

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32475
Docket No. MW-32079
98-3-94-3-463**

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

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employees
(St. Louis Southwestern Railway Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned an outside concern (James Buchanan Contractor) to perform Maintenance of Way work (cutting weeds and brush on the right of way with the use of chain saws, weed slags and a tractor) between Mile Post 509.5 and Mile Post 511.5 in the vicinity of Gilmer, Texas beginning August 24 through September 4, 1993 (System File MW-93-28-CB/MW 93-187).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with fifteen (15) days' advance written notice of its plan to contract out the above-described work in accordance with Article 33.**
- (3) As a consequence of the violations referred to in either Parts (1) and/or (2) above, Foreman W. K. Harris, Machine Operator L. D. Goodson, Laborer Driver A. D. Walker and Laborers R. L. Taylor and L. E. Ray, Jr. shall each be allowed seventy-two (72) hours' pay at their respective straight time rates and sixteen (16) hours' pay at their respective 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.

From August 24 through September 3, 1993, Private contractor James Buchanan and his crew cut brush and weeds from property abutting Carrier's right of way in Gilmer, Texas, pursuant to a contract with the local County Agency. The record suggests that at some point during this process Carrier permitted the use of its tractor in the clearing operations.

The Organization contends that in allowing an outside contractor to use chain saws, axes, machetes and power mowers to perform the challenged work while qualified covered employees were available, Carrier violated the Scope, Seniority, Contracting Out and other provisions of the parties' Agreement dated January 5, 1981. The Carrier, it urges, has customarily and traditionally assigned work of maintaining its right-of-way, including the routine work of cutting weeds and brush, to its maintenance of way forces. Its actions here in assigning non-employees to perform that work without notifying and conferring with the Organization demonstrated bad faith and deprived Claimant of work opportunities encompassed by the Agreement, resulting in monetary loss to each of them. In support of its position, the Organization cites a number of Third Division Awards in which the performance of such work by a contractor or lessee on Carrier's property or right-of-way was found to violate the Agreement.

The record here is clear that notwithstanding Carrier's contribution of one of its tractors to Buchanan's clearing operations, it otherwise had no involvement with, was not responsible for, and derived no benefit from the work Buchanan performed. Carrier's response to the claim included an un rebutted statement from its Regional Engineer establishing that the work in question was contracted for by the County, directed and controlled entirely by it, and, most significantly, performed not on Carrier's property or right-of-way, but on county property.

The Organization has the burden of establishing proof of violation in case handling on the property. On the record here, it has failed to carry that burden. The proscriptions of the Agreement barring the subcontracting of certain work are directed without exception to situations where the Carrier contracts to have outsiders perform covered work for Carrier's benefit. In this case, the Buchanan crew was the county's, not the Carrier's agent, engaged to perform work exclusively on county, not railroad property. Accordingly, we find no proscribed subcontracting within the contemplation of the Scope Rule. *See* Award 2 of Public Law Board No. 747 (Seidenberg). Since no work was performed on Carrier's property or right-of-way, the Awards cited by the Organization are, without exception, inapposite.

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 23rd day of February 1998.