

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 41743  
Docket No. MW-41785  
13-3-NRAB-00003-110424

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 Employees Division -  
( IBT Rail Conference  
(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 outside forces to perform Maintenance of Way work (remove non-operational telephone line poles from the right of way) on the Springfield Line beginning on April 1, 2010 and continuing through June 8, 2010 (Carrier’s File NEC-BMWE-SD-4924 AMT).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an advance written notice of its plans to contract out said work or make a good-faith attempt to reach an understanding concerning said contracting as required by the Scope Rule.**
- (3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants S. Paprocki, M. Valentino, C. Kobierowski and D. Cerrito shall now each be compensated for three hundred and seventy (370) hours at their respective straight time rates of pay and for ninety (90) hours at their respective time and one-half rates 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 contracting dispute involves the demolition and removal of non-operational communication and signal poles and line from both sides of the main track on the Springfield Line from MP-2 to MP-62, which was admittedly performed by contractors using equipment including boom and grapple trucks during the claim period, after the Carrier served advanced written notice on the General Chairman of the IBEW on August 28, 2009, and no objection was filed by the IBEW. It is undisputed that no similar notice was served on the Organization's General Chairman.

The Organization argues that work of the character involved is encompassed within its Scope and Classification of Work Rules as maintenance of the right-of way, entitling it to both advanced written notice of contracting, as well as the right to perform such work. It also asserts that BMWF-represented employees have historically performed similar work, and includes statements from a number of employees indicating that they worked with the C&S Department removing pole lines from the right-of-way on the Shore Line during the Northern District electrification project using grapple trucks. The Organization maintains that it is irrelevant if the work is reserved to the IBEW and if notice was served on that Organization, because this is not a craft dispute, but a contracting one, and exclusivity is not required in a contracting dispute, citing Public Law Board No. 6671, Award 4. It states that the appropriate remedy is for the Claimants to share in all hours expended by the contractors in performing this work, and that the full employment defense is not available to the Carrier in a case such as this.

The Carrier contends that the work in question is not exclusively reserved to BMW-represented forces and not within BMW's Scope Rule, noting that these were communications poles that fell within the scope of the IBEW Agreement, because signal pole work goes to BRS-represented employees. It asserts that it was not disputed between them that the work in question was IBEW work, and that they were notified of the contracting and did not object. The Carrier also notes that the extent of BMW-represented personnel performing similar work consisted of one instance 25 years earlier when the IBEW cut the communications poles down and BMW-represented employees worked along with them to pick up and remove them, and argues that such evidence neither proves historical performance nor a reservation of work necessitating notice or assignment. It further contends that the Organization failed to demonstrate that the work belongs to BMW-represented personnel, especially based upon the use of a particular type of equipment, which has no bearing on the reservation of work of a particular nature, inasmuch as many crafts use boom and grapple trucks in the performance of their work. The Carrier also argues that the claim seeking payment at the overtime rate for work not performed is excessive and has no support on this property, relying on Third Division Awards 31129 and 35863.

A careful review of the on-property record evidence convinces the Board that the Organization made a prima facie showing that removal of the telephone poles in question was arguably encompassed within the Scope Rule of its Agreement as the performance of maintenance of right-of-way work, so as to require advance written notice of the Carrier's intent to contract out such work. This is especially true when considering the undisputed evidence establishing that BMW-represented employees in the past have been assigned to assist IBEW-represented employees in removing telephone pole lines that had been used for communications from the right-of-way on the Northern District after they were cut down and the wires removed. There is no dispute that the maintenance of communication telephone pole lines falls under the primary jurisdiction of the IBEW, and the Carrier recognized this fact when it served advance written notice to the IBEW in this case. However, because this is not a craft dispute between the IBEW and the BMW, exclusivity of performance is not a required showing by the Organization in order to be entitled to notice of intent to contract out. See, Third Division Awards 37695, 37696 and 37815. The Carrier has served notice on multiple Organizations when each has an arguable claim to part of the work that is being contemplated for contracting. See, e.g. Public Law Board No. 6671, Award 4. Its failure to comply

with the notice and conference provisions of the BMW Scope Rule in this case violated the parties' Agreement.

With respect to the appropriate remedy, the Carrier repeatedly argued on the property that the claim was excessive. Because the notice furnished to the IBEW indicates that the subcontracting in this case involved both the demolition and removal of non-operational signal poles and line, and there is no contention that the demolition of such poles and line arguably falls within the Organization's Scope Rule, the parties are directed to do a joint check of the records to determine the number of hours expended by the contractor forces solely with regard to removing the poles from the right-of-way - a discussion that could have resulted from a conference after receipt of notice by the Organization - and the Carrier shall compensate the Claimants for their proportionate share of such hours at their straight time rates of pay, the amount held to be the appropriate calculation for a lost overtime opportunity on this property. See, Third Division 35863, as well as Public Law Board No. 6671, Award 4.

**AWARD**

Claim sustained in accordance with the Findings.

**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 30th day of September 2013.