

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40319
Docket No. MW-39983
10-3-NRAB-00003-070190
(07-3-190)**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad 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 (cleanup of right of way and painting) on a two (2) mile stretch of track from North Avenue to Highland Boulevard and on the south side of the overpass from Third and Oklahoma Avenue to 16th and Cleveland Avenue in and around Milwaukee, Wisconsin on June 3, 2005 (System File C-20-05-C080-09/8-00228-122 CMP).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intent to contract out said work as required by Rule 1 and failed to enter good faith discussions to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as set forth in Appendix I.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the Claimants (all employees assigned on June 3, 2005 to B&B Crew BBMILWA2/1250, Section Crews**

MWCUDAHY/1568, MWMUSKEG/1568, MWMILWA3/1568, MWMILWA1/1568 and Maintenance Crew MWMILWA2/1568) shall now each be compensated at their respective straight time rates of pay for a proportionate amount of the four hundred twenty (420) hours expended by the outside forces in the performance of the aforesaid work on June 3, 2005.”

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.

On June 3, 2005, there was a city-wide clean up sponsored by the City of Milwaukee and volunteers from Deloitte & Touche, an accounting, and advisory firm. The cleanup was part of an effort to discourage illegal dumping and graffiti. According to newspaper accounts and press releases relied upon by the Organization, volunteers picked up trash along a two mile stretch of the Carrier's track as part of the cleanup project. Carrier employees operated front-end loaders and trucks to haul away the debris collected by the volunteers.

The Organization asserts that the cleanup project was work reserved to BMWE-represented forces and, therefore, the Carrier was required to notify the Organization of its intent to assign the work. The Organization further argues that the cleanup along the right-of-way could have been performed by BMWE forces who have traditionally and customarily performed work of this nature. The Carrier

violated the Agreement by utilizing outside forces to perform scope protected work, the Organization insists.

The Carrier argues at the outset that the claim should be dismissed on the basis of untimeliness. It then goes on to assert that the Organization failed to establish a violation of the Agreement. In the Carrier's view, the Organization did not meet its burden of proving that the work at issue is scope covered. Equally important, the Carrier did not contract out work. The Carrier contends, therefore, that it had no obligation to provide advance notice.

Based upon our review of the record in its entirety, the Board finds that the claim was timely presented and is properly before the Board.

On the merits, the Note to Rule 1 reads, in pertinent part:

"NOTE: In the event Carrier plans to contract out work within the scope of this agreement, the Carrier shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto. . . ."

The burden was on the Organization to prove that the Agreement language was violated. Its case fails in several significant respects. First, unlike the Awards cited by the Organization in which there was specific Agreement language which reserved to BMW-represented forces the right to perform the disputed work, the Scope Rule herein is general in nature. Compare, Third Division Awards 30160 and 31889.

Second, that being the case, the Organization was required to establish that BMW-represented forces have customarily, historically, and traditionally performed the disputed work. In the absence of specific Scope Rule coverage, there must be probative evidence of such a pattern of performance. The few brief quotes from a news release that were provided by the Organization do not meet that evidentiary standard. The evidence does not support the finding that trash pickup is reserved to BMW-represented forces by custom or practice.

Third, the Note to Rule 1 pertains only to those situations where work has been contracted out. There is no evidence in this record that any work was contracted out. The City of Milwaukee initiated a citywide cleanup project and requested volunteers to perform the work. The Carrier did not hire, direct, or compensate a contractor to perform the cleanup work. Moreover, there is no evidence that the Carrier would have undertaken this project absent the impetus from the City, because the goal of the cleanup project was to highlight and enforce anti-graffiti and dumping laws in the city.

It is true that the Carrier derived an indirect benefit from the work that was performed. However, there is no indication that the volunteer cleanup project was an attempt to circumvent the Agreement. In the absence of a proven Scope Rule violation, this claim must be 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 1st day of March 2010.