Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12823
Docket No. 12758
95-2-93-2-108

The Second Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists
(and Aerospace Workers
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(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"1. That CSX Transportation, Inc., violated the September 25, 1964 Agreement, particularly Article II, when it abolished a Machinist maintenance position in the Car Shop and subsequently subcontracted Machinist work in connection with the maintenance and repair of jacks, cranes, shop vehicles, air compressors and other shop machinery in the Car Department at Birmingham, Alabama to an outside firm during the latter part of 1989 and continuing thereafter on a regular basis with no "Advance Notice" relative thereto.

2. That accordingly, CSX Transportation be ordered to furnish all the involved invoices and pay Machinists D.L. Wilder, C.W. Moore, K.O. Myers, M.W. Scott, D.W. Pate, C.M. Barnett, B. Thrift, T.H. Byrd, H.B. Moore, R.C. Newton and J.D. Shoemaker an amount equal to the man hours expanded by the subcontractor(s) with an additional 10% penalty, divided equally."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 Carrier has raised two challenges to the Board's authority and jurisdiction to render a decision on the merits of this which must be addressed before any consideration is given to any other aspect of the case. First, Carrier contended that the Organization representative who initiated and progressed this dispute on the property was not the designated duly authorized representative of the Claimant employees and therefore he had no status to initiate or progress this dispute. Carrier insisted that, on this basis alone, our Board must dismiss the dispute for lack of jurisdiction. Secondly, Carrier argued that no conference between the parties was held during the on-property handling of the dispute. Therefore, they contend that the Board is precluded from considering the merits of the dispute and must dismiss the case for lack of jurisdiction.

On the first contention relative to the issue of duly authorized representative, the Board notes that this argument was raised by Carrier in their May 30, 1990, response to the Organization's three letters which initiated the instant claim. Carrier merely stated that "... you are not the 'duly authorized' representative covering employees of the Machinist craft on the former L&N railroad property . . . ." Carrier did not at any time during the on-property handling of this dispute identify who was the duly authorized representative. For the first time in their presentation to this Board, Carrier stated that "Carrier's records indicate that L&N General Chairman Roger Elmore is the 'duly authorized' representative of Machinist craft employees at Birmingham, Alabama, a former L&N location." However, Carrier presented nothing, either on the property or before the Board, in the form of evidence to support their contention of and reference to "Carrier's records" relative to this issue. Neither did Carrier offer any rebuttal to or challenge of the Organization's assertion as made in the Organization's June 12, 1990, letter which stated that ". . . Carrier was advised several years ago that in addition to General Chairman Roger Elmore, several other General Chairmen, including this writer, are authorized and subject to handle matters 'from time to time' on the former L&N Railroad." Rather, Carrier continued to handle the grievance through several exchanges of correspondence which addressed the merits issues and presented evidence and argument in support of their position without ever again on the property challenging the duly authorized representative issue. The avoidance of "chaos and confusion" about which Carrier expressed concern in their submission to the Board would have been completely satisfied by a judicious on-property examination of the issue with the inclusion in the case record of probative evidence from their records such as correspondence from the Organization to the Carrier designating the duly authorized representatives. At the very least, a statement from the incumbent L&N General Chairman would have resolved the issue.

As the originator of this affirmative defense, Carrier had the responsibility to prove their assertion with more evidence than is found in this case record. The Board has no disagreement with Third Division Award 28249 as cited by Carrier. That case simply did not have a fact situation which was even remotely similar to the situation which existed in this case. On the basis of this record, Carrier has not supported their affirmative assertion with probative evidence. Therefore, their contention in this regard is rejected.

Relative to the contention by Carrier that the Board must dismiss this case because there was no on-property conference, the Board is perplexed by Carrier's actions and position. The Board knows full well that a conference between the parties to a dispute is a jurisdictional prerequisite to submission of the dispute to a Section 3 Board of Adjustment. There have been many Board awards as well as decisions by courts of appropriate authority which have held that it is the duty of both parties to a dispute to meet in conference. These awards and decisions have held that such a requirement is not merely perfunctory, it is mandatory. Both parties are required by both the Railway Labor Act and the negotiated agreement present in this dispute to meet, face to face, in conference in a sincere effort to resolve their differences. It is only after the parties cannot reach agreement on the property that a Section 3 Board's jurisdiction becomes operative.

The several awards cited by Carrier in their submission to this Board are all well reasoned. Of particular interest is Award 129 of S.B.A. No. 570 in which we read the following excerpt:

> "And while the way is left open for the carrier to seek a conference, surely the obligation to make the request lies with the claiming party in case it decides to proceed further.
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> * * * *
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> In conclusion we note that under the circumstances of this case the denial of jurisdiction would probably not be inconsistent with the cited awards of the Third Division, since here the Carrier did at least invite a conference and the Organization apparently did not follow through."

This well-reasoned opinion is apropos in the instant dispute but from a reverse direction. When the claiming party makes not one, but three, requests for a conference, this Board believes that they have met their obligation of compliance. This Board believes that neither party to a dispute can deliberately ignore legitimate requests for a conference and then hide behind an argument of jurisdiction because no conference is held. How many times must the claiming party request a conference before concluding that the respondent party is "stonewalling"? The Board believes that three requests for a conference "at your earliest convenience," all of which are totally ignored, in spite of the fact that subsequent correspondence was issued by the respondent party, is a clear indication of an obstructionist tactic.

Carrier's plea to the Board that they "did not have the opportunity to suggest a meeting date, time and place prior to the Organization's presentation of this case to the Board" is simply not believable. The chronology of events in this case indicates the following:

4-7-90	Initial request from Organization for reasons and supporting data re alleged subcontracting.
4-19-90	Claim from Organization for 10% penalty account no advance notice given.
5-5-90	Claim from Organization for 11 named Claimants.
5-30-90	Denial of claim by Carrier.
6-12-90	Rejection of Carrier's denial by Organization. First request for conference.
6-28-90	Second request for conference.
7-17-90	Third request for conference.
4-11-91	Carrier replied to 6/12, 6/28 and 7/17 letters with no mention of conference requests.
	NOTHING FURTHER WRITTEN BY CARRIER.
2-5-92	Organization listed case with Section 3 Board.

While the Board wholeheartedly subscribes to the language,

meaning, intent and interpretations of the principle which requires an on-property conference as a condition of jurisdictional acceptance by a Section 3 Board, the Board does not condone or endorse the tactic of deliberate avoidance of a conference by one of the parties to the dispute as a means of denying jurisdictional acceptance by the Section 3 Board. To permit such a tactic would surely encourage one party to simply ignore a legitimate request for a conference and thereby deny access to the other party to a Section 3 Board on jurisdictional grounds. The Board does not believe that such a situation was envisioned by the learned Justices and Referees who have ruled on this issue. Of the many awards which we have reviewed in this case, none involved a situation such as exists here. Therefore, on the basis of this particular case record and without in any way diminishing the requirement of direct negotiation in conference as a prerequisite of advancement of a dispute to a Section 3 Board, this Board rejects Carrier's jurisdictional argument and will review and decide this dispute on its merits.

When we examine the case record of this dispute, we find that the Organization has offered little more than unsupported assertions, allegations and conjecture that a violation of the provisions of Article II of the September 25, 1964 Agreement had occurred. In the Organization's first letter to the Carrier (April 7, 1990), they opined that:

> ". . . it is my understanding that an employee of Ricwill is regularly assigned at the CSXT Shop to perform Machinist work in connection with the maintenance of shop machinery and equipment such as fork lifts, cranes and etc."

No dates, no specifics of work allegedly performed, nothing more than the generalized allegation was presented.

The Organization's second letter (April 19, 1990) advanced the allegation that Carrier was guilty of subcontracting Machinist's work at Birmingham, Alabama, "including the overhaul of several jacks." Again there are no dates specified and no work particulars given.

When the penalty claim was initiated by the Organization's letter dated May 5, 1990, they made vague references to contractor's employees allegedly performing unspecified work on "... jackks, cranes, vehicles, air compressors and etc.", but again they did not identify dates, times or the nature of the work allegedly performed. It was not until the Organization's letter of August 18, 1990, that they, for the first time, specified the date of August 10, 1990, as an incident in which an outside contractor allegedly performed 16 hours of work on floor jacks.

In their reply to this August 18th letter, the Carrier took no exception to this amendment of the initial claim.

Article II of the September 25, 1964 Agreement specifically limits the application of the provisions of the Agreement to "the work set forth in the classification of work rules of the crafts parties to this Agreement, and all other work historically performed and generally recognized as work of the crafts at the facility involved . . . ." This Board has repeatedly held that the moving party to a dispute under the provisions of this Article II must first establish a prima facie case that there has been, in fact, some violation of the provisions of the Agreement before the burden is shifted to Carrier to come forward with a defense for their actions. Allegations and unsupported assertions that contractors have been used to perform unspecified work at unspecified times on unspecified dates are not sufficient to establish a prima facie case of violation of the Agreement.

However, the record in this case reveals that the Carrier in their May 30, 1990 letter of rejection to the Organization and again in their April 11, 1991 letter to the Organization candidly acknowledged that they did, in fact, utilize an outside contractor to overhaul the floor jacks at Boyles Yard because "... the repairs needed exceeded the skills and expertise of the Machinists at that location." Carrier went on to aver that "Carrier does not possess the expertise nor tools to perform complete overhauls on equipment of this type." Carrier then proceeded to admit that "... while Carrier would not deny that Machinists at Birmingham had performed some types of repairs to these jacks in the past, we strongly disagree with Mr. Scott's statement that he and Mr. Komyers '. . . completely rebuilt the Duff-Norton 50 ton jacks . . . .'"

These acknowledgments and admissions by Carrier give credibility to the Organization's generalized statement that work which accrued to Machinists had been given to an outside contractor without prior notice to the Organization. This contention was part of the Organization's allegation throughout the on-property handling of this dispute. Once having made such an admission against interest, Carrier cannot continue to argue that they were unaware of what the Organization was talking about in their claim. Carrier placed themselves in a position of being required to defend their actions.

Article II, Section 1 of the September 25, 1964 Agreement clearly stipulates that subcontracting of work may be done only when one or more of the five (5) specific conditions exists. Item (2) of that Section 1 permits subcontracting when "... skilled manpower is not available on the property from active or furloughed employees." Item (3) of Section 1 permits subcontracting in situations in which the "... essential equipment is not available on the property." Carrier's argument and evidence in regard to the magnitude of the complete overhaul of the floor jacks in question and the absence of skilled manpower and equipment to perform this complete overhaul is convincing to the Board. . Such a use of the outside contractor was, therefore, a proper exception to the general prohibition relative to the use of such contractors. The applicability of these exceptions does not, however, relieve Carrier of the obligation to give advance notice to the Organization as required by Article II, Section 2 of the September 25, 1964 Agreement.

Article VI of this Agreement deals with the resolution of disputes which arise thereunder. Section 14 of Article VI makes provisions for the remedy which is assessable for violations of the Agreement. In this case, the only proven (admitted) violation by Carrier consists of their failure to give advance notice to the Organization prior to engaging the outside contractor to perform the work of overhauling the floor jacks here in question. It is the Board's decision, therefore, that the provisions of Article VI, Section 14(b) are applicable and are awarded in this instance.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 26th day of January 1995.