

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20950
Docket Number MW-20948

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Chicago and North Western Transportation 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 outside forces to install a switch at Bayport, Minnesota on March 17 and 18, 1973 (System File 0-7/81-19-74).

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

(3) Section Foreman Oren McCulloch and Section Laborer Frank Rumpf each be allowed pay at their respective time and one-half rates for an equal proportionate share of the one hundred thirty-six (136) man-hours expended by outside forces in performing the work described in Part (1).

OPINION OF BOARD: In March of 1973, Carrier arranged for construction of additional trackage. Claimants insist that certain switch installation work performed in connection therewith is encompassed by the Scope of the Agreement and reserved to track forces.

Carrier defends its failure to utilize the employees for performance of the work in question on the basis that the track is industrial and is not part of the Carrier's property.

In this regard, Carrier has cited a number of Awards and ICC rulings to demonstrate that under the circumstances of this case, the work does not come within the scope of Carrier's agreements with its railroad employees. We have no desire to disturb the settled law in this area; but acceptance of the validity of the cited authorities does not dispose of the issues presented here, inasmuch as there is a dispute concerning ownership in this case.

Our review of the handling of the matter on the property leads us to conclude that the sole issue before us deals with Carrier's ownership, control, etc., of the track vis-a-vis the industry, and a resolution of that issue is controlled by the concepts of burden of proof.

We feel that the Organization, on the property, did squarely frame the issue, and repeatedly denied Carrier's assertions. We also feel that, under this record, Carrier's contentions are properly categorized as an affirmative defense. This Board has not hesitated, in the past, to deny claims when the

record demonstrated that the parties have advanced various assertions, and the evidence has failed to preponderate to the benefit of either party. Consistently then, the Board is inclined to adopt the same judgment factor regarding an affirmative defense.

To be sure, the employees may not ignore an issue on the property and then, to this Board, complain that proof was not presented prior to submission of the case. But, such is not the case here. In fact, the entire handling on the property suggests that this issue was the paramount concern.

We feel that our Awards 19623 and 20230 are particularly pertinent here, and that Award 18447 should have a bearing on Carrier's failure to produce, at the appropriate time, evidence within its control to substantiate its assertion.

The financial amount of the claim was not disputed. Accordingly, we sustain the claim in its entirety.

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 Employees involved in this dispute are respectively Carrier and Employees 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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois this 30th day of January 1976.