Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33469
Docket No. MW-32519
99-3-95-3-412

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Southern Pacific Transportation Company (Eastern Lines)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned or otherwise allowed employees of the City of Welder, Texas to cut grass and weeds on the Carrier's right of way on May 11 and 12, 1994 (System File MW-94-297/BMW 94-578 SPE).

2. The Agreement was further violated when the Carrier entered into the above-described contracting transaction without giving the General Chairman at least fifteen (15) days' advance written notice of its plan to do so as set forth in Article 36.

3. As a consequence of the violations referred to in Part (1) and/or Part (2) above, Machine Operator A. Cruz and Track Laborers G. Y. Torres and O. Y. Delapaz shall each be allowed sixteen (16) hours' pay at their respective straight time rates."

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 May 17, 1994, the Organization submitted a claim on behalf of the employees noted supra alleging that on May 11 and 12, 1994 the city employees of Welder, Texas, were used to cut grass and weeds along Carrier's right-of-way, duties which the BMWE claimed had "traditionally and historically" belonged to the Maintenance of Way Employes. The General Chairman asserted that the work which Welder City employees performed on May 11 and 12 was not "emergency in nature," and therefore, Claimants, who were "fully qualified and available," should have been called to perform the duties on a regular, weekend or overtime basis. The Organization further alleged that Carrier failed to engage in "good faith efforts" to reduce the use of contracting out, and had not complied with Article 36 of the Agreement by failing to notify the General Chairman of its intent to contract out said work.

Carrier denied the claim contending that the City of Welder, "without Carrier's approval," conducted a beautification project which encompassed portions of Carrier's right-of-way. Carrier maintained that it neither requested that the work be done nor did it pay for the work in dispute. Carrier further contended that the work at issue is not reserved to the Organization under the Scope Rule of the Agreement, nor is there any other agreement rule or understanding between the parties which reserves the work exclusively to members of the Organization.

A thorough review of the evidence presented shows that on May 11 and 12, 1994, without Carrier's prior knowledge, participation or permission, the City of Welder, Texas, conducted a "beautification project" for its own benefit. That the project encompassed portions of Carrier's right-of-way and may thus have inured in some way to Carrier's benefit is not necessarily dispositive since the record resoundingly supports Carrier's position that it did not plan the work, request that the work be performed or finance the project. We have been made aware of Third Division Award 25402, which held a Carrier liable for a Scope Rule violation because a third party performed

unauthorized mowing work on a leased right-of-way despite the Carrier's good faith express efforts to prohibit the third party lessee from conducting any such operations on the leasehold.

Award 25402 is distinguishable from the present matter by its articulated assumption that the Carrier in that case "eventually . . . would have utilized" the Agreement-covered employees to perform the work; whereas neither evidence nor assumption support that conclusion in the record of this case. Moreover, in all of the facts and circumstances we are not persuaded to follow Award 25402 down the novel path it has blazed in finding strict liability under a theory of an affirmative duty in an Employer to stand as absolute guarantor of the Scope Rule rights of its employees under a Collective Bargaining Agreement against unauthorized and unsolicited encroachment by strangers to the Agreement. Quixotically, Award 25402 held the Carrier liable despite finding that the work on leased property had been performed without the Carrier's knowledge, inducement or authorization and despite good faith efforts by Carrier to prevent such an occurrence from happening. We must decline to follow that kind of reasoning and find greater wisdom in the overwhelming majority of Awards which have declined to hold a carrier liable in such circumstances.

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 22nd day of September 1999.