

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24383
Docket Number MW-24424

William G. Caples, Referee

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 outside forces were used to perform clearing and ditching work between Sheldon and Houston, Texas (Liberty Road to Greens Bayou) August 18 to October 1, 1980 (System File MW-80-162/296-5-A).

(2) Because of the aforesaid violation, System Machine Operator Elmer Ermis be allowed two hundred fifty-six (256) hours of pay at his straight time rate."

OPINION OF BOARD: Article 36 of the Agreement between the parties provides in pertinent part:

"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.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith."

In July of 1980 Carrier wrote the General Chairman advising him of its desire "to clear and grub the right-of-way and improve operating drainage from Liberty Road to Greens Bayou ... This property lies between our main line and Hwy. U.S. 90." The letter also advised that there were no machine operators

on furlough available to perform the work. The General Chairman by letter dated 6 days after the original letter advised, "we cannot agree to allow the carrier to perform this work by the use of contractors" as the work has been historically performed by the Maintenance of Way Department. For these and other reasons the letter went on to advise the carrier the Brotherhood was "not agreeable to the contracting of our work" and asked for a conference. While the matter was under discussion the work was performed by an outside contractor from August 18 to October 1, 1980. It being the Carrier's position it had no knowledge of the contractor performing the work until after the work had been completed. The Carrier also asserted the work was not of any benefit to it.

The whole record seems clear that the work which was performed was within the scope of the agreement; that the claimant was available and equipment was available to perform it. The work was performed at a time and in a place where the record shows Carrier contemplated having the work done on its right of way. The Carrier cites cases, among them Fourth Division Award 3837 stating a Carrier:

"cannot be held liable for actions taken by another where agreement or at least acquiescence on its part cannot be demonstrated."

It seems that reasonable men reading this record would conclude there was at least acquiescence. The burden of proof of rule violation was sustained.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

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By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of May 1983.