

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26108
Docket Number MW-26060

Marty E. Zusman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Southern Pacific Transportation Company (Eastern Lines)

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

(1) The Agreement was violated when outside forces were used to perform Maintenance-of-Way Department work (hauling and spreading crushed rock) at Kirby Yard beginning February 17, 1983 (System File MW-83-60/390-49-A).

(2) The Carrier also violated Article 36 when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) As a consequence of the aforesaid violations, Messrs. G. V. Cantu, J. R. Cardenas, T. Daniels, M. R. Magallanez, W. H. Miles and C. R. Cano shall each be allowed one hundred thirty-six (136) hours of pay at the laborer-driver's straight time rate and sixty-four (64) hours of pay at the laborer-driver's time and one-half rate."

OPINION OF BOARD: The instant dispute was initiated on March 14, 1983 when the Organization notified the Carrier of alleged violation of Agreement Rules including Article 36 (Contracting Out). The Organization contends that the Carrier assigned work to outside forces without notification to the Organization as required by the Agreement. Specifically, the Organization maintains that six employees of an outside contractor were driving dump trucks which hauled materials to fill tracks and that such work should have been assigned to those holding seniority under the Maintenance of Way Agreement. The Carrier explicitly denies that there has been any violation of the Agreement.

As a preliminary point, this Board notes that a review of the record on property fails to establish that key evidence of the Carrier's argument was exchanged and discussed as required by long established precedent of the National Railroad Adjustment Board and codified by Circular No. 1 (Third Division Awards 20841, 21463, 22054). The only evidence that the Board can consider is that exchanged between the parties on the property.

There appear to be two distinct issues with regard to these Claims. First, the Carrier asserts that the Organization has failed to meet its burden of proof in establishing exclusivity and points to a number of Awards (Third Division Awards 22367, 20920 and 20841). Secondly, Carrier argues that the Claim at bar was filed on behalf of improper Claimants.

With respect to the first issue above this Board finds no probative evidence to substantiate that the Carrier notified the Organization of its intent to contract out work which is required by Article 36 which reads in pertinent part:

"Article 36. Contracting Out

In the event this 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."

If it was the Carrier's intent to argue that such letter was submitted, it should have been so documented on the property. The only letter in evidence is an internal Carrier letter which does not satisfy the provisions of the Agreement. The lack of such a letter provides a prima facie case for the Organization's Claim. Carrier not only denied the lack of notification but also further stated that "the Company can substantiate [that] work of this nature has been consistently performed by outside contractors, therefore, there is no evidence of exclusivity in use of MofW employees." No substantiation was presented on the property to support an affirmative defence that the work was not within the Agreement. As the Carrier did not provide notice of its intent to contract out and assertions do not carry evidentiary weight, this Board finds that the Carrier violated the Agreement.

The Claim at bar was filed by the Organization on behalf of six employees. The Carrier states that none of the Claimants hold laborer driver seniority or commercial licenses which would qualify them. In addition the Carrier notes that Claimant W. H. Miles "resigned in 1974 and therefore [was] not working for Southern Pacific on the dates involved." The Organization maintains that the Claimants "could have easily...acquired the necessary licences..." if the Agreement had not been violated. The Organization does not respond with regard to Claimant Miles.

This Board holds that Claimant Miles is not a proper Claimant. As the intent of the Agreement is clear to provide time for the parties to discuss such issues prior to contracting out, such arguments that Claimants are not "qualified" comes too late for consideration. With respect to Part (3) of the Claim, the Claimants (except Miles) should be made whole for all time lost at their straight time rates of pay.

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 in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of August 1986.