

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26436
Docket Number MW-26335

Elliott H. Goldstein, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(The Chesapeake and Ohio Railway Company
(Southern Region)

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

(1) The Carrier violated the Agreement when, without a conference having been held as required by the October 24, 1957 Letter of Agreement [Rule 82(c)], it assigned or otherwise permitted outside forces to perform weed and brush cutting work between Mile Post 650 and Mile Post 665 beginning April 1, 1983 (System Files C-TC-1907/MG-42117 and C-C-1951/MG-4341).

(2) Because of the aforesaid violation, Trackmen A. N. Ingram, S. W. Fryman, Sr., G. Lovings, M. F. Nordman, J. A. Heirt, J. L. Key, J. E. Fightmaster, D. Helton, T. Pichany and A. B. Fryman shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours (1200 as of October 4, 1983) expended by outside forces in performing the work referred to in Part (1) hereof."

OPINION OF BOARD: At issue herein is whether the controlling Agreement was violated when employees of the City of Covington, Kentucky, cut and removed weeds and brush from portions of the Carrier's property as part of a beautification project over the course of several years.

The Organization asserts that the project performed by the City employees constituted a violation of, inter alia, Rules 66, 83 and Appendix B to the Agreement. The Organization maintains, first, that these Rules clearly reserve mowing work to the Carrier's forces; and, second, require a conference with the General Chairman before scope covered work can be contracted to outside forces. In the instant case, it is the Organization's position that the Carrier unilaterally contracted out the work involved here without discussing the matter with the General Chairman, and therefore the Claim must be sustained.

The Carrier contends that this Claim should be dismissed because it is not the same Claim that was handled on the property. In the Carrier's view, the Claim handled on the property concerned whether the Carrier was required to give notice of contracting work to the General Chairman, whereas on appeal to the Board, the Claim was amended to allege that Carrier was required, and failed, to confer with the Organization on the matter. Since this is a new issue not heretofore discussed during the handling of this dispute, it is not properly before the Board and should not be considered, Carrier argues.

Carrier further maintains that the Claim is procedurally defective, in that it does not specify the dates upon which the work was performed, the number of hours involved, or the number of City employees used to perform the work. Moreover, Carrier raises numerous objections to the named Claimants, asserting that none was working on a force assigned to cut weeds and brush at Covington, Kentucky; that, to the contrary, at least one Claimant was an Assistant Track Inspector at Stevens, Kentucky, and the remaining Trackmen were working at either Stevens or Newport, Kentucky, at the time in question.

Finally, Carrier asserts that it was proper to contract out the work because it has been doing so for a number of years, without objection by the Organization. Carrier also raises, as a secondary issue, the question of whether Claimants are entitled to monetary damages.

From our review of this case, it is clear that the controlling Agreement reserves certain work to these employees, and the October 24, 1957, Letter of Agreement (Appendix "B") between the parties specifies that the Carrier will perform all maintenance of work with classified employees except where special circumstances exist. It was further agreed that Carrier would not farm out the work with impunity, but would discuss the matter with the Organization before contracting out the work. The Organization's contention is that no such conference was held even though work which could have been performed by the employees was contracted to the City of Covington. We agree.

Carrier defends by arguing that a different case was submitted to this Board than the one which was handled on the property. That argument is not persuasive, however. The Board is of the view that the employees set forth a basic Claim and followed it consistently through the handling of this dispute. Absent any evidence that a conference between the parties was held concerning the matter of farming out the work at issue, we must find that there was a violation of the Carrier's obligation and accordingly we will sustain the Claim. The disputed work belongs to the Organization. (See Third Division Award Nos. 25930 and 22274.)

With reference to the issue of damages, we note that while the Organization is not barred from insisting on compliance with the Agreement, it would be unfair to hold the Carrier liable for the compensatory portion of this Claim when, from all the evidence, it appears that the disputed work has been performed by City employees for several years without claim or complaint. In view of the Organization's apparent acquiescence to the use of outside forces, and Carrier's reliance upon this acceptance, the Claim will be sustained but without issuance of monetary damages. Furthermore, the lack of specificity as to dates, times, and who should have done the work precludes a monetary remedy for this Claim.

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

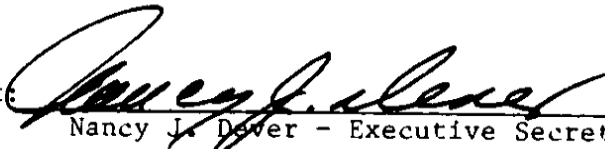
That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of August 1987.