

The Third Division consisted of the regular members and in addition Referee Charlotte Gold when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

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

(1) The Carrier violated the Agreement when it assigned and/or permitted Chicago and North Western Transportation Company forces to remove and install track ties on a side track between Lakeland and Bayport, Minnesota on September 19 and 20, 1985 (System File C #34-85/800-46-B-223).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement 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, the following listed claimants shall each be allowed thirteen (13) hours of pay at their respective straight time rates and two and one-half (2 1/2) hours of pay at their respective time and one-half rates.

R. H. Rinholen	J. P. Delap	K. W. Hurst	R. A. Black
W. J. Hanson	S. T. Bruton	G. A. Manning	G. W. Wimmer
B. E. Lahti	D. J. Stokke	D. D. Labrenz	D. J. Clover
R. D. McGrew	M. E. Lutz	R. M. Hayes	E. J. Becker
T. R. Nagle	S. M. Strande	G. W. Ladue	M. S. Hibbard
C. G. Vohs	M. C. Bohl	T. A. Kennebeck	M. E. Strong
K. E. Georgeson	C. V. Smaney	R. W. Hammer	E. E. Gerleman
B. W. Winters	C. H. Telfered	B. D. Maug	M. J. Seeley
T. C. Brzowsky	R. L. Jones	D. G. Vanderford	M. F. Jones
G. E. Evenson	D. W. Jondal	G. N. Lees	D. W. O'Neill"
S. E. Druckrey	M. L. Brownlee	M. S. Selchert	

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.

On September 19 and 20, 1985, a 43-member tie gang employed by the Chicago and North Western Transportation Company performed tie work on the side track between Lakeland and Bayport, Minnesota, adjacent to the Anderson Window Company. The Organization maintains that this track was controlled by Carrier and that, consequently, the work in question should have been done by furloughed employees of Carrier's Track Subdepartment, rather than "contracted out."

On the property, Carrier argued that the C & NW performed the work without Carrier's authority and that when the Soo Line became aware of this fact, it immediately ordered the C & NW to stop. As a result, it contends that it was not responsible for the C & NW's actions.

Carrier raised a question about the Board's jurisdiction in this case. The Carrier contended that what transpired here fit the description of a coordination, as defined in the Washington Job Protection Agreement of 1936, and that therefore this dispute should more properly be settled under the dispute resolution procedures contained in Section 13 of that Agreement. As a result, the present claim before this Board should be dismissed.

Labor argued that since the issue of jurisdiction had not been addressed on the property, it was inappropriate to raise it for the first time before the Board. It was added that the record contained no evidence that a coordination had taken place. In support of this position, a Dissent to Third Division Award 28838 was submitted which dismissed a claim on similar grounds.

A review of Award 28838 reveals that the Board had a sound basis for concluding that the Board should consider the matter of jurisdiction. It was noted that "A jurisdictional issue may be raised at any juncture in the proceedings." The Board in this case agrees. A jurisdictional issue is essentially a question of arbitrability. It is well accepted that questions of substantive (as opposed to procedural) arbitrability may be raised for the first time at the tribunal level, where a tribunal's jurisdiction may be in dispute. In doing so, however, the Party raising the issue has the burden of proving that the claim is not arbitrable.

In addressing the issue of jurisdiction, Labor argued (as they did in the prior case) that there is no evidence in the record of a coordination. Had there been, it was acknowledged that the claim should be dismissed by the Board.

In Award 28838, it was concluded that the Parties' arguments suggested "a situation in which two railroads have pooled facilities or operations formerly performed by each separately" and that "... the transaction as characterized by the Organization is more like a coordination than a typical subcontracting situation." While clearly the Board, in that instance, found

sufficient circumstantial evidence in its record to conclude that a coordination had taken place, the present record does not contain such proof. The only reference to the relationship between the two railroads here is a single statement in Carrier's Submission to the effect that the track in question belonged to the Soo Line but was utilized by the C & NW "in accordance with a Trackage Rights Agreement." Without further information about this Agreement, it is not possible to say that the two railroads "unified, consolidated, merged, or pooled in whole or in part their separate railroad facilities or any of their operations or services (the prerequisite for determining that a consolidation took place). Without the existence of a consolidation, the Washington Job Protection procedures do not come into play. Since there is no evidence of a consolidation, it must be concluded that the Board has jurisdiction in this claim.

In regard to the merits of the case, the Organization does not credit Carrier's contention that it stopped the tie work immediately after learning that it was being done. Rather, the Organization suggests that Carrier was aware that it was being performed and allowed it to go on until it was completed.

Without support in the record for these allegations, this Board cannot give them any weight. More than mere suspicion is required to show that Carrier was aware of what was taking place on the side track near the Anderson Window Company and did not take action.

Based on the facts as presented, it is clear that Claimants' rights were violated. At the same time, however, the Board cannot conclude that Carrier should be held liable for what occurred. There is no evidence that the work was performed with the authority, instruction, or knowledge of a Carrier official or agent or at Carrier's direction. Given this set of circumstances, a claim that Carrier violated the Agreement by its actions cannot be sustained.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of May 1992.