

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42990
Docket No. MW-42915
18-3-NRAB-00003-150074**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(Delaware Hudson 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 (Asplundh) to perform Maintenance of Way work (weed and vegetation control) throughout the Carrier’s system beginning on April 26, 2012 and continuing (Carrier’s File 8-00950 DHR).**
- (2) The Agreement was further violated when the Carrier failed to provide an advance notice of its intent to contract out the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as required by Rule 1 and ‘Appendix H’.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants K. Harrington and D. Turner shall now each be compensated at their respective and applicable rates of pay for an equal and proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning on April 26, 2012 and continuing.”**

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 Carrier contracted out weed and vegetation control work to Asplundh on April 26, 2012. The Organization protested, claiming a violation of applicable provisions of the collective bargaining agreement.

The Carrier notes that it has historically contracted out herbicides application as this is done using hy-rail equipment that is not owned by the Carrier. It points out that the Carrier is required by regulations to use a qualified vegetation management service with appropriate certification, training and specialized equipment. There was no tradition, custom or practice of bargaining unit employees performing this work, argues the Carrier. According to the Carrier, the equipment belongs to Asplundh and can only be operated by its employees. The Carrier does not deny that it failed to provide the Organization with advance notice and opportunity for conference, but asserts the proper remedy for its lapse is a cease and desist order.

The Organization does not dispute the facts as described by the Carrier. However, it contends the Carrier's failure to provide the requisite notification and conferencing warrants granting the claims. It concedes that the Carrier may have contracted out this type of work in the past, but points out that it did so with concurrence of the Organization after it had provided the Organization advance notice and opportunity for conference. The Organization asserts that the Carrier's failure to assign this work to Maintenance of Way employees was a violation of the Agreement and that the Carrier's failure to comply with the advance notice and

conference provisions compounded that violation. It concludes that a fully sustained claim is required.

In the opinion of the Board, vegetation control is properly considered scope covered work because it directly involves maintenance. The Carrier has historically recognized this by issuing a contracting notice and inviting conference. No circumstance or situation has been cited which had changed, altering the nature of this work.

In repeated conferences over time, the parties have agreed that the workers and equipment used to perform this task are sufficiently specialized to allow for subcontracting. Against this backdrop, the Carrier suddenly contracting out the work without providing advance notice or opportunity for conferencing as envisioned by the Agreement.

Because the work falls squarely within the language of Rule 1, the lack of notice and opportunity for conference constituted a violation of the parties' Agreement. However, the parties' history of allowing the subcontracting in question constitutes a mitigating circumstance. There was no evidence of any basis for an expectation by either party that something had changed and the work would now be given to BMW represented employees. As a result, a fully sustained award is not indicated. The fact remains, however, that the work is properly designated as scope covered, and the notice and conference requirement negotiated between the parties applies and is fully enforceable.

The claim is granted in part. The Carrier will cease and desist from contracting out weed and vegetation control without providing the Organization advance notice and an opportunity for conference.

AWARD

Claim sustained in accordance with the Findings.

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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 29th day of March 2018.