

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43610
Docket No. MW- 44547
19-3-NRAB-00003-170619**

The Third Division consisted of the regular members and in addition Referee Michael Capone when award was rendered.

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

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to backfill the vacant trackman position(s) on Brush Cutting Support Gang S134 on December 18, 19 and 26, 2015 and January 2, 2016 (Carrier's File NEC-BMWE-SD-5446 AMT).**
- (2) The Carrier violated the Agreement when it failed to backfill the vacant trackman position(s) on Brush Cutting Support Gang S134 on December 13, 18, 19, 20, 26 and 27, 2015 and January 2 and 3, 2016 (Carrier's File NEC-BMWE-SD-5447).**
- (3) The Carrier violated the Agreement when it failed to backfill the vacant trackman position(s) on Brush Cutting Support Gang S134 on December 13, 15, 20, 27, 28 and 29, 2015 and January 3 and 4, 2016 (Carrier's File NEC-BMWE-SD-5448).**
- (4) The Carrier violated the Agreement when it failed to backfill the vacant trackman position(s) on Brush Cutting Support Gang S134 on December 14 and 15, 2015 and January 4, 2016 (Carrier's File NEC-BMWE-SD-5449).**
- (5) The Carrier violated the Agreement when it failed to backfill the vacant trackman position(s) on Brush Cutting Support Gang S134 on December 14, 21 and 22, 2015 (Carrier's File NEC-BMWE-SD-5450).**

- (6) The Carrier violated the Agreement when it failed to backfill the vacant trackman position(s) on Brush Cutting Support Gang S134 on December 28 and 29, 2015 (Carrier's File NEC-BMWE-SD-5451).**
- (7) The Carrier violated the Agreement when it failed to backfill the vacant trackman position(s) on Brush Cutting Support Gang S134 on December 21 and 22, 2015 (Carrier's File NEC-BMWE-SD-5452).**
- (8) As a consequence of the violation referred to in Part (1) above, Claimant M. Asselin shall be compensated eight (8) hours' overtime for each of the claim dates.**
- (9) As a consequence of the violation referred to in Part (2) above, Claimant N. Garrett shall be compensated eight (8) hours' overtime for each of the claim dates.**
- (10) As a consequence of the violation referred to in Part (3) above, Claimant E. Smeaton shall be compensated eight (8) hours' overtime for each of the claim dates.**
- (11) As a consequence of the violation referred to in Part (4) above, Claimant G. Cartwright shall be compensated eight (8) hours' overtime for each of the claim dates.**
- (12) As a consequence of the violation referred to in Part (5) above, Claimant A. Barbeiro shall be compensated eight (8) hours' overtime for each of the claim dates.**
- (13) As a consequence of the violation referred to in Part (6) above, Claimant C. Hayes shall be compensated eight (8) hours' overtime for each of the claim dates.**
- (14) As a consequence of the violation referred to in Part (7) above, Claimant J. Dolbee shall be compensated eight (8) hours' overtime for each of the claim dates.”**

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.

On February 10, 2016, the Organization filed seven claims on behalf of the Claimants asserting that the Carrier violated the Memorandum of Understanding, dated August 1, 2009, Rule 55 – Preference for Overtime Work, and the Northern District Overtime Call Order/Track Department provision when it failed to backfill vacant trackmen positions that were bulletined for the purpose of supporting outside contractors performing tree cutting services. The on-property record of the Carrier's denials of the claim and subsequent appeals by the Organization indicates that the final decision by the Carrier was on March 10, 2017. The Organization rejected the Carrier's decision and filed its notice of intent with the Third Division. The claim is now properly before the Board for adjudication.

Relevant Provisions

Memorandum of Understanding, ("MOU") dated August 1, 2009, which in pertinent part, reads:

"IT IS AGREED:

1. a. In the application of the Scope Rule of the Northeast Corridor BMW Agreement, Amtrak may use outside contractors to cut and clear trees from the vicinity of overhead wires and signal systems and that such contracting out shall not constitute a violation of the agreement or serve as the basis for

claims against the corporation. Amtrak will provide the BMW with an informational notice as to the location of the work to be performed.

- b. BMW forces will continue to perform all other work that has been customarily and historically performed in connection with the general cutting and clearing of vegetation and brush from the right of way, except as provided above.
- c. When protection is deemed necessary as determined by Amtrak, MW forces will perform said work.

Tree Cutting Program Supplemental Notice New England Division, in pertinent part, reads:

“This is an informational Supplemental Notice to the Carrier's prior letter dated April 16, 2015, in accordance with the BMW Tree Cutting Agreement to advise that Amtrak intends to use the services of an outside contractor to cut and clear trees along the Amtrak Right-of-Way. The work will be done at the additional locations designated below:

* * *

The contractor is expected to use an 8 person gang with a 75 ft. bucket truck, as well as a truck with a chipper. Amtrak forces will assist the contractor with a Tree I Brush Cutting Support Gang consisting of 4 BMW employees (1 Foreman, 1 Truck Driver, 2 Trackman [sic]), as well as a 2-person ET Gang in connection with this work. Amtrak BMW forces will also provide protection for the tree cutting, as necessary.

No Amtrak employees will be furloughed as a result of the contracting out of this work.”

The Organization argues that the Carrier's failure to fill the bulletined positions in accordance with the Tree Cutting Program Supplemental Notice

(hereinafter referred to as the “Supplemental Notice”), dated April 16, 2015, violates the Agreement and past practice when it deprived the Claimants of work opportunities to support the third party contractors. The Organization maintains that once the Carrier knew no one bid on the bulletined positions, it was obligated to backfill the open jobs.

The Carrier contends that the nothing in the MOU or Supplemental Notice obligates it to fill the bulletined positions. Moreover, the Carrier argues that the absence of any bids for the open jobs, which were advertised on November 16, 2016, relinquishes its obligation use the trackmen to support the contractors.

The Board finds that the Organization has not met its burden of proof that the Carrier violated the Agreement or an established past practice when it did not fill the bulletined positions provided for in the Supplemental Notice. There is no dispute that any of the trackmen bid for the open jobs. As such, the Claimants lack standing to claim they were deprived of a work opportunity. Having decided not to pursue the option of performing the support function for the contractors, the Claimants have no basis to now seek compensation for work they rejected.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find that the Claimants were not aggrieved and lack standing to submit the claim.

AWARD

Claim dismissed.

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 17th day of May 2019.