NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20640
Docket Number MW-20516

David P. Twomey, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 or otherwise permitted other than scope covered employes to build right-of-way fence between Aurora and Verona, Missouri. (System File A-9416/D-7010)

(2) The Carrier also violated Article IV of the National Agreement dated May 18, 1968 when it gave no notice whatever to the General Chairman of its intention or plan to have said right-of-way fence constructed by other than scope covered employes.

(3) Track Foremen M. R. Smith and J. L. Wilson and Section Laborers R. A. Cordova, G. W. Bounous, R. C. Wilson, E. O. Pippin, J. C. House, R. H. Barnes and S. D. Anderson each be allowed 16 hours of pay at their respective rates of pay.

OPINION OF BOARD: On July 12, 1972 Mr. W. L. Reidle mailed notice to the Carrier, requesting the Carrier to repair a right-of-way fence. This notice was made pursuant to Missouri Law, Section 389.650 RS (1969), which provides that the Carrier has thirty days to comply, and if unable to do so, the adjoining property owner has the option of performing the work and thereafter bringing a legal action against the Carrier to recover expenses. The Carrier did not perform the work within the thirty days, and sometime after August 14, 1972 Mr. Reidle commenced making repairs which repairs were completed by October 1, 1972, requiring one hundred and forty four man hours to complete. Subsequently, Mr. Reidle brought legal action against the Carrier under Section 389.650 to recover his expenses.

The Claimants in this action are Track Department employes, who contend the repair of the fence was work within the Scope of the parties Agreement; and that such repairs, without notice to the General Chairman, was a violation of Article IV of the May 17, 1968 Agreement.

In order to sustain the Organization's position on Claim (1), the Organization must show that the Agreement clearly reserves to the employes an exclusive right to the work in question, or, if not, then it must show by probative evidence that the work in question has been exclusively reserved to the employes by custom, practice and tradition, system wide. No exclusive reservation of the work in question is found in the Scope Rule. Nor does the record show exclusive reservation of the type of work to the employes by custom, practice and tradition, system wide. Since the Organization has not met its burden of proof on this issue, we must deny Claim (1).

Article IV of the May 17, 1968 National Agreement states in pertinent part:

> "In the event a 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...."

Article IV is clear and unambiguous. It specifically stipulates that, when the Carrier "plans" to "contract out" work within the Scope of the Agreement, it must "notify" the General Chairman in writing at least (15) days in advance of the "contracting transaction". The record is clear that the Carrier did not "plan" to contract out the work in question. Nor did the Carrier "contract out" the work. Since the Carrier did not plan to contract out the work, it was impossible to "notify" the Organization in advance. Nor was there ever a "contracting transaction" with Mr. Reidle. The very essence of Article IV is concerned with the contracting out of work; and in this case there simply was no contracting out of work. Necessary to any contracting out arrangement is a contract or agreement between the parties. There was never any agreement between Mr. Reidle and the Carrier concerning the essential elements of the fence repair job: there was never any agreement on the quantity or quality of materials, the rate for labor charges and completion time factors. Mr. Reidle unilaterally commenced making repairs to the fence under rights given him by Missouri law. This Board is bound by and restricted to the clear and plain meaning of the Agreement of the parties.

Neither Awards 19899 nor 20158 support the Organization's contentions. In Award 19899, the Carrier entered into an agreement with the Mississippi Forestry Commission to plow fire lines along Carrier's right-of-way and to reimburse the Commission for costs. In the instant case, the Carrier had no agreement whatsoever with the adjoining property owner to have the right-of-way fence repaired. In Award 20158 the Carrier contracted with an outside company to perform ditching work; in the instant case there was no contract involved.

While there is no Agreement support for the employes claims, there is no economic advantage for the Carrier to allow the repetition of such an event. In this case the Carrier was required to pay Mr. Reidle for all of his expenses in repairing the fence. Further, inherent in the statutory right of Mr. Reidle to bring legal action for repair expenses would be the court enforceable right to also collect reasonable attorneys fees for his law suit from the Carrier. Finally, the Carrier was required to expend further resources for its own legal counsel in handling the matter.

The claims must be denied.

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

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulus
Executive Secretary

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