

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42996
Docket No. MW-43069
18-3-NRAB-00003-150308**

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 Employes Division -
(IBT Rail Conference
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(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 (brush cutting) on the Sunbury Subdivision beginning on September 16, 2013 and continuing through October 11, 2013 (Carrier’s File 8-00949 DHR).**
- (2) The Agreement was further violated when the Carrier failed to provide a proper 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 P. Smith and E. Nicholson shall now each be compensated for one hundred sixty (160) hours at their respective straight time rates of pay and three hundred twenty (320) hours at their respective time and one-half rates of pay in connection with the outside forces performance of the aforesaid work beginning on September 16, 2013 continuing through October 11, 2013.”**

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.

By letter dated August 12, 2013, the Carrier presented the Organization with a letter stating that it intended to contract out herbicide application work on the NEUS. The Carrier subsequently clarified that the work was intended to include brush cutting. The Organization protested that this work belonged to the bargaining unit and was being contracted out in violation of the parties' collective bargaining agreement.

Though the Carrier acknowledges that brush cutting was historically done by BMW represented employees, it distinguishes the work concerned here. It points out that the contractor used a specialized work head in which the sprayer is attached to the cutting mechanism; vegetation is sprayed and cut simultaneously. It notes the Asplundh EcoBlade was not available for rental and in order to increase efficiency and accomplish both tasks at the same time, its only option was to contract out. The Ecoblade equipment belongs to Asplundh, it explains, and can only be operated by Asplundh's employees. It also maintains that Asplundh holds all the necessary licensing in order to store, mix and apply herbicides in any State and its employees are fully knowledgeable about each State's requirements and legislation.

The Organization notes that that during the conference, the Carrier never made any declaration as to what attempts, if any, were made to rent or utilize equipment with relation to the brush cutting aspect of this work which could have and historically had been performed by BMW represented forces. It alleges the

Carrier also failed to specify whether or not it had other equipment available that could perform the brush cutting work. The Organization does not recognize any unilateral right of the Carrier to remove brush cutting work from the Agreement and assign it to third parties.”

The Carrier had not previously tried out use of the Ecoblade. It apparently was relatively new technology utilizing specialized equipment which could perform two tasks at once, indicating a substantial increase in efficiency.

It is clear to the Board that brush cutting work is within the scope of protected duties recognized as BMWED work. The distinction in this case is that the tasks of brush cutting and herbicide application were combined and simultaneously performed. This combination of tasks had not previously been performed by BMWED employees.

This does not mean that the combined tasks could now be excluded from scope covered work. To the contrary, the new multitask included and incorporated a well-recognized scope covered duty: brush cutting. Because the combined task encompassed well established, scope covered work, the new duty was properly deemed to be subject to the notification and conferencing requirements. This action by the Carrier is indicative of good faith.

It is extremely significant in this case that the Carrier could not purchase or rent the equipment involved, and had no way to train its employees to do the work. There was no alternative means available to gain access to the equipment and skills needed to perform brush cutting and herbicide application at the same time. The new technology was reasonably perceived by the Carrier as offering the potential of substantially increasing efficiency. On these grounds, the Carrier cannot be said to have violated the Agreement by compromising BMWED employees’ rights when it outsourced the new technology.

The Board’s decision in this instance is limited to the particular facts of the case. The Board’s recognition of the Carrier’s right to contract out under these specified circumstances should in no way be interpreted as negating the covered nature of brush cutting work. The parties have negotiated a means of dealing with changes in available equipment and methodology, which is for the Carrier to

provide notice and an opportunity for conference so that the parties can address and adjust to ever-changing technology. Applicable contractual mandates were met.

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 29th day of March 2018.