Award No. 4988
Docket No. 4775
2-SAL-SM-'66

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Levi M. Hall when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 39, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Sheet Metal Workers)

SEABOARD AIR LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current Agreement other than Sheet Metal Workers were improperly assigned to renew overhead water line between tracks 1 & 2 and 3 & 4 in the Car Department, Hialeah, Florida Shops.

2. That the Carrier be ordered to compensate the following sheet metal workers, ten (10), eight (8) hour days each: S. H. Polk, E. P. Fleming, P. E. Hilliard, V. W. Scott, R. D. Simpson, J. A. Lamanski, R. Brown, L. S. Childress, W. A. Best, L. Skipper, J. J. Mann, R. S. Peacock, F. L. Sloan, L. Thrift, R. L. Fordham, L. A. Pollard, L. B. Sims, and Sheet Metal Workers W. C. Weeks and H. Paxton, five (5), eight (8) hour days each.

EMPLOYES' STATEMENT OF FACTS: The Seaboard Air Line Railroad, hereinafter referred to as the carrier, maintains a running repair shop at Hialeah, Florida where they have employed members of all the shop crafts which includes the following sheet metal workers: S. H. Polk, W. C. Weeks, E. P. Fleming, P. E. Hilliard, V. W. Scott, R. D. Simpson, J. A. Lamanski, R. Brown, L. S. Childress, W. A. Best, L. Skipper, J. J. Mann, R. S. Peacock, F. L. Sloan, L. Thrift, R. L. Fordham, L. A. Pollard, L. B. Sims, H. Paxton, hereinafter referred to as the claimants. Among other facilities, there is an overhead water line running between tracks known as 1 & 2 and 3 & 4 approximately 4000 feet. This line is used for the purpose of supplying drinking water for the passenger cars that are turned and worked in the shop. All of the facilities were originally installed by a contractor as an overall construction of the shop. Since its construction, the sheet metal workers have maintained all of the water lines, having completely renewed one line that runs parallel to the one in question. Prior to the date contractor was assigned to renew the water line, Master Mechanic L. B. Alexander approached General Chairman R. L. Lanier with regards to the contracting of the water

the occurrence on which the claim or grievance is based." Section 2 of the rule specifies that a claim may be filed at any time for an alleged continuing violation of any agreement but it also specifies: "However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof." Therefore, even if it could be held that there was a violation of the agreement in contracting the project, under the clear requirements of Rule 31 payment for such violation would be restricted to period 60 days prior to July 26, 1963 (not from March 15, 1963 through May 31, 1963 as claimed). This would limit payments to five days between May 27 and May 31, 1963.

The organization alleged that Assistant Master Mechanic Henderson's declination of the claim was not rendered within 60 days and that the claim should be allowed as presented account failure to comply with provisions of Rule 31. As the record shows, the evidence did not substantiate such allegation, Mr. Henderson making sworn affidavit that he delivered his declination to Local Chairman Johnson on Monday, September 23, 1963, within the 60-day time limit, substantiated by his personal notations on his desk calendar on September 20th and September 23rd. As out in the record, if Mr. Henderson did not deliver his declination until September 25th, as alleged, it is strange the 60-day time limit provisions were not immediately invoked instead of waiting two months to inject such allegation. Here we have the peculiar situation of the organization **alleging** that the claim should be paid because it was **not declined** in accordance with requirements of Rule 31 whereas the **record** clearly and conclusively **shows** the **claim as filed by it** was positively **not** in accordance with requirements of Rule 31.

As set out in the record and not disputed, the claimants not only worked regularly during the entire period covered by the claim but also worked overtime account shortage of sheet metal workers. Therefore, since they suffered no loss account of the project being contracted they could have no valid claim for any penalty payments during such period even if it could be held that the agreement was violated. As held in Third Division Award 10963, to award such payments would be imposing a penalty on the Carrier and giving the employes a windfall, neither of which is provided for or contemplated by the agreement. Also see Third Division Awards 12131, 12937, 13171; Second Division Awards 4254, 3967, 4083, among others.

There is no merit to the claim and it should accordingly be denied. As held in Third Division Award 3523, without a referee, involving a claim on this property, "The claimant in coming before this board assumes the burden of presenting some consistent theory which, when supported by the facts, will entitle him to prevail."

FINDINGS: The Second 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 employe 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.

It is the Claim of the Petitioners that, under the effective Agreement, other than Sheet Metal Workers were improperly assigned to renew an overhead water line in the Car Department, Hialeah, Florida, Shops between March 15, 1963, and May 31, 1963. Petitioner in support of its Claim relies on Rule 98, the "Classification of Work" rule for Sheet Metal Workers and Rule 31(a), requiring the Carrier to notify Petitioner of the disallowance of the claim or grievance within 60 days from the date the claim is filed.

As to the application of Rule 31(a) — it appears the claim was filed July 26, 1963; there are conflicting statements as to just what date the notice of disallowance of the claim was served on the Local Chairman. The notice of disallowance of the claim was dated September 13, the day before the Local Chairman left for his vacation and could not be served at that time. The Local Chairman contends the notice was not served upon him until September 25, 1963, one day past the 60 days required in the Agreement. Carrier's representative alleges the Local Chairman was served on September 23. Both of them signed affidavits. No notice of this alleged violation was called to Carrier's attention, however, until November, 1963, when Carrier had refused an extension of time to the Petitioner. Under all of these circumstances, it not having been called to Carrier's attention at the time of the reception of the notice of disallowance that it was not timely served, we will have to resolve the question against the Petitioner.

Let us then proceed to a consideration of the Claim on the merits: At Hialeah, Florida, the Carrier maintains a repair shop where there are employed members of all Shop Crafts including Sheet Metal Workers. A water line runs through the shop which is used for the purpose of supplying drinking water for passenger cars, all of the facilities having been originally installed by a contractor, and since its construction Sheet Metal Workers having maintained all the water lines. The pipe originally constructed was 2½ inch pipe. It was determined that during the course of time for various reasons set forth in the Record this 2½ inch pipe had proved inadequate as it was impossible to take care of the watering of cars. It was decided that what was needed was a larger 4 inch cement-lined pipe with a booster pump to replace the 2½ inch pipe. The claim of the Petitioner covered only a portion of the work and it is not effectively denied that there was a shortage of Sheet Metal Workers at the time this work was about to start. Furthermore what was involved was more than just pipe work. There was carpentry and electrical work to be performed. In addition this was a specialized project requiring the use of equipment not owned or used by the Carrier.

In keeping with past practice on this property, involving work of this type and magnitude, the entire job including the booster pumping station was contracted out. That this had been the practice was evidenced by thirty-six projects named in the Record.

The Carrier is not required to split up a part and retain a part of its employes to perform where the whole project is of such a nature as to warrant the Carrier in the exercise of managerial judgment to contract out the work. Under the facts presented in this Record, there is nothing in the current agreement forbidding it from contracting out the work here involved.

See Awards 4019 and 4642.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois this 18th day of November, 1966.

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