

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40208
Docket No. MW-38542
09-3-NRAB-00003-040535
(04-3-535)**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(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 (Kramer Tree Service) to perform Maintenance of Way and Structures Department work (cut trees and brush around bridges) on the Shoreline Sub, Kohler, Ind. Lead, Milwaukee Sub, Harvard Sub and Janesville Sub on June 4, 5, 18, 19 and 20, 2003 instead of Messrs. C. Mink, K. McCarrell and J. Feltz, Jr. (System File 8WJ-7378T/1378099 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 C. Mink, K. McCarrell and J. Feltz, Jr. shall now each “*** be compensated at their respective rate of pay for an equal share of the 200 man/hours work performed by Contractor forces in performance of the tree removal and brush cutting cited herein.”**

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 Claimants established and hold seniority in the B&B Department on District 8. They were assigned and working on their respective positions on the Milwaukee B&B Gang headquartered at Butler, Wisconsin, on the dates involved in this dispute.

On June 4, 5, 18, 19 and 20, 2003, the Carrier assigned Kramer Tree Service to cut trees and brush from around bridges at a number of locations. Five employees of the contractor, using chain saws and brush axes, expended eight hours each on the claim dates.

The Organization claims that the Carrier did not provide proper notice to the General Chairman and thus did not act in good faith. Second, it claims that it was improper for the Carrier to contract out the above-mentioned work because it is work that is properly reserved to the Organization. According to the Organization, the Carrier had customarily assigned work of this nature to be performed by its Maintenance of Way employees. It further claims that this work is consistent with the Scope Rule. According to the Organization, the Carrier's Maintenance of Way employees were fully qualified and capable of performing the designated work. Because the Claimants were denied the right to perform the relevant work, the Organization argues that the Claimants should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. It contends that the work that was contracted out was not simply the trimming of trees and brush that is ordinarily within the scope of BMW-represented employees. Rather, the Carrier contends that the work involved the removal of trees that were approximately 50 to 100 feet tall. The Carrier contends that it does not have the necessary skills or equipment to climb and cut trees of this magnitude, and has not done so in the past. In addition, the trees were located in close proximity to high voltage power lines. The Carrier contends that such work does not belong to BMW-represented employees under either the express language of the Scope Rule or any binding past practice. Further, as to the alleged notice violation, the Carrier asserts that it did provide notice. In addition, the Carrier contends that the issue of providing notice was not raised on the property and, therefore, cannot be considered by the Board.

First, as to the alleged Rule 1(b) violation, we find that we need not reach this issue because the argument was not raised on the property. Next, we reach the issue of whether the work in question has been traditionally and customarily performed by BMW-represented employees. Special Board of Adjustment No. 1016, Award 150 framed the scope issue as follows:

“In disputes of this kind, the threshold question for our analysis is that of scope coverage. There are generally two means of establishing scope coverage. The first is by citing language in the applicable scope rule that reserves the work in disputes to the Organization represented employees. The second method is required when the language of the scope rule is general. In that event, the Organization must shoulder the burden of proof to show that the employees it represents have customarily, traditionally and historically performed the disputed work. It is well settled that exclusivity of past performance is not required in order to establish scope coverage vis-à-vis an outside contractor.”

In the instant case, we carefully reviewed all on-property record evidence to ascertain whether the Organization proved that the involved work belongs to the

Organization. First, we note that the work of tree removal is not specifically identified in the Scope Rule. See Third Division Award 37363.

We next turn our attention to whether the Organization proved that BMW-represented employees have customarily, traditionally, and historically performed the disputed work. In the instant case, while the Organization presented some evidence to show that similar work belonged to the Organization (trimming of trees and brush) that evidence is insufficient for the Organization to meet its burden of proof. See Third Division Awards 37480 and 37365, as well as Public Law Board No. 4402, Awards 20 and 28.

Based on the record evidence and the above-cited precedent, we find that the work of large tree removal is not definitively encompassed within the plain language of the Scope Rule. Nor has the Organization been able to prove that this work has historically and traditionally been performed by members of the Organization. Thus, having determined that the work was not within the scope of the Organization, we find that the Organization failed to meet its burden of proof. Accordingly, 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 21st day of December 2009.