support that the instant work not only belonged to BMWF-represented employees, but the Note to Rule 55 prohibited the contracting of this work, and the central requirement to the Note is notification in advance to the General Chairman. The Organization states that it was unequivocally scope covered work, performed by an outside contractor’s forces without prior notification.

The Carrier denies any violation, in addition to denying that this work belongs to BMWF-represented employees. It argues that the work was not exclusive; the work was not “customarily performed by employees” as required by the Note; the evidence presented by the Organization was insufficient; and as indicated by the Roadmaster, the equipment and FRA required safety project mandated the use of outside contractors because “it was a specialized machine hired to address a unique problem.” The Roadmaster’s statement makes the Carrier’s case that there were “tall overhanging trees very close to a residential area where there was no safe way to cut back the vegetation with the equipment BNSF has on

the property.” The Carrier asserts that its actions did not require prior notice and did not violate the Agreement.

The Board finds that the project using a special piece of equipment “designed with a 35 ft. reach” to cut overhanging branches is not central to the instant case. There is absolutely no way of determining if this equipment design was utilized rarely or continuously. There is no way in this record to conclude exactly what work the outside contractor’s forces performed. The Organization clearly presented evidence from the Agreement, Awards, statements, bulletins and documents that the work performed arguably belongs to BMW-employees. There is sufficient evidence that BMW-employees have done tree cutting, limb cutting and other tree control. There are numerous signed statements to that effect with some stating that BMW-employees have cut limbs and even spent several days to “push down trees.”

The Board is persuaded that the disputed work performed on the property is not sufficiently shown by the Carrier to be beyond the work customarily performed by BMW-employees. The central dispute between the parties is the cutting of trees; if this was within the norm or outside the norm of customary work. The Carrier argued that it was outside the norm, which the Organization continued to deny. As an affirmative defense, the Board is not persuaded that it was supported by sufficient probative evidence requiring specialized equipment. The Board will not evaluate the issue of special equipment for two reasons. First, the Carrier never provided the necessary proof that the disputed work necessitated the equipment, but more importantly, this issue should have been discussed by the parties, and would have had proper notice been given.

The work performed involved cutting tree limbs on the Carrier’s right-of-way on segments of the Dakota Division over three days in 2000. It was work classified and included in the duties of BMW-employees which could be contracted out if special equipment was needed. However, that is to be determined by discussion prior to contracting out with proper notice. The overwhelming documentation carefully reviewed by the Board revealed numerous instances of felling trees, cutting trees, utilizing chain saws and doing work that could arguably be similar to the instant work. Whether the disputed work could or could not have been performed in part or in total by the Carrier’s forces; whether special designed equipment was or was in no way necessary; these are the matters to

which the Agreement mandates discussion. In the absence of proper notice, the Board concludes that the Carrier violated the Agreement.

The Board reviewed the Carrier's discussion of appropriate remedy for the violation. We also reviewed the numerous Awards on this subject. The Board holds that the claim will be sustained as presented. This demonstrated violation adversely affected the Claimants in causing a loss of work opportunity.

AWARD

Claim sustained.

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 25th day of October 2006.