

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(St. Louis Southwestern Railway Company

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

(1) The Carrier violated the Agreement when, beginning January 2, 1986, it assigned outside forces to pick up cross ties in the vicinity of Muad, Texas on the Tyler Sub-Division (System File MW-86-2-CB/53-880).

(2) The Carrier also violated Article 33 when it did not give the General Chairman advance written notice of its intention to contract out said work.

(3) Machine Operators B. R. Culclager and L. B. Murry shall each be allowed one thousand four hundred twenty-two (1422) hours of pay at their respective straight time rates because of the aforesaid violations."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Prior to 1983, the Carrier sold scrap ties "as is and where is" to numerous purchasers. In some cases, however, these ties were inaccessible to the purchaser, and it was necessary for the Carrier to pick them up and move them to another location. To accomplish this, in 1983, the Carrier leased a tie crane and buggy and used its own employees for the operation of this equipment. At the same time, the Carrier entered into an agreement with Spencer Pilgreen Company, which agreed to purchase all scrap ties.

In 1984, Spencer Pilgreen purchased its own tie crane and buggy and entered into an agreement with the Carrier whereby Spencer Pilgreen would furnish the equipment, but the Carrier would provide an operator. In November 1985, Spencer Pilgreen purchased a second crane and hired employees to operate the equipment. When Spencer Pilgreen began to pick up and remove scrap ties

with its own equipment and employees in 1986, the instant Claim was filed. The Organization contends the Carrier violated the Agreement by improperly subcontracting out work belonging within its scope.

The basic issue in this case is whether or not the picking up and removing of scrap ties which have been sold "as is and where is" is within the scope of the Agreement and subject to the rules regarding subcontracting. Article 1 of the Agreement, which is the Scope Rule, merely lists the titles of positions covered by the Agreement. There are no specific descriptions of the duties of the crafts or positions listed. Machine Operators in the Roadway Machine Department are listed in Article 1. Additionally, the position of Tie Crane Operator is referred to in Article 2, Seniority Rules. From this, we can conclude the duties performed would generally fall within the scope of the Agreement. In this case, however, the work was done for the benefit of Spencer Pilgreen and involved the removal of material which belonged to Spencer Pilgreen. The ties had already been removed from the track structure by covered employees and left on the right-of-way. At this point, they were no longer the property of the Carrier.

In Third Division Award 10826, the Board denied the Claim that the dismantling of a shed had been improperly assigned to a contractor.

Finding that the Carrier in that case had sold the shed to a salvage dealer, the Board denied the Claim, holding:

"The Carrier has the legal right to sell its property; and, after such sale, ownership of such property is then vested in the purchaser thereof. The work of the new owner in removing the purchased property is not - in our opinion - work that could belong to the Organization under any rule or theory brought to our attention."

That Award provided the basis for our decision in Third Division Award 24280, which involved the removal of scrap ties by a purchaser under a contract which provided that the purchaser would collect the ties. The Board held that such a sale and removal by the outside purchaser was not improper and required no notice under Article IV, Contracting Out, of the May 17, 1968 National Agreement. Accordingly, we hold here, as we did in Award 24280, that the work was not contracted out.

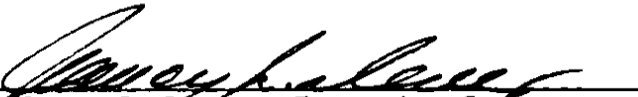
The Organization maintains this work inures to the covered employees because the Carrier had first assigned it to them when the work was done with equipment leased by the Carrier. When Spencer Pilgreen provided its own equipment, the job was initially bulletined to the Carrier's forces. This history, argues the Organization, estops the Carrier from allowing the work to be performed by persons not under the Agreement. We do not agree. Once Spencer Pilgreen acquired equipment to do the work, it could control who operated it. The fact Spencer Pilgreen, in effect subcontracted the work to the Carrier did not obligate it to continue to do so. As the work was no longer under the Carrier's control, the Claimants had no rights to it.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of August 1990.