

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25402  
Docket Number **MW-25484**

Eugene T. **Herbert**, Referee

PARTIES TO DISPUTE: ( **Brotherhood of Maintenance of Way Employees**  
(Southern Pacific Transportation Company  
Eastern Lines

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) The Carrier violated the Agreement when it assigned and/or permitted outside forces to perform weed mowing work between Mile Post 21 and Mile Post 23 on Sept. 10, 1982 (System File **MW-82-212/365-2-A**).

(2) The Carrier also violated Article 36 when it did not give the 'General Chairman advance written notice of its intention to contract said work.

(3) Machine Operator W. N. **Lastor** shall be allowed eight (8) hours of pay at his straight time rate because of the violation referred to in Part (1) hereof.

OPINION OF BOARD: This is a case in which Carrier's Lessee, **George Wimpey** of Texas, Inc., permitted a third party to perform weed mowing work within fifteen feet of the centerline of Carrier's track contrary to an express provision of the Lease Agreement.

Organization asserts that the said mowing operation constitutes a violation of both the Scope Rule and Article 36 of its **Agreement** with Carrier which sets forth procedural requirements, including advance written notice, which must be adhered to when Carrier plans to contract out work within the Scope of the Agreement.

Carrier's position is that it did not intend to, and did not in fact, contract out the weed mowing work to a third party, that it did not benefit from the work performed. that the work was performed contrary to the injunction in its Lease Agreement and without Carrier's permission or acquiescence and that Organization has not carried the burden of proving a systemwide history, tradition and custom that its **employees** have performed such weed mowing work to the exclusion of others. **Finally** Carrier asserts that no monetary damage to Claimant, who was employed elsewhere at the time, resulted from the unauthorized mowing.

The Board concludes that the record establishes no violation by Carrier of Article 36. At no time did Carrier seek the service of any third party to perform the work in question. We are further convinced that the Carrier did not expect that its Lessee would violate the Lease by mowing **on** the right of way. Nor was Carrier's acquiescence to that deed likely or probable.

However, based on the record as a whole, we believe that Organization has met the required burden of proof on the issue of its exclusive entitlement to perform mowing work within Carrier's right of way. It is noteworthy in this regard that Carrier sought expressly to prohibit its Lessee from conducting any operations on that portion of its railroad operating property, doubtless for the very purpose of honoring its Agreement with Organization by reserving and protecting work to be done there for its benefit.

Furthermore, it, cannot be denied that Carrier actually received benefit from the work performed. Eventually it would have utilized Claimant's services to weed-mow the two miles of right of way in question at an undisputed cost based on 8 hours of straight time pay. The actions of an unauthorized third party have **therefore** conferred financial benefit on Carrier while removing a commensurate work opportunity from Carrier's **Employees**.

Though Carrier has exhibited no bad faith here, the Board concludes that an affirmative duty rests on Carrier to enforce the Scope Rule. By reason of the breach of its Lease Agreement, Carrier would appear to have recourse, which Organization does not, against the Lessee for damages, if any, resulting from that breach;

Finally, though Claimant was in fact employed elsewhere at the time the mowing took place, he has nevertheless been deprived of a future opportunity to perform that additional work to which he was rightfully entitled. Accordingly, the claim must be sustained.

**FINDINGS:** The Third **Division** of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and **Employees** within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

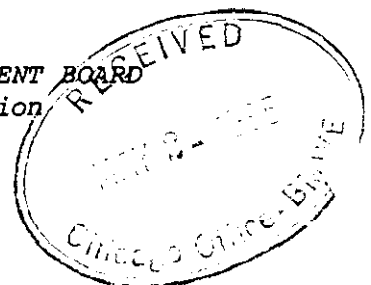
Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, **this 15th** day of April 1985.



CARRIER MEMBERS' DISSENT  
TO  
AWARD 25402, DOCKET MW-25484  
(Referee Herbert)

The rationale of the majority is so extraordinary that it cannot be allowed to pass without some words of dissent.

In essence, the majority found that the Carrier had not acted improperly in any manner. The Carrier did not violate Article 36; it did not request the contractor to perform the work; it did not expect the Lessee would violate its lease with the Carrier; it did nothing to indicate that it would acquiesce to the work performed by the contractor; and it exhibited no bad faith.


Having found the Carrier entirely blameless, the majority thereupon sustains the claim! The asserted rationale is that the Carrier had an "affirmative duty" to enforce the Scope Rule. The majority does not indicate how the Carrier was supposed to accomplish the task. In effect, the majority has made the Carrier an insurer of the Agreement, guaranteeing the Organization of the Agreement's integrity regardless of fault on the part of the Carrier. The majority should need no reminding, however, that the railroad is a transportation carrier, not an insurance carrier.

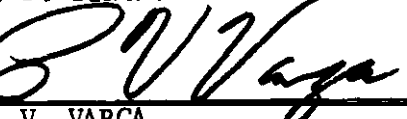
Further, having found the violation, the majority finds that a monetary award is due the Claimant even though the record reveals that the Claimant was fully employed at all relevant times. The apparent rationale is that the Carrier somehow benefitted from the work of the contractor and, in any event, it can recover the payment to the Claimant by suing the Lessee for the amount paid to Claimant. While the reasoning seems to have appeal, particularly if you read it quickly, it hardly is practical to suggest that the Carrier now institute legal proceedings to recover from the Lessee, or the contractor, the eight hours pay due the Claimant under the Award. The majority certainly refers to no portion of the Agreement to support such extraordinary conclusion.

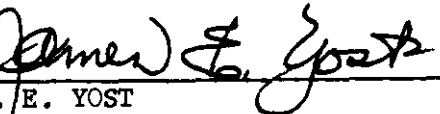
It is our belief that while the majority opinion may be read in the future for its novel approaches to contract dispute arbitration, it will not serve as a precedent.

  
M. W. FINGERHUT

  
W. F. EUKER

  
T. F. STRUNCK

  
P. V. VARGA

  
J. E. YOST

COMMENT TO  
CARRIER MEMBERS' DISSENT  
AWARD NO. 25402  
DOCKET NO. MW-25484

The Award in this case is not, as Carrier seems to suggest, Punitive in either intent or result.

A majority of the Board has indeed found that Carrier's actions in this matter were not improper except only in its refusal to honor Claimant's demand. It would, however, be improper to Permit Carrier to retain the economic benefit bestowed on it, albeit without its Prior knowledge or consent, in the face of its Agreement with Organization which recognizes, under the Scope Rule, the latter's exclusive property right thereto.

Carrier's inclusion in the Leatt Agreement of a prohibition on conducting operations within the right of way was an acknowledgement of its affirmative duty to enforce the Scope Rule for Organization's benefit. It can accomplish that task, in the event of unauthorized actions by third Parties, simply by transferring the economic value of any windfall received to those members of the Organization whose claim thereto is, in accordance with the Agreement, superior to that of Carrier. Whether other practical means may exist to enforce the Scope Rule as to third parties is a matter solely for determination by Carrier and beyond the purview of this Board.

we **must assume** that Claimant eventually **would have been** called **upon to perform** the work in question and Carrier would thereupon have been required to Pay **for** his Labor. **Under** these **circumstances**, the fact that Claimant **was** fully employed at the time the unauthorized mowing Cook place in **no way** affects his *right* to be compensated **for the loss of** work opportunity.

**While there are some novel** aspects to **this case**, there is nothing extraordinary about the majority decision. Carrier **is** indeed **an absolute** guarantor, **as is**, of course, Organization, **of** obligations undertaken **in** the Collective Bargaining **Agreement**. **One** of Carrier's obligations is to respect Property rights deriving from the Scope **Rule**. In **this case** Carrier has **found, not** stolen, **a** coin which belongs to Organization. The **law** requires that Carrier deliver that coin to its rightful owner, There **can** be no Contrary precedent.

  
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Eugene T. Herbert  
Referee