

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24621  
Docket Number MW-24739

Robert Silagi, 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 assigned or otherwise permitted outside forces to construct a crossover switch at Beaumont, Texas (Carrier's File 013.31-247).

(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) Messrs. F. J. Caillier, A. Como, W. Hargrove and L. Leger each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside forces in performing the work described in Part (1) hereof.

OPINION OF BOARD: During the latter part of 1978 Southern Pacific proposed to the Carrier that the latter grant the former the right to operate on Carrier's Yard Main through Wall Street to enable straight way movements of Southern Pacific trains between the east and north. Such a proposal involved track changes. An agreement was reached in November 1979 permitting Southern Pacific to operate through the Wall Street Yard on Track No. 5. To accomplish the connection at College Street, the existing crossover between Carrier and Missouri Pacific main lines had to be relocated. Carrier's portion of the existing crossover between Carrier and Missouri Pacific was removed by Carrier's forces during the week of December 17, 1979. On January 7, 1980, Missouri Pacific requested that the new crossover be returned to its original location or that a new crossover be constructed farther west of its present location. A week later Carrier informed Missouri Pacific that it would review the request and advise Missouri Pacific of its decision. Missouri Pacific reinstalled the crossover connection allegedly on January 29 and 30, 1980.

The Organization contends that the installation of switches is work encompassed within the Scope Rule in that it customarily and traditionally is performance of Maintenance of Way employes. Carrier does not challenge Claimants' contractual right to do the work.

The Organization further contends that Carrier violated Article IV of the May 17, 1968 National Agreement which reads 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."

Carrier concedes that the work was done by outside forces, however, it insists that such work was performed without advance notice to itself, without its consent or knowledge and that it did not plan or contract with Missouri Pacific to do the work. Moreover, Carrier asserts that the dates on which the work was actually performed are not the dates for which the Organization makes its claim. Finally, Carrier argues that even if it violated the Agreement the Claimants are not entitled to compensation because they were fully employed on and paid for the claim dates.

An undated letter signed by all Claimants addressed to the General Chairman of the Organization states that the work on the cross-over switch took place on 3 days at the end of January 1981 and on 3 days in mid-February. Since that letter was never made available to the Carrier while the claim was progressed on the property, it will not be considered now (Award 14244). The claim dates advanced by the Organization were February 10, 11 and 12, 1981. Carrier asserts that the actual dates of work were January 29 and 30, 1981, according to records of Missouri Pacific. Carrier did not produce said records. Its failure to introduce such vital evidence into the proceedings when it either had the records in its possession or could easily have obtained them invites the conclusion that the evidence was unfavorable. (Award 14244) We are therefore left with conflicting claim dates. Assuming, arguendo, that the work was indeed performed on two days late in January 1981, we now examine the Organization's comment regarding said work. According to the Organization the installation of a switch mandates that the track be taken out of service for a considerable number of hours. It therefore argues that Track No. 5 could not have been removed from service for such a period of time without Carrier's knowledge and consent. Track No. 5, whether it was a main line as contended by the Organization, or a non-main line as contended by Carrier, ran through the Wall Street Yard. As such it was highly visible. It is improbable that anyone could have taken the track out of service and installed a switch without Carrier's knowledge and consent. There is no evidence in the record that Carrier attempted to stop Missouri Pacific once it learned of the latter's activities. Had an effort been made to halt the outside forces from installing the switch, Carrier's argument about its lack of knowledge, consent and plans to contract out work would carry greater weight. Given all the circumstances of the preliminary negotiations between Carrier and Missouri Pacific, the timing of those negotiations and the dates on which the work was performed, we conclude that Carrier's conduct in tolerating the work without objection, manifested implied consent and knowledge of an act which infringed upon Claimants' rights.

Carrier argues that the failure to specify the precise dates on which the work was performed is fatal to the claim. The record does not show that Carrier had any difficulty in identifying the incident which precipitated the claim. Nor did Carrier allege surprise or inability to prepare a proper defense because of the alleged errors in claim dates. This Board has often held that a charge against an employee in a disciplinary case is adequate if it reasonably apprises the employee of the set of facts or circumstances under inquiry to provide an opportunity to prepare a defense and prevent surprises. (Award 12255 - Seff) Elementary fairness indicates that a similar rule may be invoked against the Carrier, especially in this case where neither party produced irrefutable evidence as to the actual claim dates.

We turn now to Carrier's argument about compensation. Carrier argues that Claimants may not receive compensation because they were fully employed during the claim period. The Organization argues that the assignment of this work to outside forces resulted in loss of work opportunity and related monetary benefits to Claimants. We agree. See Awards 12785, 15689, 15888 and others. "This Board is not precluded from granting compensation for the loss of opportunities of earnings resulting from the contracting out of work ..." (Award 16009).

The claim is sustained and compensation shall be paid to Claimants as requested in Claim (3).

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 Employee 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

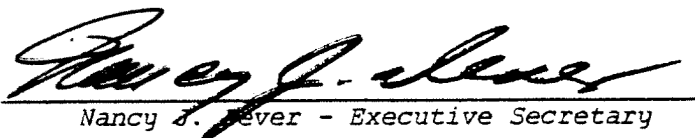
That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Nancy J. Sever - Executive Secretary

Dated at Chicago, Illinois this 13th day of January 1984.