

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42598
Docket No. MW-42807
17-3-NRAB-00003-140532**

The Third Division consisted of the regular members and in addition Referee Robert A. Grey when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Springfield Terminal Railway 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 Engineering and Mechanical Department work (cutting brush) at various locations including at CPF445-MP448 beginning on September 3, 2013 and continuing instead of assigning said work to Equipment Operators R. Brunelle and P. Ricardi (Carrier’s File MW-14-04).**
- (2) The Agreement was further violated when the Carrier failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Article 3.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Brunelle and P. Ricardi shall each be allowed ‘. . . all involved hours at time and one-half of the Equipment Operator’s rate of pay for both claimants and including all lost benefits, as a result of this Contracting out issue.***’ beginning September 3, 2013 and continuing until the violation ceases.”**

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 Board finds that on the record presented, the claimed work is scope-covered under Articles 1 and 5 of the Agreement, thus requiring the Carrier to comply with the contracting requirements of Article 3.

Article 3 provides, verbatim:

“3.1 In the event the Company plans to contract out work within the scope of the Agreement, except in emergencies, the Company will notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto.

3.2 If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company will promptly meet with him for that purpose. Said Company and Organization representatives will make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the Company may nevertheless proceed with said contracting and the Organization may file and progress claims in connection therewith.”

The Carrier provided written notice to the General Chairman, dated July 9, 2013, that the Carrier intended to hire a contractor “. . . to cut brush at selected locations of Pan Am Southern from Mechanicville, NY to Ayer, MA, beginning no sooner than July 29, 2013 . . .” Pursuant to the General Chairman’s request, the parties discussed the contracting transaction on July 31, 2013. On August 5, 2013, the General Chairman wrote a detailed letter to the Carrier setting forth the Organization’s opposition to the contracting transaction. On August 23, 2013, the

Carrier responded to the General Chairman with a detailed letter in support of the contracting transaction. On September 3, 2013, the contracted work began.

The Board has carefully reviewed the parties' post-notice, pre-claim correspondence and finds that same demonstrates good faith attempts to reach an understanding concerning the contracting transaction. Therefore, the Board finds that the Carrier complied with Article 3.

The Carrier's assertion of a past practice of contracting such work is not supported in the record by factual evidence. However, the Organization did not meet its burden to prove that the claimed work is reserved to the Organization.

Therefore, under the facts and circumstances presented in this record, the Board does not find the Carrier in violation.

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 19th day of April 2017.

LABOR MEMBER'S DISSENT
TO
AWARD 42598, DOCKET MW-42807
(Referee Robert A. Grey)

In this case, the Majority erred in its decision. Specifically, the Majority held:

“The Carrier’s assertion of a past practice of contracting such work is not supported in the record by factual evidence. However, the Organization did not meet its burden of proof that the claimed work is reserved to the Organization.”

This holding is confusing and in serious error. The Carrier did not refute the reservation of brush cutting during the on-property handling or within its submission to this Board. In fact, the Carrier acknowledged the work was reserved to the Organization but argued that it was justified in contracting out the work due to a practice. Once the Majority held that the Carrier failed to establish a practice, the only logical conclusion is that the Carrier unjustifiably contracted out reserved Maintenance of Way work. For the above-mentioned reasons, it is clear that the Majority erred in rendering its decision. Therefore, I respectfully dissent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Zach Voegel', written in a cursive style.

Zachary C. Voegel
Labor Member

**Carrier Members’
Dissenting Opinion
to
Third Division Award 42598
Docket No. MW-42807**

Referee Robert A. Grey

The Board erred in failing to conclude that the record of this case demonstrated that the Carrier has an extensive history of contracting out brush cutting on the property.

In its July 9, 2013, written notice to the Organization, and again in its Submission to the Board, it was clearly stated that the Carrier has *“historically supplemented its own brush cutting forces with contractors. In fact, the level of supplemental contracted brush cutting forces used across the system has remained relatively consistent since at least as far back as 1998.”* In its Submission to the Board, the Carrier further pointed out that *“None of the foregoing has been refuted and must stand as fact on the record.”*

It is for the foregoing reasons that the Carrier must dissent from the Boards finding that “the Carrier’s assertion of a past practice of contracting such work is not supported in the record by factual evidence.”

Anthony Lomanto
Carrier Member

Matthew R. Holt
Carrier Member

May 31, 2016