

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30844  
Docket No. MW-29364  
95-3-90-3-275

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Emery Tree Service, Inc.) to cut brush along the right of way between Roselle Park and Perth Amboy, N.J. on the New Jersey Division on October 3, 4, 5, 6, 7, 10 and 11, 1988 (System Docket MW-353).
- (2) As a consequence of the aforesaid violation, Foreman J. Montesana, Class 3 Machine Operator R. Jaques, Vehicle Operator P. Hackenberg, Casual Driver G. Fallon and Trackman/Operator J. Constantine shall each be allowed fifty-six (56) hours of pay at their respective straight time rates."

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 waived right of appearance at hearing thereon.

On August 19, 1988, the Carrier sent the following notice to the General Chairman:

"Without prejudice to our position that brush cutting and cleaning up of debris is not covered by the Scope of our agreement and that such work has historically been contracted without advance notice, and solely to avoid any possibility that Third Division Award 27012 will prevail, this is to advise of our intent to contract brush cutting and removal of debris from the following locations:

Subdivision #8, N. C. Division - So. Plainfield, Newark  
Jamesburg, Freehold,  
Farmingdale, and Union

Work of this nature is not covered by the Scope of our agreement and has been contracted historically without notice and without protest. In any event, there are no employees furloughed on the applicable work zone on the New Jersey Division. Furthermore, aside from the foregoing, it would not be economical to recall a furloughed employee, nor would such employee be required to return for work of such short duration.

In the event you wish to discuss this matter, we are available to meet in our office at 9:00 A.M. on Wednesday, August 24, 1988."

Subsequently, a claim was filed protesting the Carrier's action.

After reviewing the record, the Board is compelled to conclude that the Organization's basic entitlement to perform the work in question was established in Award 27012, among others. Under Award 27012 they need not show that they have done the work in question exclusively. It is sufficient to establish that they have customarily done brush cutting. In other words, they are entitled to the work if historical use of Carrier forces is the ordinary course of conduct by the Employer. Even though contractors may have been used in the past, this does not necessarily establish that employees did not ordinarily do the work.

As a result of Award 27012 and this Board's analysis of the evidence of this record, it must be concluded that the Agreement was violated. However, no monetary damages are appropriate in view of the fact all the Claimants were fully employed and indeed performed some overtime during the claim period. Nor is the Board convinced that there was a loss of work opportunity. The claim is sustained as the Agreement was violated; however, no monetary damages are appropriate.

#### AWARD

Claim sustained in accordance with the Findings.

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O R D E R

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 27th day of April 1995.