

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31668
Docket No. MW-31216
96-3-93-3-184**

The Third Division consisted of the regular members and in addition Referee Robert Richter 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 the Carrier assigned employees of an outside concern (Asplundh Railroad Division) to perform Maintenance of Way work (clearing/cutting brush, weeds, etc.) around crossings with the use of chain saws from M.P. 158 in Garrison, Texas and working toward Shreveport, Louisiana beginning on January 13, 1992 and continuing (System File MW-92-72/MofW 92-37 SPE).**
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman proper advance notice in writing of its intention to contract out the work in question in accordance with Article 36.**
- (3) As a consequence of the violations referred to in Part (1) and/or Part (2) above, Laborers A. D. Mares and E. B. Garcia shall each be compensated for 216 hours' pay each at their respective straight time rates of pay and 27 days each to be used as qualifying days for vacation purposes and continuing."**

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 waived right of appearance at hearing thereon.

The Organization filed this claim on February 18, 1992 alleging the Carrier used an outside contractor to cut brush from Mile Post 158 in Garrison, Texas, working toward Shreveport. It furnished a letter from an I&R Foreman in support of its case. The letter was written on May 8, 1992, some three months after the claim was filed. In the letter the foreman states the work began in the first week of December, but no work was performed for three weeks around Christmas and New Year's. The letter indicates the work ceased on January 30, 1992. By its own evidence only 17 calendar days are involved. However, no evidence has been produced that the contractor worked any or all of these days.

The Organization argues the Carrier violated Article 36 of the Agreement when it failed to give notice of the contracting out of the work in question. It claims that Track Department laborers have customarily and historically performed the work of removing excessive vegetation around grade crossings.

The Carrier's position is that it has contracted out the work of weed and brush control to Asplundh since 1986. It has furnished copies of these contracts. It also argues that the Scope Rule is general in nature, and that the Organization has failed to prove the work of brush cutting belongs exclusively to maintenance of way employees. The Carrier has never given the Organization advance notice of the contracting out of this work.

The Organization counters the Carrier by arguing that the past contracts only dealt with chemical weed spraying and did not including brush cutting. It also took the position that the exclusive position taken by the Carrier only applies when other crafts are involved, not outside contractors.

From the correspondence in the record it appears the Organization concedes the contracting out of the use of Chemical Weed Spray is not work belonging to the Track Department. It appears the only contention is that the contractor's use of chain saws to cut brush violates the Agreement.

The Organization has the burden to prove the Agreement has been violated. It alleges the outside contractor cut brush using chain saws beginning January 13, 1992. However, a review of the file reveals not one scintilla of evidence that the work in question was done on the claim dates.

Article 36 of the Agreement reads in part as follows:

“ARTICLE 36

CONTRACTING OUT

In the event this carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.”

Inasmuch as the Carrier has shown that it has contracted with Asplundh for the control of weed and vegetation along its right-of-way since 1986, the Organization has failed to show the work is within the scope of the Agreement.

The Organization has failed to show the alleged work was actually performed, and that the work performed by the contractor since 1986 is work covered by the Scope Rule.

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 29th day of August 1996.