

NATIONAL RAILROAD **ADJUSTMENT BOARD**

THIRD DIVISION

Award Number 25562

Docket Number MW-25384

Frances Penn, Referee

(Brotherhood of Maintenance of Way **Employees**

PARTIES TO DISPUTE: (

(Southern Pacific Transportation Company
Eastern Lines

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

(1) The Carrier violated the Agreement when it assigned the work of clearing right-of-way (July 29, 1982 through **August 4, 1982**) and loading and hauling trash from the right-of-way (August 24, **1982** through August **31**, 1982) between Houston and fiempstead, Texas to outside forces (System Files MW-82-194/360-86-A and **MW-82-206/364-87-A**).

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

(3) Because of the aforesaid violations, Machine Operator R. F. Berckenhoff shall be allowed forty (**40**) hours of pay at his straight time rate and Machine Operator W. N. **Lastor** and Laborer-Driver P. T. Aguirre shall each be allowed forty-eight (**48**) hours of pay at their respective straight time rates.

OPINION OF BOARD: This claim involves clearing and hauling work done by a Contractor with a tractor dozer, front end loader and dump truck along a stretch of Carrier's right-of-way. The Contractor was hired by the Hines Industrial Corporation which had leased an area adjacent to Carrier's tracks. The Lease dated July 28, 1982 stated, "The premises shall be used solely by Lessee for the cutting of grass." The Lease also provides, "**No** equipment shall be permitted within fifteen (**15**) feet of the center Line of lessor's **track**." It is not disputed that some of the work took place within two feet of the main track in violation of the Lease. On March 3, 1983, the Carrier notified the Lessee that work had been done by the Contractor on the Carrier's right-of-way within the fifteen foot Limit set forth in the Lease. The Letter concluded, "**The** purpose of this Letter is to call to your attention the fact that Contractor's forces are improperly performing work on the Carrier's right-of-way, are fouling the main Line without proper flagging protection, and have apparently built a temporary cross-over on the tracks without proper authority."

The Organization contends that the Carrier contracted Out this work or permitted it to be performed by an outside Contractor; that the work contracted out is work exclusively reserved to members of the Organization as required under Article 36 of the Agreement. The Organization maintains that a Carrier official, O. G. Humphries, had authorized this work before it was done and that the area in question was under the sole control of the Carrier. The Carrier contends that the Contractor was hired by the Hines Industrial Corporation, not by the Carrier, and that the Carrier did not authorize the hiring of a Contractor. The Contractor, according to the Carrier, performed work in excess of the Lease by going within fifteen feet of the center Line without permission, and therefore the work is not covered by the Agreement. The Carrier also maintains that the work was not performed in connection with the maintenance of its operations.

The Board concludes on the basis of the entire record that the Organization has met the required burden of proof to establish that the Agreement was violated by the Carrier. The record is **unrebutted** that a Carrier official had been notified of the work to be done by the Contractor. Both parties cite Fourth Division Award No. 3837 which states: "This Board has considered this same or similar **circumstances** on numerous occasions before. The preponderance of Awards tend to support the line of **reasoning** that a Carrier cannot be held liable for actions taken by another where agreement or at Least acquiescence on its part cannot be demonstrated." In this instance, the Board concludes that the Carrier acquiesced to work of clearing **brush** and hauling **trash** which went beyond the work of cutting grass which is specified in the Lease. Furthermore, the evidence in the record **shows** that the work which was performed with roadway machines was within the Scope of this Agreement. The **Claimants** were available and equipped to perform the work, and the Carrier derived benefit from the work, which improved and beautified its property. Under these circumstances. 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 **Employes** involved in this dispute are respectively Carrier and **Employes** within the meaning of the **Railway Labor Act**, as approved June 21, 1934;

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

That the **Agreement** was violated.

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Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 26th day of July 1985