

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35977
Docket No. MW-32960
02-3-96-3-339**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employees
(Duluth, Missabe and Iron Range Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way work (brush spraying and brushcutting) in the areas of Duluth Dock, Proctor Hill, Missabe Division Main Lines and the Interstate Branch on October 26 through November 23, 1994 (Claim No. 39-94).**
- (2) The Carrier further violated the Agreement when it failed to give the General Chairman a proper advance written notice of its intent to contract out the work as required by Supplement No. 3.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Trackmen L. Maki, D. Anderson, R. Stenroos and A. Van Blyman shall each be allowed an equal proportionate share of the total number of man-hours expended by the contractor's forces at the trackman's straight time rate of pay.”**

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.

There is a dispute over the Carrier's contracting out brushcutting work.

By notice dated August 8, 1994, the Carrier advised the Organization:

"This is to notify you of the Carrier's intent to hire an outside contractor . . . to perform brush spraying around the entire system and to cut brush under pole lines, bridges, crossings and other selected locations along the right-of-way in the following areas:

- A. Duluth Docks
- B. Proctor Hill
- C. Missabe Division Main Line
- D. Interstate Branch

This work will commence as soon as practicable and is consistent with past practice of the Carrier using outside contractors to perform such work under Supplement 3.

Please advise if you wish to further discuss the matter."

Conference was subsequently held.

In light of that notice, the Organization's assertion that it was not given a proper advance written notice of the Carrier's intent to contract out the work must be rejected. With respect to the merits, Supplement No. 3 from December 1, 1969 provides, in pertinent part:

* * *

"(d) It is further understood and agreed that the Company can continue in accordance with past practice the contracting of right-of-way cutting, weed spraying, ditching and grading."

The Carrier asserts that it has routinely used outside forces to perform the disputed work. On the property, the Organization conceded that, in the past, the Carrier had used outside forces for the disputed work (“[p]rior to that date [December 1, 1969], a mixed practice did exist in connection with the right of way cutting, weed spraying . . .”). However, the Organization argues for a sustaining Award with the position that “. . . since that time, the carrier has not contracted out this work but has assigned [M]aintenance of Way employees to perform the right of way cutting.”

Putting aside the conflict in the record concerning whether the Carrier had used outside forces to perform this work since December 1, 1969 (which conflict would ordinarily dictate a finding in a contract dispute that the Organization’s factual assertion has not been established) a reading of the above-quoted provision of Supplement No. 3 and the Organization’s concession that prior to December 1, 1969 “a mixed practice did exist in connection with the right of way cutting, weed spraying . . .” ends the inquiry. According to the Organization, prior to December 1, 1969, the Carrier used outside forces to perform the disputed work. Under Supplement No. 3, “. . . the Company can continue in accordance with past practice the contracting of right-of-way cutting, weed spraying. . . .” That is what the Carrier did in this case - it contracted the work as Supplement No. 3 specifically allows.

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 19th day of March, 2002.