NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20639
THIRD DIVISION Docket Number MW-20442

David P. Twomey, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Kansas City Southern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it used outside forces to unload new rail at DeQuincy, Louisiana. (System File 013-31-120)

(2) The Carrier also violated Article IV of the National Agreement of May 17, 1968 when it did not give the General Chairman advance written notice of its intention to contract said rail unloading work.

(3) Track Foreman Leo Clark and Track Laborers A. Tucker, C. Gray, Jr., J. B. Rankins, K. D. Porties and A. Nelson each be allowed pay at his respective straight time rate for an equal proportionate share of the total number of man hours expended by outside forces in the performance of the rail unloading work.

OPINION OF BOARD: The Petitioner contends that the Carrier violated the Agreement when it permitted outside forces to unload new rail at DeQuincy, Louisiana between July 7, 1972 and August 4, 1974. The Petitioner contends that the Carrier did not give notice in writing, or otherwise, to the General Chairman of its plan to contract out this rail unloading work to outside forces as required by Article IV of the May 17, 1968 National Agreement.

The Carrier contends that the rail was the property of Servitron, Inc. and was not of the Carrier's ownership until unloaded and placed on the ground as per contract between the Carrier and Servitron.

On page 2, /RP-3/, Employes Statement of Facts, we quote as follows:

> "The Carrier ordered approximately 3000 tons of new rail from Servitron, Inc. through the latter's Baton Rouge, Louisiana office. The rail was to be shipped 'F.O.B. DeQuincy, Louisiana in care of L. M. Barnett, Asst. V.P., DeQuincy, Louisiana', with instructions that 'Routing to be furnished later' and that the seller would be 'held responsible for failure to follow freight shipping directions'."

From the Petitioner's rebuttal page 1 /RP-50/ we quote as follows:

"At page 3, the Carrier contends that 'Copy of Carrier's Exhibit No. 1 was handed to the Organization Representatives in conference'. The Carrier is in error. The fact is that its Exhibits '1', '2' or '3' were not 'handed to' or otherwise presented to the undersigned General Chairman by the Carrier during conference or at any other time during the handling of this dispute on the property...."

Carrier's Exhibit No. 1, referred to above, contains the following information: On June 14, 1972 the KCS Railway Co. ordered approximately 3000 tons of new rail from Servitron, Inc., Baton Rouge, Louisiana. The order called for the rail to be shipped "F.O.B. DeQuincy, Louisiana (unloaded from cars)." It was to be shipped "Care of L.M. Barnett, Asst. V.P., DeQuincy, Louisiana." The instructions were that "Routing to be furnished later" and that the seller would be "held responsible for failure to follow freight shipping directions...."

Comparing the quotation from the "Employes Statement of Facts" above with the essential information contained in Carrier's Exhibit No. 1, also quoted above, it is clear that the information is virtually the same in both, with the only exception being that the Employes Statement did not contain the parenthesis statement "(unloaded from cars)." Searching all the correspondence between the parties prior to the "Employes Statement" to this Board, we do not turn up any other possible source for the explicit and quoted information in the "Employes Statement" other than the purchase order now before this Board as Carrier Exhibit No. 1. The inference then is overwhelming that the Organization was given a copy of Carrier's Exhibit No. 1 on the property. This is not the case of one assertion "standing off against another assertion; clear evidence of record, not speculation or conjecture, enables this Board to resolve this issue. Thus, Carrier's Exhibit No. 1, having been discussed on the property, is properly before this Board.

Exhibit No. 1 is a purchase order from the KCS Railway which contained the terms of a valid contract "offer." The offer was "accepted" by a Mr. Curtis, the Vice President of Servitron, Inc. At the point of acceptance or approval by Servitron, we then have a valid and legally enforceable contract. The terms are clear and both parties are bound by those terms and both have the right to sue in a court of law to enforce the terms. The contract between KCS and Servitron, Inc. calls for delivery of the rail "F.O.B. DeQuincy, Louisiana (unloaded from cars)." It is undisputed that Servitron employees did in fact unload the cars as per the contract agreement. The Employes of the KCS Railway have no

rights under their collective bargaining agreement with KCS Railway relating to handling rail owned by another company. The work in the case before this Board did not belong to the Carrier; and the Agreement of the parties to this dispute can only apply to that work which the Carrier has the power to offer. See Award 13056. Certainly routing and billing errors in the movement of freight cars by agents of the Carrier, or even the very extreme of intentionally improperly naming on waybills on the part of Carrier's agents, can not serve to convert the property of another (in this case Servitron) to that of the Carrier. Thus we must deny the claim.

The entire issue of the employment status of Mr. L. M. Barnett was not properly developed on the property where now both parties attempt to make an issue of his status for the first time before this Board. Assertions concerning his status on the part of the Carrier with counter-submissions on the part of the Organization are not properly before us.

While not affecting the outcome of this case because of the overriding status of the contract terms between KCS and Servitron, the Board feels compelled to point out that mere repeated unsupported statements on the part of the Carrier are most unpersuasive in the eyes of this Board where the Carrier alone possesses supporting records and documents that could have been utilized to back up the Carrier's statements: i.e., statements in RP-23 letter, RP-28 Carrier Statement and RP-91 Carrier Rebuttal that "freight charges were assessed against Servitron, Inc. for the transportation of the rail."

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: [signature]
Executive Secretary

Dated at Chicago, Illinois, this 7th day of March 1975.