

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

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 that:

(1) The Agreement was violated when outside forces were used to cut brush and weeds between Dallas and Richardson, Texas beginning December 19, 1983 (System File MW-84-29/410-79-A).

(2) Because of the aforesaid violation, Track Foreman L. N. Shelton. System Laborer Driver **M. A. Reyna, Jr.** and System Laborers **D. L. Bailey, J. A. Whitte**, **R. L. Mackey**, **G. A. Davis**, **J. Salazar, Jr.**, **R. C. Turner**, **C. R. Comeaux** and **T. W. Jones** shall each be allowed pay at their respective rates for an equal proportionate share of the total "umber of man-hours expended by outside forces in performing the work referred to in Part (1) hereof."

FINDINGS:

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

The carrier or carriers and the **employe** or employees involved in **this** dispute are respectively carrier and **employees** 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 waived right of appearance at hearing thereon.

A review of the record reveals the following handling between the Parties before appeal to the Board. It is necessary and significant to point this out since we are limited to the facts and contentions set forth in these documents.

On June 23, 1983, the Carrier transmitted the following subcontracting notice to the General Chairman:

"Please accept this **as** Carrier's Notice under Article 36 of the **BMWE** Agreement of Carrier's intent to utilize services of **a** contractor to remove vegetation growth on **Dallas** Belt Line between **M. P. 4** and **M. P. 13.5**.

This ~~area has~~ slopes ~~too~~ steep for conventional mowers and is mostly out of range for track mounted brush cutters. The company ~~is~~ unable ~~to~~ use ~~contractor~~ who would normally spray chemical vegetation control due to the area being ~~too~~ close to residential neighborhood.

It is necessary we use services of a contractor as the need for brush removal is immediate to comply with City of Dallas sanitation and fire codes. The City of Dallas has filed legal action which requires immediate response.

Asplundh Tree Services will use rough terrain cranes, tree destroyers and various tree felling and removal machines, which the Company does not have available."

In a letter dated June 27, 1983, the **Organization** objected to the sub-contracting.

The next development ~~was~~ on August 8, 1983, when another notice was sent which read as follows:

"Please accept this as Carrier's Notice under Article 36 of the ~~BMWE~~ Agreement of Carrier's intent to utilize services of a contractor to provide tree, brush and weed removal on the Dallas Belt Line **M. P. 0 to 13.6, H&TC Main Line M. P. 273 to 276** and The Somethun Branch in Dallas and The **Seagoville** Branch. The contractor, Asplundh Co. (Railroad Division) a specialist in weed control for Public Utilities has specialized equipment and personnel not otherwise available to this Company.

During the same period ~~contractor~~ is performing above, the Carrier will have 3 S. P. owned and 3 leased tractor mowers on the Dallas-Austin seniority district with Company operators, and will also have an on-track brush cutter with 2 system operators starting on the Ft. Worth Branch.

Since Carrier's equipment is fully utilized, services of contractor is necessary to timely complete project."

The Organization took exception to the Carrier's intentions on August 11, 1983, and requested a conference.

On February 13, 1984, the Organization filed the instant claim ~~with~~ the Carrier. The relevant contentions contained in that Claim are as follows:

"Beginning December 19, 1983, and continuing through the present date Asplundh Tree Experts Company, 11409 Gatewood, Dallas, Texas, has had a crew of one foreman, one truck driver and eight laborers cutting brush and clearing the right-of-way between Dallas and Richardson, Texas, and on the Somethun Branch in Dallas.

It is our position that the notice of intent to contract out this work dated August 8, 1983 is very misleading as the Carrier states that specialized equipment and personnel would be utilized to perform this Maintenance of Way work.

General Chairman W. E. Allen and First Vice Chairman J. R. Solares paid a visit to the location of the work and find no specialized equipment or personnel being used. The equipment **was** nothing but chain saws, **axes**, a brush chipper and two ton truck with rail wheels and the personnel was nothing but laborers cutting brush, feeding brush into the chipper which was throwing the chips and sawdust back on the right of way.

If is further our position that this work that the contractor is performing is nothing more than laborer **work** and should be performed by Maintenance of Way forces as Maintenance of Way forces have always been used to clear and clean **this** Carrier's right-of-way."

The Carrier, on March 11, 1984, responded to the Claim in relevant part as follows:

"It is our contention that proper notice has been served of the Carrier's intent to contract for the removal of brush and other vegetation in the Dallas area. We have utilized all Southern Pacific owned vegetation equipment in addition to leasing equipment to be operated by Southern Pacific personnel."

On March 12, 1984, the Organization responded contending that since specialized equipment was not being used furloughed employees could have done the work. The Claim **was** appealed to the next level on March 21, 1984.

The Carrier **Officer** designated to handle claims declined the Claim April 24, 1984, as follows:

"Wish to advise I concur **with** Regional Maintenance of Way Manager A. L. Casper's letter of **declination** dated March 7, 1984.

The cutting of brush and tree removal from Company owned property is not work reserved exclusively to track laborers and foreman. Under the circumstances your claim as presented is without basis and respectfully declined."

A conference was held on the Claim July 10, 1984, and the Carrier following the conference wrote the General Chairman as follows:

"During that conference you were provided copy of the general agreement between this Company and Asplundh Tree Expert Company, schedule B of that agreement showing the Carrier was utilizing the hi-rail trimlift with two operators and necessary hydraulic tools and equipment and a 5-man climbing crew with tools, truck and chipper.

Under the circumstances the claim you have presented is without agreement support and respectfully declined."

The Organization responded on July 27, 1984, thusly:

"During the conference held in your office on July 10, 1984 you were advised that First Vice Chairman J. R. Solares and myself visited the job site and no specialized equipment was used as clearly stated in my claim of March 21, 1984. There was nothing more than laborer work being performed with a truck with rail wheels attached (common on the Southern Pacific, every District manager has one), and a chipping machine which could be leased or purchased in most all large cities (Dallas or Forth Worth).

You were further advised that no trimlift was at the job site, no climbers were at the job site or required to cut the small brush and trees that were being removed. The laborers were just that laborers with chain saws and axes.

This claim will be forwarded to the Third Division of the National Railroad Adjustment Board for further handling."

The last correspondence prior to appeal was a November 28, 1984, letter from the Organization to the Carrier repeating their previous contentions and transmitted letters from various employees regarding the past performance of this work.

What is most noteworthy about this case, as evidenced by the correspondence on the property, is (1) the fact the Carrier sought, in its notice, to justify the subcontracting based on the use of special equipment, and (2) the fact the Organization asserts it observed the contractor cutting brush without the use of specialized equipment.

This accusation is quite **serious**. Significantly, it forms a basis to question the **Carrier's** good faith, a very important element in these matters in light of the December 11, 1981, letter from the National Railway Labor Conference to the **BMWE** International President. The letter states in pertinent part:

"The carriers assure you that they will assert good faith efforts to reduce the incident of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees." (Emphasis added)

Basically, in the face of this assertion the burden shifted to the Carrier to demonstrate as a threshold matter that it was operating with the requisite degree of good faith.

It is the opinion of the Board that the Carrier has failed in this burden. The record is void of any satisfactory explanation which counters the Organization assertions. Accordingly, the fact the Carrier has failed in this burden is a fundamental and overriding concern precedent to reaching any finding as to exclusivity and is a compelling basis on which to sustain the Claim.

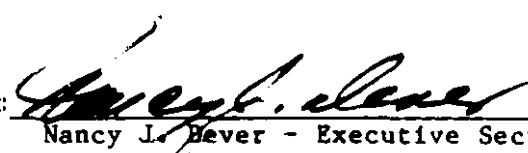
The Carrier is directed to review its records and compensate an equal number of Claimants as utilized by the contractor on a pro **rata** basis for the total number of hours expended by the contractor under these two notices. In this regard, it is noted that the Carrier failed to raise the contentions on the property that the Claimants were under pay at the time of the **subcontracting**. In fact, there were a variety of contentions raised for the first time before the Board.

#### AWARD

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois this 15th day of January 1988.