

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Southern Pacific Transportation Company (Eastern Lines)

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 and Structures Department work in connection with a derailment on the Fort Worth Branch between Mile Post 32 and Mile Post 34 on September 24, 25 and 26, 1984 (System File MW-84-139/420-66-A).

(2) The Carrier also violated Article 36 of the Agreement when it did not give the General Chairman advance notice of its intention to contract said work.

(3) As a consequence of the aforesaid violations, Machine Operator R. F. Berckenhoff shall be allowed sixteen (16) hours of pay at his straight time rate and fourteen (14) hours of pay at his time and one-half rate."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

On September 24, 1984, there was a derailment on the Carrier's Dallas Division. The Carrier used an outside contractor to furnish a tractor dozer and operator to assist with the cleanup. The contractor worked sixteen (16) straight time hours and fourteen (14) overtime at the derailment site. The Organization argues the performance of tractor dozer work accrues to employees holding seniority in the Roadway Machine Department, and assignment of the work to an outside contractor defeats the intent of the controlling Agreement.

The Carrier insists the Claimant was told it could not move the dozer the Claimant was assigned to because it was not available. The Carrier contends the Claimant said that, under such circumstances, he did not want to work. The on-the-property correspondence indicates the Organization asserted the Claimant was not offered the derailment work, but if so instructed, he could not refuse. Notwithstanding, on December 19, 1984, the Claimant wrote the following letter:

"Reference to your letter dated Nov. 28, 1984. The foreman came to the trailer and asked me to go help him run some kind of line. He did not ask me to run another dozer. The foreman said that they would have someone else there.

I told him that I didn't want to work if they didn't need my dozer. I didn't tell him, but I had a bad tooth ache all that and didn't want to work unless they needed me to run my machine."

The Board finds the un rebutted statement of the Claimant establishes that he made himself unavailable. The Organization focuses upon the Claimant's statement he was not asked to run another dozer. What is overlooked is that, once the Claimant said he did not want to work, the foreman had no obligation to pursue the matter further. He had a right to accept the Claimant's unavailability at face value. It defies logic to argue that the foreman should have pursued the issue and ask the Claimant to work on another dozer.

The Board concludes the Organization has failed to meet its burden of proof and has not supported its claim with relevant and probative evidence as opposed to assertions.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1988.