NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20563
THIRD DIVISION Docket Number SG-20054

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Southern Pacific Transportation Company
(Texas and Louisiana Lines

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Southern Pacific Transportation Company (Texas and Louisiana Lines) that:

In behalf of Signalmen I. Pinkert and D. A. Marshall for payment of eight (8) hours each at pro rata rate, May 12, 1971, because Contractor was used to perform Signalmen's work at Sherman, Texas.

OPINION OF BOARD: On the claim date Signal Gang No. 1, composed of Asst. Signalman Marshall, one of the two Claimants herein, Asst. Signalman Crocker, and Foreman Irwin, were engaged in the replacement of an underground cable at Sherman, Texas. Signalman Pinkert, the other Claimant herein, is assigned to Signal Gang No. 1 but was on vacation on the claim date.

While digging a trench for the cable, the gang encountered buried concrete which required a jack hammer to dislodge. Such equipment was not at the site. The Foreman contacted a local company and rented a jack hammer and an air compressor under an arrangement which called for the hammer to be operated by the local company's employees. The rented equipment and outside employees were used for five (5) hours, including travel time. The Foreman's decision to rent the equipment was without instructions from or the knowledge of Carrier's officers; also, so far as the record shows, Claimant Marshall, who was working on the cable project, made no protest or complaint to his Foreman about the use of the rented equipment by the local company's employees.

The Carrier's first defense is that the Foreman's arrangement with the local company was without the Carrier's request, direction, or knowledge, and that Claimant Marshall acquiesced in the transaction by not making a protest at the time. In support of this defense the Carrier cites Award Nos. 12907, 15827, 18939, and other authorities which hold that a Carrier is not answerable on a claim where the disputed work has, in fact, been performed by a volunteer without Carrier's direction or authorization. The Employees' response is that the Foreman is an agent of the Carrier and that his actions are taken on Carrier's behalf and, further, that Claimant Marshall's action was proper because his recourse was to grieve rather than to protest.

The Carrier's affirmative defense is resisted by the Employees' assertion of propositions which are valid in many situations but which are not applicable in the facts of this case. We believe the cited awards are apropos. Although the Foreman did not actually perform the disputed work, his voluntary and unauthorized action, of which the Carrier had no knowledge, was the direct cause of the performance of the disputed work by the outside employees. Claimant Marshall was present at the transactions and he should have protested in order to disassociate himself from the Foreman's voluntarism. He failed to do so and consequently the Carrier is not answerable on his claim. The same holds true for Claimant Pinkert even though it might appear that he cannot be charged with the obligation to protest the transaction, since he was not present when it occurred. However, the non-presence of Claimant Pinkert is irrelevant. Claimant Marshall was working and Claimant Pinkert was not working at the site of the disputed work when the outside employees were brought in; thus, in the facts of this dispute, the Marshall claim is the basic claim while the Pinkert claim has somewhat the nature of a derivative claim. It is axiomatic that upon failure of the basic claim, the derivative claim also fails, and we shall therefore deny the claim as to both of the Claimants.

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 Employes involved in this dispute are respectively Carrier and Employes 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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 30th day of December 1974.