NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26541

THIRD DIVISION Docket Number MW-26040

Rodney E. Dennis, Referee

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

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

1. The Carrier violated the Agreement when, from June 13 through 17, 1983, it assigned outside forces to mow grass and weeds on the Carrier's right of way in and around Jennings, Louisiana. (System File MW-83-101/402-6-A).

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

3. The Carrier violated the Agreement when, on July 6, 1983, it assigned Laborer Driver C. W. Jones, instead of Machine Operator M. J. Neveu, Jr. to operate a tractor mower to mow grass and weeds on the Carrier's right of way at Roanoke, Louisiana.

4. As a consequence of Nos. (1) and/or (2) above Claimant M. J. Neveu, Jr. shall be allowed forty (40) hours of pay at the applicable machine operator's rate and as consequence of No. 3 above, Mr. Neveu, Jr. shall be allowed eight (8) hours of pay at the applicable machine operator's rate."

OPINION OF BOARD: Employes of the City of Jennings, Louisiana, under the authority of a local ordinance, went on Carrier property with its mowing equipment and cut weeds and grass in an effort to clean up some overgrown, unsightly areas. The Organization contends that this constituted an improper subcontract of its work and a violation of Article 36 of the Controlling Agreement.

"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 the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.
>
> Nothing in this Article shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith."

Carrier contends it did not authorize the City of Jennings to perform mowing on its property. It did not know the work was being done and it did not compensate the city for the mowing it performed.

This Board has reviewed the record on this portion of the Claim and can find no evidence to demonstrate that Carrier was in fact aware of what city employes were doing on its property. Given this lack of knowledge or agreement on the part of the Carrier, we have no recourse but to conclude that Carrier did not improperly subcontract the work in question and deny that portion of the Claim.

The Organization also contends that on July 6, 1983, Carrier assigned a Laborer Driver to perform tractor mower work rather than Claimant. The Carrier contends that the Laborer only moved the tractor mower from one location to another when the employee who was operating the mower on the day became ill. He did not actually engage in any mowing work.

The record does not contain any evidence to contest this point. The burden of proof in such claims cases rests with the Organization. It has not carried its burden in this instance. The Board is therefore compelled to deny this portion of the Claim.

The Organization also contends that Carrier, in its denial of the Claim in the ffrst instance, failed to give reasons and on that basis alone, the Claim should be sustained.

The Board has reviewed the record on that issue and here, too, it must deny the Organization's request. While the October 5, 1983, declination letter could have been more specific, it does provide a reason for declining the Claim. The words issued in the letter, "investigation reveals that claim as presented . . . is without basis and is respectfully declined," meet the minimum requirements for a reason declining a Claim.

Based on the review of the record, this Board must conclude that the Claims are denied in all aspects.

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: Nancy J. Dever

Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1987.

LABOR MEMBER DISSENT
TO
AWARD 26541 - DOCKET MW-26040
(Referee Dennis)

The decision of the Majority to deny this claim was based on the premise that the mowing work performed on the Carrier's property by employes of the City of Jennings was performed without the Carrier's knowledge or authorization. That premise is both untrue and immaterial.

The fact that the premise is untrue is evidenced by Carrier's Exhibit "E" which the Carrier states is a "representative" municipal ordinance concerning vegetation control. The ordinance plainly establishes that the municipality may not enter private property to control vegetation without prior notice to the property owner and that the property owner will be responsible for the cost of the work performed by the municipality. Hence, the knowledge of the Carrier and an implied consent to permit the mowing in question cannot reasonably be disputed.

In any event, whether the Carrier had knowledge of the work performed by the employes of the city is immaterial. If the municipality entered the Carrier's property without the Carrier's knowledge, the municipality acted in violation of its ordinance and the Carrier should seek redress from the city. The undeniable fact is that the action of the municipality (authorized or unauthorized by the Carrier) conferred a financial benefit on the Carrier while removing a commensurate contractually guaranteed work

opportunity from the Claimant. In Third Division Award 25402, which involved the parties involved herein, this Division held that Claimant should not be required to bear the burden of that loss.

The premise upon which Third Division Award 26541 is based is false. Therefore, I dissent.

D. D. Bartholomay
Labor Member

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER DISSENT
TO
AWARD NO. 26541, DOCKET MW-26040
(Referee Dennis)

The Dissent disagrees with two conclusions of the Majority.

Initially, the Dissent argues that the Majority could not find that the Carrier did not know that the municipality had performed the work in question, even though there was no evidence that the Carrier did have such information. It comes to this extraordinary conclusion because the city ordinance provides that the municipality may not enter private property without prior notice, and obviously the municipality would never dream of taking action that would violate a city ordinance. The Dissent's faith and trust in good government is admirable but one would have thought that the recent Iran-Contra hearings would serve as a civics lesson that government does not always tell all, or comply with its own laws.

The Dissent's second argument is that even if the Carrier did not know of the municipality's action, it nevertheless should be held responsible because the work "conferred a financial benefit on the Carrier." In so arguing, it relies upon Third Division Award 25402. The Carrier Members filed a dissent to that Award and it is incorporated herein by reference. Beyond that dissent, we wish only to add that we believe that we have not yet reached a point where a legal obligation can arise where someone performs a service for someone else, which was not

requested, on the grounds that the service was "beneficial." We believe that the phrase, "Do me a favor, don't do me any favors" covers the matter.

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

P. V. VARGA

J. E. YOST