

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

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

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

(1) The Agreement was violated when the Carrier assigned outside forces to perform cleaning and tie handling work in the Texarkana Yards and on the Eustace Branch in the vicinity of Athens, Texas beginning March 4, 1985 (System File MW-85-17-CB/53-814).

(2) The Carrier also violated Article 33 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, furloughed Laborers H. N. Montgomery and R. W. Briggs shall each be allowed ninety-six (96) hours of pay at the laborer's straight time rate for March 4, 5, 6, 7, 8, 11, 12, 13, 14, 18, 19 and 20, 1985 and eight (8) hours of pay for each day, subsequent to March 20, 1985, on which outside forces perform the work referred to in Part (1) hereof."

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.

The instant claim on behalf of two furloughed laborers, is based on the Organization's contention that outside forces were used to perform Maintenance of Way work in violation of the Agreement. The Organization alleges that beginning March 4, and continuing through March 14, 1985, two Spencer Pilgreen employees were used by the Carrier to clean the right-of-way in the Texarkana Yards, working in conjunction with the tie gang, and assisting the tie handler operator in banding ties.

The Organization further contends that similar work was performed by Spencer Pilgreen employees on a continuing basis, beginning March 18, 1985, on the Carrier's Eustace Branch near Athens, Texas. It is also the Organization's position that the Carrier violated Article 33 of the current Agreement by failing to notify the General Chairman.

The Carrier argues that its letter to the Organization dated February 14, 1985, constituted sufficient notice of its intent to subcontract out the work at issue here. The letter states:

"Under provisions of Article 33 of the current agreement, this is notice of the Carrier's intent to contract out the following work:

Clean up debris along tracks and in yards on Pine Bluff Division. Contractor will utilize a yard cleaner operated by contractor forces. It is necessary to utilize a contractor for this work as Carrier yard cleaners are being fully utilized.

This work will begin approximately March 1, 1985 and continue for approximately 75 working days."

The Carrier further asserts that the ties removed by production tie gangs have been sold to Spencer Pilgreen and other outside companies for many years, and it has always been their responsibility to remove the old ties. The banding of ties by Spencer Pilgreen consisted of the banding of the used ties that had been purchased and was not violative of the Agreement, the Carrier insists.

The first issue in the case turns on whether the Carrier's February 14, 1985 letter constituted sufficient notice of its intent to subcontract. In reviewing the record in its entirety to make a determination on this question, the Board notes that certain of these arguments were raised by both parties for the first time before this Board on appeal. Those new contentions are deemed waived. Confining ourselves to the record on the property, this Board is of the view that the notice was sufficiently specific so as to inform the Organization of the work which was to be subcontracted. While the February 14, 1985 letter is somewhat generic in nature in the sense that no particular contractor is expressly named, we find that it served its requisite purpose under Article 33 by giving the Organization advance notice of the action taken.

The second question is whether outside forces were used to perform Maintenance of Way work in violation of the Agreement. The Organization asserted in its Claim that Spencer Pilgreen employees performed cleaning and tie handling work. The Carrier countered by arguing that Spencer Pilgreen purchased the material as it was removed from the track structure and was solely responsible for its disposition.

The Carrier's contention is in the nature of an affirmative defense. If proven by substantive evidence, we would agree that the work would cease to be within the scope of the Agreement once title to the material transfers. However, the evidence necessary to substantiate that critical point is lacking. Significantly, the Carrier never furnished any documentation which would indicate a sale took place, nor was there any probative evidence submitted regarding the practice claimed. Assertions and arguments, it must be remembered, cannot be given probative evidentiary weight.


That being the case, and the Carrier not having advanced any further arguments refuting the Organization's claim to the work in question, we rule to sustain Paragraphs 1 and 3 of the claim. Paragraph 2, pertaining to the notice provision, is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1991.