Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13585
Docket No. 13365-T
01-2-98-2-54

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

PARTIES TO DISPUTE: (National Conference of Firemen & Oilers
(
(CSX Transportation, Inc. (former Chesapeake & Ohio
( Railway Company)

STATEMENT OF CLAIM:

"1) That CSX Transportation Railway Company violated the September 25, 1964 Agreement, when it subcontracted the digging of ditches for the purpose of installing new airlines in its Russell, Kentucky yards and failed to give proper notice of intent. Also, CSX Transportation did not provide the required information which was requested.

2) That CSX Transportation Railway Company in accordance with Article VI, Section 14 (b) of the September 25, 1964 agreement, compensate Firemen & Oilers G. L. Frye, R. L Robinson, E. Bryant, D. Yates, R. B. Braden, J. Morrison, D. McGinnis, P. Martin, L. Horsely, Ron Damron, Richard Damron, J. McCoy, C. Fritts, H. D. Daniels, J. Oakes, W. L. Imes, J. Schneider, W.S. Duke, D. Stone. This is to be divided equally 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 were given due notice of hearing thereon.

As Third Party in Interest, the Brotherhood of Maintenance of Way Employes was advised of the pendency of this dispute and chose to file a Submission with the Board.

The record reflects that following a telephone conversation on July 2, 1996 between a Carrier Employee Relations official and an officer of the Sheet Metal Workers International Association (SMWIA), the Carrier provided SMWIA with written notice of its intent to subcontract certain aspects of the work associated with the installation of the compressed air system in the train yard at its Russell, Kentucky, facility. The Carrier advised SWMIA that it had awarded two outside concerns, Huff Contracting, Inc. and Rail Construction, Inc., the work of digging and filling ditches in connection with this project and confirmed that CSXT Pipe Fitters would make all necessary piping connections, "working in concert with the subcontractors who will be handling the jacking, boring and other associated aspects of the project." Lastly, the Carrier indicated that although, in its judgment, Article II of the September 25, 1964 Agreement was not applicable, notice was being provided without prejudice to that position, asserting that if the Agreement were applicable, the work in question would be permitted under Section 1 of Article II. SMWIA found that arrangement acceptable and the work at issue commenced on or about August 1, 1996.

On November 25, 1996, the Organization submitted this claim, asserting that the Carrier violated the Agreement by subcontracting the ditch-digging and filling work to outside contractors without giving it notice, and charging that such work accrued to the Claimants because they had historically performed it. The claim further set forth ten questions seeking detailed information with respect to cost, duration, licensing and related issues. Those positions and questions were repeated in progressing the claim on the property. The Carrier declined the claim on January 10, 1997.

According to the Organization, Article II (Part A) of the September 25, 1964 Agreement is the contractual bedrock for its claim:

"Article II – Subcontracting

The work set forth in the classification of work rules of the crafts parties to the Imposed Agreement or, in the scope rule if there is no classification of work rule, and all other work historically performed and generally recognized as work of the crafts pursuant to such classification of work rules or scope rules where applicable, will not be contracted except in accordance with the provision of Sections 1 through 4 of this Article II. The maintenance and repair of equipment which has been historically (not necessarily exclusively) maintained and repaired by a carrier's own employees, no matter how purchased or made available to the carrier, shall not be contracted out by the carrier except in the manner specified. In determining whether work falls within either of the preceding sentences, the practices at the facility involved will govern."

In support of its assertion of exclusive accrual the Organization offers the statements of five long service employees, each attesting to his familiarity with the operation of the Russell facility over the years. Three of the five stated that they either personally dug and covered up ditches at that site in the past or recognized that work as belonging to F&O Laborers. The other two affiants had served as Foreman and Supervisor/Manager of the Russell facility. Both represented that they had always assigned such work to F&O employees. The Organization maintains that its evidence as to past practice is unrebutted and therefore must stand.

As to the notice issue, the Organization relies upon Article II, Section 2 of the September 25, 1964 Agreement, as amended in the November 27, 1991 IMPOSED AGREEMENT, providing in part as follows:

"If the carrier decides that in the light of the criteria specified above it is necessary to subcontract work of a type currently performed by the employees, it shall give the General Chairman of the craft or crafts involved notice of intent to contract out and the reasons therefor, together with supporting data sufficient to enable the General Chairman to determine whether the contract is consistent with the criteria set forth above.

> Advance notice shall not be required concerning minor transactions. A minor transaction is defined for purposes of notice as an item of repair requiring eight man-hours or less to perform (unless the parties agree on a different definition) and which occurs at a location where mechanics of the affected craft, specialized equipment, spare units or parts are not available or cannot be made available within a reasonable time."

According to the Organization, the record is clear that the Carrier both failed to give proper notice of its intent to subcontract the work in question and refused to provide the reasons for its actions and supply the information and data requested.

The Carrier posits several lines of defense. It denies that the disputed work has ever accrued exclusively to the Claimants' craft, either by the express terms of the Agreement or by past practice. Although no notice was necessary because the ditching work does not accrue to any single Organization, if notice was necessary, the Carrier satisfied its obligations by notifying SMWIA of its intent to subcontract the ditch work in its letter of July 3, 1996, which proved satisfactory to SMWIA as evidenced by that Organization's response. The work at issue, however, was of a type not required to be "piecemealed," as established by numerous prior Awards, and therefore required no notice to F&O. Additionally, as it explained to the Organization, it let the contract on a "turnkey" basis, with the two outside concerns furnishing all tools, equipment, labor, supervision and transportation to dig the ditches and lay the pipe, and covered SMWIA personnel making all pipe connections. Substantial arbitral authority, it argues, supports the proposition that minor aspects of more substantial contracts may be subcontracted without doing violence to Article II.

For the following reasons, the claim respectfully must be denied.

Article II of the Agreement states that three relevant categories of work are subject to the contractual prohibition on subcontracting; work that is expressly set forth in the Classification of Work Rule; work referenced in the Scope Rule; or work "historically performed and generally recognized as work of the crafts." (Farm-out of one further category involving "maintenance and repair of equipment which has been historically . . . maintained and repaired" by the craft is also barred. The work at issue involves new installation, not maintenance and repair of existing equipment.)

With respect to the first category, Article II, on its face and as construed by a number of prior Awards, does not specifically identify ditch digging as work reserved exclusively for the Claimants' craft.

With respect to the second category, the Scope Rule does not appear anywhere in this record, and the Board is therefore unable to reach any conclusions in that regard.

With respect to the third category, we find that a reliable indication of the parties' historical practice is also lacking. Plainly, the burden of proving historical performance of work by practice rests on the Organization. In this instance, it appears that covered personnel did in fact perform ditch digging in the past at Russell, but the record is devoid of any proof either that they did so historically or that ditch work is activity that is "generally recognized as work of the craft." As has been held repeatedly, unsworn assertions, standing alone, will not support an affirmative award, especially when, as here, they are challenged. In this instance, that principle takes on heightened significance in the face of the Brotherhood of Maintenance of Way Employes' Submission. In that pleading, BMWE argues that it has a contract right by virtue of [its] Agreements to perform work of ditching and trenching anywhere on the right-of-way of the Carrier's property. However, notwithstanding BMWE's contract right to perform work of excavating ditches and trenches on the subject property, BMWE also recognizes that F&O - represented employees are claiming a contract right to perform the character of work involved here. (Emphasis supplied.)

What the Claimants' sister Organization is saying is that ditch work rightfully belongs to BMWE members on CSXT, but that "the controlling BMWE and F&O Agreements are clear with respect to work and the basis for allocating work to respective crafts in such situations . . . " citing a general "purpose of the work" standard. On the contrary, whatever may be said of the BMWE Agreement, the F&O Agreement is far from clear on ditching - it fairly may be characterized as silent on the subject. Moreover, by its very nature BMWE's Submission cuts the throat of the theory on which the Claimants base their claim; that ditching work is historically recognized as the work of Firemen and Oilers. BMWE's predicate is that the principle of exclusivity has no application in the context of subcontracting; that while ditching and trenching is by contract generally the work of BMWE Laborers, it may also be accomplished in limited circumstances by the Claimants' class if the purpose of the work so indicates. Swimming beneath the surface of those arguments are two concessions that impale the Claimants here - ditching work is hardly work that is historically recognized

as the work of Firemen and Oilers, and the purpose of the work at issue related primarily to skills found within the Sheet Metal Workers' craft.

In sum, if the specific Rule does not reserve such work to the Claimants and the evidence of historical performance is both unpersuasive and contradicted by the representations of the Carrier and BMWE, the proper conclusion here is that while some Claimants may have performed ditching work in the past, ditching is not "generally recognized as the work of the class." Indeed, the Claimants at no time in the case handling on the property laid claim to having operated the backhoe owned and operated by the subcontractors and necessary to efficiently complete the ditching, referencing instead their prior use of "shovels, mattocks, picks, etc."

Given the above findings, it follows that the Carrier had no contractual notice requirements under the circumstances. Accordingly, the claim is respectfully denied.

## AWARD

Claim denied.

## ORDER

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 23rd day of February, 2001.