Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28310
Docket No. MW-27770
90-3-87-3-249

The Third Division consisted of the regular members and in addition Referee Irwin M. Lieberman 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 permitted outside forces to mow weeds and grass at Luling, Texas on March 24 and 25, 1986 and April 22 through April 25, 1986 (System Files MW-86-64/452-21-A and MW-86-69/453-10-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) As a consequence of the aforesaid violations, furloughed Machine Operator J. H. Hudson shall be allowed sixteen (16) hours of pay at the machine operator's straight time rate and Machine Operator J. J. Flores shall be allowed sixty-four (64) hours of pay at his straight time rate."

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 employes involved in this dispute are respectively carrier and employes 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.

The Organization alleges that Carrier violated the Agreement by permitting the contracting of the mowing work on its right-of-way in the City of Luling, Texas, in derogation of the rights of the Claimants. The record indicates that the work was indeed performed by other than Carrier employees on the dates in question. The Carrier indicated that the particular grass cutting activity was not for its benefit but rather for the benefit of the City in its beautification program. The Carrier indicated that its mowing program anticipated the cutting of grass and weeds in that area at most two or three times a year.

The record in this dispute indicates that the Carrier did not authorize the work in question, did not pay for it, and in fact was not aware of when the work was performed. The mowing was done by municipal employees under the control of and by direction of the municipalities involved.

This Board has dealt with the identical issue, between the same parties in Third Division Award 26541. In that Award, we said:

> "Carrier contends it did not authorize the City of Jennings to perform mowing on its property. It did not know the work was being done and it did not compensate the city for the mowing it performed.
>
> This Board has reviewed the record on this portion of the Claim and can find no evidence to demonstrate that Carrier was in fact aware of what city employees were doing on its property. Given this lack of knowledge or agreement on the part of Carrier we have no recourse but to conclude that Carrier did not improperly subcontract the work in question and deny that portion of the Claim."

In addition to the reasoning expressed in the Award cited, supra, there have been a host of Awards dealing with the contracting of similar work. See for example, Third Division Awards 23422, 24078, 26103, among many others. Based on the entire record, it is our conclusion that Carrier did not engage in contracting out any work accruing to the employees covered by the Agreement. Consequently, the Claim must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1990.

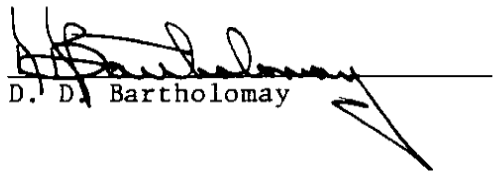
LABOR MEMBER'S DISSENT
TO
AWARD 28310 - MW-27770
(Referee Lieberman)

The Majority's decision in this Award allows this Carrier, by its own inaction, to circumvent the Parties Agreement.

The Majority held that, "The record in this dispute indicates that the Carrier did not authorize the work in question, did not pay for it, and in fact was not aware of when the work was performed. The mowing was done by municipal employees under the control of and by direction of the municipalities involved." However, the Carrier's highest designated officer defended against the claim by contending that, "We receive a notice by certified mail that the weeds on our right-of-way exceed the height of weeds allowed by the City ordinance...." and that, "In the event we fail to mow the weeds, the City will perform this service without further notice." Then the Carrier attaches a copy of the pertinent City statutes which clearly under Sec. 14-20 specifies that the owners of the property will be charged for the work performed by the City, i.e., "***the city may do such work or make such improvements as are necessary to be done, and pay therefor and charge the expenses incurred thereby to the owner of such lot. Such expenses shall be assessed against the lot or real estate upon which the work was done or the improvements made." The Carrier is notified by certified mail that the work will be done, subsequently charged, and yet pleads ignorance of the events of this claim. Carriers pleadings of ignorance apparently caused the Majority to look beyond the Agreement to reach its decision and perhaps, because of Carriers inability to respond to certified mailings concerning violation of City ordinances, felt that any further constraints, albeit Agreement lan-

guage to the contrary, should not be imposed. Such a decision obviously renders this Award palpably erroneous.

I, therefore, dissent.



D. D. Bartholomay