Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32192
Docket No. MW-31964
97-3-94-3-314

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Louisville
(and Nashville Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces and Roadmaster L. D. Smith to perform Maintenance of Way and Structures Department work (weed eradication/spraying) between Mile Posts 2.4 and 95.0 on the Memphis Subdivision on May 18 and 19, 1993 [System File 14(33)(93)/12(93-0820) LNR].

(2) The Carrier violated the Agreement when it assigned outside forces and Assistant Roadmaster D. G. Hopper to perform Maintenance of Way and Structures Department work (weed eradication/spraying) between Mile Posts 95.0 and 370.0 on the Memphis Subdivision on May 19 and 20, 1993 [System File 14(34)(93)/12(93-0821)].

(3) The Carrier violated the Agreement when it assigned outside forces and Assistant Roadmaster D. G. Hopper to perform Maintenance of Way and Structures Department work (weed eradication/spraying) between Mile Posts 143.0 and 148.8 and in the Jackson Yard on the Memphis Subdivision on June 7, 1993 [System File 14(37)(93)/12(93-0850)].

(4) The Carrier violated the Agreement when it assigned outside forces and Assistant Roadmaster D. G. Hopper to perform Maintenance

of Way and Structures Department work (weed eradication/spraying) between Mile Posts ND 116.7 and ND 132.0 on the Memphis Subdivision on June 7, 1993 [System File 14(35)(93)/12(93-0851)].

(5) The Carrier violated the Agreement when it assigned outside forces and Roadmaster L. D. Smith to perform Maintenance of Way and Structures Department work (weed eradication/spraying) between Mile Posts 2.4 and 63.0 on the Bruceton Subdivision on June 11, 1993 [System File 14(40)(93)/12(93-0923)].

(6) The Carrier further violated the Agreement when it failed to give the General Chairman fifteen (15) days' advance written notice of its intent to contract out the work as required by Article IV of the May 17, 1968 National Agreement.

(7) As a consequence of the violations referred to in Parts (1) and/or (6) above, Claimant D. R. Morgan shall be allowed sixteen (16) hours' pay at the foreman's straight time rate and three (3) hours' pay at the foreman's time and one-half rate; and Claimants D. W. England, R. K. Allen, R. A. Foster and E. L. Holland shall each be allowed sixteen (16) hours' pay at the Rank 3 Operator's straight time rate and three (3) hours' pay at the Rank 3 Operator's time and one-half rate.

(8) As a consequence of the violations referred to in Parts (2) and/or (6) above, Claimant R. C. Baker shall be allowed eight (8) hours' pay at the foreman's straight time rate and eight (8) hours' pay at the foreman's time and one-half rate; and Claimants C. Grimes, L. L. Dickson, R. D. Davidson and B. J. Spicer shall each be allowed eight (8) hours' pay at the Rank 3 Operator's straight time rate and eight (8) hours' pay at the Rank 3 Operator's time and one-half rate.

(9) As a consequence of the violations referred to in Parts (3) and/or (6) above, Claimants R. C. Baker and C. Grimes shall each be allowed eight (8) hours' pay at their respective Rank 1 and Rank 3 straight time rates.

(10) As a consequence of the violations referred to in Parts (4) and/or (6) above, Foreman D. S. Devault and Rank 3 Operator D. W. England shall each be allowed four (4) hours' pay at their respective time and one-half rates.

(11) As a consequence of the violations referred to in Parts (5) and/or (6) above, Claimants D. R. Morgan and D. W. England shall each be allowed four (4) hours' pay at the respective flagman and Rank 3 Operator's time and one-half 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.

The focus of this dispute is the Carrier's use of an outside contractor to spray weed killer along Carrier's right-of-way. The Organization alleges that on specified dates the Carrier failed to notify it of its intent to contract out Scope protected work. The Organization argues that the Carrier further violated the Agreement when it permitted Supervisors to provide flagging for the contractor. It is the position of the Organization throughout this claim that the work belonged to BMWE represented employees; it was contracted out without a letter of intent as prescribed by the May 17, 1968 National Agreement; and the Carrier further violated the Agreement by permitting Supervisors to flag for Maintenance of Way work.

The Carrier denies each allegation asserting that the spraying of weeds by operation of the weed sprayer and the flagging incidental thereto is not exclusively Maintenance of Way work. The Carrier agrees that employees have been used to

perform weed control, but argues that the work does not accrue "to them or any other particular craft." In correspondence such as that of August 10, 1993, the Carrier asserts that the Organization was notified of its intent. The Carrier also asserts on property that it neither owns the equipment, nor possesses employees licenced or experienced in the use of the involved herbicides and equipment. The Carrier denied any violation in that even the Supervisors accompanying the spray train were there to get track time and assess that the proper locations and work was performed.

Before proceeding to a resolution on merits, the Board must address an issue of evidentiary support. The Notice of Intent was filed with the Board on June 14, 1994. This claim covers consolidated claims conferenced as late as February 1994 with notice to the Carrier in April 1994 that they would be presented to the Board for adjustment. The Notice of Intent was filed by the Organization on June 14, 1994 which concludes all proper evidence. However, the Carrier submitted a letter dated June 10, 1994. The Organization strongly objects. It argues that this correspondence occurring three days prior to notice was not exchanged on property and must be ignored. We have visited this issue before. It is technically prior. The record is not closed until the Notice of Intent is received by the Board. Its timing precluded a reasonable opportunity to respond and that must be viewed as a significant consideration in its weight before us.

The Board carefully considered all evidence and argument of record. Assertions without rebuttal may be taken as fact, but when as here, assertions are rebutted, the petitioner has the obligation to provide proof. The Board denies the claim for these reasons. While the Organization argues that the work belongs to BMWE represented employees, the Carrier concurs only to the extent that employees have been used "for various weed and vegetation control programs." The Carrier denied exclusivity and the specific application involved herein. There is a lack of probative evidence addressing the equipment, licence or specific work and supporting Agreement rights of this claim. The Organization asserted that "no special certifications" were required with the Carrier denial saying Claimants "were not licensed." The Organization never asserted Claimants were "licensed" or that to dispense these herbicides no special license was required; to which Carrier proof would be necessary. Letter of support indicating work with spray trains by Mr. England and others are too general to address this issue. The availability of weed mowers or brushcutters is not demonstrated as capable of performing the disputed work. On the whole, there is a lack of evidence that the work complained of herein belongs to the employees. The documents, statements and Awards do not sufficiently prove that the work performed was work falling within the Scope of

the Agreement. If it is not Scope protected, written notice of contracting out is not required. Further a study of the Memorandum Agreement with regard to flagging indicates applicability when "advertised to Maintenance of Way Employees." No Rule violation of the Flagging Agreement is shown herein. The claim must be denied.

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 13th day of August 1997.

LABOR MEMBER'S DISSENT
TO
AWARD 32192, DOCKET MW-31964
(Referee Zusman)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is not based on the on-property handling and prior precedent between the parties. Such is the case here.

This case represents the epitome of word mangling. The Carrier contracted out the spraying of weeds along its right of way and assigned the work of flagging the spray train to a supervisor who has no right to perform any work under the Agreement. The Carrier alleged that the Claimants were not "licensed" to dispense herbicides and thus the work did not belong to them. As it was pointed out on the property, no special "certifications" were required to dispense the herbicides and therefore notice should have been given prior to contracting out the work. Hence, the issue of whether a "license" or "certification" was necessary was clearly addressed during the handling of this dispute on the property. Whether the General Chairman specifically uttered the word "license" is immaterial because the parties clearly understood the issue at hand. For this Board to assert that there is a difference between the meaning of "license" or "certification", insofar as it is concerned in this case, reduces such to a distinction without a difference. At that point, the Majority wrongly believed that the Organization never specifically challenged the Carrier's allegation that any special "license" was required. It goes beyond any logical sense to conclude that the challenge was not set forth by the Organization. Clearly, the matter was presented by the Organization to which the Carrier was obligated to show that "certification" was necessary to apply the herbicides in this instance. After all, it was the Carrier that alleged a "license" was necessary to dispense the herbicides in this instance; therefore, it should have been a simple matter to prove. At the very least, such should have been the subject at the conference pursuant to a notice in accordance with Article IV of the May 17, 1968 National Agreement.

However, there is one rather large problem. The Carrier never gave any notice of its intent to contract out this work. This is in spite of on-property Awards 19334 and 19335, wherein this Board held that the application of herbicides was arguably within the Scope of the Agreement and notice was required prior to contracting out the work to an outsider. Although the Board did not award a monetary remedy in those cases because the claimants were employed

at the time, it clearly held that notice is required for contracting out herbicide application. In subsequent awards, this Board has held that because this Carrier continually failed to issue the required notice, after repeated warning to do so, it began to award monetary remedies regardless of the claimants' employment status (Awards 31479, 31597, 31619, 31777, 32096 and 32160). Consequently, the Majority clearly misinterpreted the factual basis of the on-property handling, then compounded the error by misinterpreting the language of the rule and ignored the precedent emanating from this Board.

The Majority's errors did not stop there. A review of the record reveals that the Carrier assigned a supervisor to work with the contractor obtaining track time and flagging. This issue was clearly and definitively addressed in Award 19334, wherein the Board held:

> "We do find, however, that the Carrier violated the Agreement in assigning an Assistant Division Engineer, **an employe not covered by the Agreement to work with the contractor in the securing of line-ups, etc**." (Emphasis added)

The Board sustained the claim for the work performed by the supervisor in the above-cited award. In this case, the Majority's erroneous findings have done damage to the Agreement and the Claimants' rights to perform this type of work.

The award is therefore palpably erroneous and of no precedential value.

Respectfully submitted,

Roy C. Robinson
Labor Member