Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12822
Docket No. 12756
95-2-93-2-139

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

PARTIES TO DISPUTE: (International Brotherhood of Firemen
(and Oilers
(
(CSX Transportation, Inc. (former
(Chesapeake and Ohio Railway Company)

STATEMENT OF CLAIM:

"1. That the Chesapeake and Ohio Railway Company violated the terms of Article II, Section 1, 2, and 3 of the September 25, 1964 Agreement, when it subcontracted the cleaning and removal of sand beneath the sand tower at the Russell Ready track, Russell, Kentucky and failed to give proper notice of intent.

2. That the Chesapeake and Ohio Railway Company, in accordance with Article VI, Sections 14 (a) and (b) of the September 25, 1964 Agreement, compensate Messrs. W. Clark, R. Robinson, B. Gordon, L. Horsley, R. Gillum, and B. Chapman. This is to be divided equitably among the aforementioned individuals."

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 dispute was still pending with SBA No. 570 when on June 1, 1993, the parties at the National Level agreed that disputes of this type which had not been assigned to and argued before a Referee at SBA No. 570 could "be withdrawn by either party at any time prior to August 1, 1993." The Agreement allowed that "a dispute withdrawn pursuant to this paragraph may be refered to any boards available under Section 3 of the RLA . . . ." (underscore ours for emphasis)

The claim in this dispute arose at Carrier's Russell, Kentucky, locomotive facility. Within the confines of the locomotive facility, there is an area which is described in this case file as the Ready Track. At the Ready Track, among other facilities, there is a sand tower. Beneath the sand tower there apparently are surface water drains. On November 12, and again on November 18, 1988, Carrier used the services of an outside contractor to remove sand from within the track area around and under the sand tower. This sand removal was required because of the fact that the surface water drains had become blocked with sand and the resultant standing water in the area was creating a safety hazard. On November 12, the time consumed by the contractor was fours hours. On November 18, the time consumed by the contractor was four and one-half hours.

There is total disagreement between the parties relative to whose responsibility it is to clean up the spilled sand in the specific area in question. The Organization argued that such work has historically been performed at this location by Mechanical Department Laborers. The Carrier argued that at the Ready Track facility there are indeed certain areas in which the clean up responsibility is and has been performed by Mechanical Department Laborers. However, it insists that ALL sand removal from the track beneath the sand tower is and always has been the responsibility of the Engineering Department employees. For informational purposes only, Carrier alleged, and no one contradicted or contested, that there were no Engineering Department employees available on the dates in question to perform the service which is normally theirs to perform.

As a result of the incidents here in dispute, the Organization submitted penalty claims alleging a violation by Carrier of the provisions of Article II - SUBCONTRACTING of the September 25, 1964 Agreement and requested payment to the Claimants under the provisions of Article VI, Sections 14(a) and 14(b) of the said Agreement.

Carrier denied the claims as presented on the basis that the safety hazard caused by the standing water at the sand tower site demanded prompt action by the Carrier; that the specific work here involved did not accrue to the Claimants either by the terms of their Classification of Work Rule or by historic performance and, therefore, there was no requirement to give advance notice prior to using the outside contractor; that the Mechanical Department did not have the equipment necessary to perform the work in dispute; that, in any event, none of the Claimants were available for service at the time the outside contractor performed the service and, therefore, none of the Claimants suffered any loss of earnings; and, that the June 1987 Letter of Understanding between the Shop Superintendent and the General Chairman which was cited by the Organization was neither a proper nor a required understanding and, therefore, cannot be accepted as a basis to change the established historical practice relative to the performance of work of the nature here involved.

The Organization, for its part, argued that the June 1987 Letter of Understanding was indeed proof positive of Carrier's acknowledgment of the fact that the work here in question accrued to the Mechanical Department employees; that inasmuch as the work belonged to the Claimants by historical practice, the Carrier was required by Article II, Section 2 of the September 25, 1964 Agreement to give advance notice to the Organization before using the outside contractor; that Carrier had failed to demonstrate that the Mechanical Department employees could not have performed the work in dispute; that because the Carrier did not give advance notice of the subcontracting, the 10% penalty provision set forth in Article VI, Section 14(b) of the September 25, 1964 Agreement was properly payable; that SBA No. 570 has repeatedly held that full employment is not a bar to payment when the basic Agreement has been violated; and that the statement submitted by several employees from the facility establishes the historical performance of the disputed work by Mechanical Department employees.

The Organization's primary reliance on the Letter of Understanding between the General Chairman and the Shop Superintendent requires that we address that issue first. On this property, the Shop Superintendent is not the officer of the Carrier authorized to make or interpret agreements. Therefore, the Organization's reliance on that June 12, 1987 Letter of Understanding is misplaced. This Board has often held that isolated settlements and/or agreements made by officers who are not authorized to make or interpret agreements are irrelevant to any subsequent interpretation to or application of the properly negotiated agreement. In this instance, the June 12, 1987 letter does not establish that Carrier has agreed to the historical performance of anything by Mechanical Department employees.

The Board studied the statements submitted by the seven individuals. Two of the statements appear to be from Claimants in this case. The other five individuals who submitted statements are not identified. Of those statements which are readable (the photo quality of the statements as presented to the Board is extremely poor) there is nothing found which contradicts or refutes Carrier's position that there are two separate responsibility areas within the Ready Track area -- one area which accrues to Mechanical Department employees and another area (the area here in question) which accrues to the Engineering Department. The affidavit references to "dig ditches" and "ditch work" are not germane to this issue and lend no assistance to our determination of this claim.

As for the applicable provisions of Article II of the September 25, 1964 Agreement, the Board is convinced that the opening paragraph of said Article II specifically limits the application of the entire Article II to work which is set forth in the Classification of Work Rule or is reserved to the employees by exclusive historical practice and performance at the facility involved. In order to prevail in this dispute, the Organization must establish by more than mere declarations that the disputed work is expressly reserved to Laborers either in the Classification of Work Rule or by exclusive historical practice and performance. On the basis of the case file as found in this instance, the Organization has not met the required burden of proof.

Therefore, because the work did not accrue to the Claimants, there was no requirement that Carrier must give advance notice prior to subcontracting. The provisions of Article II of the September 25, 1964 Agreement were not violated in this case. Accordingly, the claim is denied.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

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