

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Burlington Northern Railroad Company (former St. Louis-
(San Francisco 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 dismantle, move and re-assemble the Rip Track Shed beginning June 10, 1985 (System File B-2291-2/GMWC 85-9-19A).

(2) The Carrier also violated Article 12, Rule 99 when the above-mentioned work was assigned to outside forces without prior notice to or consultation and agreement with the General Chairman.

(3) As a consequence of the aforesaid violations, B&B Foreman W. R. Reckling and Carpenter Helpers C. Lozier and J. Lozier and Carpenter J. Vonnahme shall each be allowed pay at their respective straight time rates for an equal proportionate share of the man-hours expended by outside forces in performing the work referred to in Part (1) hereof."

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 employees 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.

The Organization maintains that Carrier contracted out certain work connected with the dismantling of a rip track shed without first giving notice as required by its Agreement. Carrier responds by indicating that it did in fact give notice on January 17, 1985, that it intended to contract out this project. Carrier also contends that the Claim is procedurally defective for two reasons. First it was not filed within 60 days of the date of occurrence and, second; it was not handled in conference on the property before submission to this Board.

With regard to Carrier's allegation that the Claim was filed out of time, the record before us does not contain sufficient proof to support such a conclusion. Accordingly, the matter will not be disposed of on the basis of a time limit allegation.

With regard to Carrier's argument that a conference did not occur prior to submission to this Board, the record indicates that Carrier, at the final appeal level, denied the Claim on November 15, 1985. On November 25, 1985 the Organization's General Chairman notified Carrier that he did not agree with the declination and requested a conference to discuss the matter further. Between that date and August 14, 1986, Carrier neither responded to the letter nor did it schedule the requested Conference. Accordingly, in these circumstances Carrier's failure to act must be deemed as a constructive waiver of the conference requirement. The Claim will not be dismissed on this basis.

On the merits, the Claim of the Organization basically contends that the Agreement was breached because Carrier failed to comply with the requirement that it notify the Organization that it desired to contract certain dismantling work. The record supports a conclusion that Carrier did comply with the procedural requirements of the Agreement and notified the Organization of its intent to have outside contractors do the work covered by this Claim. Accordingly, Item 2 of the Statement of Claim must be denied.

With regard to Item 1 of the Statement of Claim, the Organization's submission to this Board does not make an elementary showing that its Agreement was violated when work connected with the removal of the rip track shed was completed by outside forces - the Submission deals almost exclusively with an incorrect contention that the notice requirements of the Agreement were not followed. This requires that we dismiss the matter because of a lack of proof.

A W A R D

Claim dismissed and denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois this 16th day of October 1989.