

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 14168
Docket No. 14028
16-2-NRAB-00002-140063

The Second Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

(Brotherhood Railway Carmen-Division of TCU/IAMAW
PARTIES TO DISPUTE: (
(The BNSF Railway Company

STATEMENT OF CLAIM:

- “1. That the Burlington Northern Santa Fe Railroad Company violated the terms of the April 1, 1971 SLSF Agreement, specifically Rule 115, and Article II, Section 1 of the September 25, 1964 Agreement, as amended, when they subcontracted the re-adjustment and tying down of shifted loads on freight cars at the Tulsa facility to Reynolds Trucking Company on May 2, 4, 5, 8, 11, 12, 14, 15, 16, 19, 20, 28 and 30, 2012.
2. That accordingly, the Carrier be ordered to compensate the Claimants, Carmen J. Frazier, K. Doll, C. Wright, R. Moore, L. Fellers, J. Randolph, D. Grace and T. Randolph, for all lost wages in accordance with the provisions of Article II, Section 11 of the September 25, 1964 Agreement, as amended, for the dates claimed.”

FINDINGS:

The Second 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 Organization filed the instant claim on July 2, 2012, on behalf of multiple Claimants who were Carmen for the Carrier at Tulsa, Oklahoma. The claim seeks to have the Claimants compensated due to the Carrier's use of contractors, instead of the Claimants, to adjust and tie down shifted loads on rail cars in the Tulsa repair tracks on the listed dates in May 2012. The Parties agree, moreover, that the instant claim represents a lead case for other pending claims filed by the Organization in Tulsa involving similar subcontracting after May 2012.

The relevant facts are not in dispute. Evidence submitted by the Carrier establishes that since at least 1993, the Carrier consistently used Reynolds Trucking Company to adjust and tie down shifted loads on rail cars in Tulsa. See, also, the numerous invoices from Reynolds to the Carrier for this type of work in Tulsa, copies of which are included in the record.

The evidence also establishes that the Organization was well aware of the consistent use of Reynolds by the Carrier for that work in Tulsa, and never complained about it before the filing of the instant claim. In fact, a written statement by the former Local Chairman of the Organization states:

"I began my career in Tulsa, OK as a Carmen on February 23, 1995 and at that time Reynolds Trucking was performing all load adjustments. In my career I have held the position of Local Chairman for the Carmen from 1996 through 2004. During that time Reynolds Trucking has performed all load adjustments and I never turned in a time claim for a contractor performing load adjustments."

The record also fails to establish that the Carrier's use of Reynolds Trucking to adjust shifted loads in Tulsa violated any specific provision of the Agreement. Although the claim cites Classification of Work Rule 115 and Article II of the Agreement, the Board finds that Rule 115 does not list such work as belonging

exclusively to the Carrier's Carmen. Therefore, Article II, which relies upon Rule 115, also does not apply.

The SLSF Agreement, also cited in the claim, is similarly inapplicable in the opinion of the Board, since its application was confined to the former Frisco territory after the Frisco operations were merged with the Carrier in or about 1980.

It is well established that in the absence of an explicit agreed-upon restriction on the Carrier's right to subcontract certain work, to prevail in a claim of improper subcontracting the Organization must establish that employees of the Carman craft exclusively performed the work before the subcontracting at issue. See, e.g., Second Division Awards 10090, 10091, 10514, 10685 and 10711. Generally, in labor arbitration, a claim of improper subcontracting normally fails if the evidence indicates that the employer regularly subcontracted the work in the past. See, Elkouri & Elkouri, *How Arbitration Works* (7th Ed. 2012), at p. 13-126.

Accordingly, it is the opinion of this Board that the record evidence fails to substantiate the Organization's claim. The work of adjusting and tying down shifted loads on the Tulsa repair tracks long was performed by contractors including Reynolds Trucking before the date of the instant claim, and the failure of the Organization to complain about the practice during that extended history precluded the Organization from suddenly complaining about it in 2012.

Accordingly, the Board cannot find that the Carrier violated the Agreement, as alleged, in subcontracting the work of adjusting shifted loads on the Tulsa repair tracks in May 2012. Consequently, the instant 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.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 20th day of December 2016.