

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42921
Docket No. MW-43035
18-3-NRAB-00003-150249**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
IBT Rail Conference**

PARTIES TO DISPUTE: (

(Lake Superior and Ishpeming Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside force (Environmental Recycling Group) to perform Maintenance of Way work (plant trees) along the north property line of the West Yard on September 19, 20 and 21, 2013 (System File C-31-13-080-10-L LSI).**
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman in writing of its intent to contract out the aforesaid work as required by Rule 4 and the December 11, 1981 National Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants T. Beaudry, A. Ranta and S. Shepich shall each now ‘. . . be allowed a proportionate share of thirty-four (34) hours at their respective 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 were given due notice of hearing thereon.

The Organization filed the instant claim on behalf of the Claimants, alleging that the Carrier violated the Agreement when it contracted out certain Maintenance of Way work instead of assigning such work to the Claimants, who were able and available to perform the work. The claim further alleges that the Carrier committed another violation of the Agreement by failing to provide written notice to the General Chairman of its intent to contract out the work in question. The Carrier denied the claim.

The Organization contends that the instant claim should be sustained in its entirety because the work at issue historically and customarily has been performed by Maintenance of Way forces, because the work at issue is reserved to Maintenance of Way forces under the Agreement's Scope Rule, because the Carrier failed to comply with Rule 4's mandate that it provide the General Chairman with written notice of its intent to contract out the work at issue, because there is no merit to the Carrier's defense, because the Carrier's actions resulted in a lost work opportunity for the Claimants, and because the requested remedy is appropriate under the circumstances. The Carrier contends that the instant claim should be denied in its entirety because the Organization failed to meet its burden of proving that the Agreement confers exclusive rights to the work at issue upon Maintenance of Way forces, because the Organization has failed to meet its burden of proving that a mutually recognized past practice has established such exclusive rights upon Maintenance of Way forces, and because no represented employee has lost any work as a result of the Carrier's actions here.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board has reviewed the record in this case, and we find that the Organization has failed to meet its burden of proof that the Carrier violated the

Agreement when it contracted out the planting of trees on its property in September of 2013. The Scope Rule, which is cited by the Organization, does not give the Organization employees the exclusive right to perform tree planting. Since the work at issue is not included in the Scope Rule, then the Contracting-Out Rule does not require notice being given to the General Chairman. If the Carrier wants to contract out work within the scope of the applicable schedule agreement, the Carrier has the requirement of notifying the General Chairman. But, in this case, the work that was being contracted out was not covered by the Scope Rule.

Finally, the Organization has come forward with insufficient past practice of BMW employees performing tree planting. The three statements put in the record are simply not enough to make it clear that this work has exclusively been reserved to the Organization in this case.

Since the Organization bears the burden of proof in cases of this kind and has failed to meet that burden, this Board has no choice other than to deny the claim. Therefore, 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 14th day of February 2018.