

Award No. 12929
Docket No. MW-12479

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC
RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when it assigned or otherwise permitted employes of the Rommell Construction Company to perform the work of remodeling the passenger station at Danville, Kentucky, and constructing an extension thereto of approximately 28 by 80 feet to service as a freight warehouse and also the dismantling of the yard office to provide for room for the construction of the aforesaid extension.

(2) B&B Foreman B. F. East, B&B Mechanics B. Reynolds and R. Coleman and B&B Mechanic Helpers H. E. Childers and C. Muse each be allowed pay at their respective straight time rates for eight hours each day of July 29, 30, 31, August 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 31, September 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23 and each day thereafter upon which employes of the Rommell Construction Company performed any of the work referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: On July 29, 1959, a foreman, two carpenters and two carpenter helpers employed by the Rommell Construction Company of Louisville, Kentucky, started the work of remodeling the passenger station at Danville, Kentucky, so as to provide a combination freight and passenger station. The work was to be completed by November 1, 1959. Employes of the Rommell Construction Company performed all carpentry, brick and masonry work on this project but the Rommell Construction Company sublet the plumbing and electrical work to another contractor because the Rommell Company's forces were neither licensed nor qualified to perform plumbing or electrical work.

The Carrier's B&B forces were qualified and properly equipped to perform all B&B work on this project and have performed similar work in the past.

The Division will, therefore, without passing upon the merits, dictate a like holding here.'

The same principle was applied in denying the claim in Award 13554, BRT v. K&IT, the same parties as here.

The excerpted portion of the findings from Award 18923 is applicable; the claim is denied without passing upon the merits."

The above referred to awards nullify the claim and demand which the Brotherhood here attempts to assert, even if nothing else did so.

CONCLUSION

Carrier has proven that:

(a) The effective agreement was not violated as alleged and does not support the claim and demand here made.

(b) The work contracted was not of the character usually, customarily or traditionally performed by maintenance of way employees.

(c) The point at issue has heretofore been conceded by the Brotherhood.

(d) Prior Board awards support Carrier's action.

(e) Prior Board awards have denied claims where, as here, claimants were on duty and under pay.

Claim and demand being without any basis and unsupported by the agreement in evidence, the Board has no alternative but to make a denial award.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier in this case entered into an agreement with an outside, independent Contractor for renovation and consolidation of its freight, passenger and Yard Office facilities at Danville, Kentucky. The Petitioners maintain essentially that this work should have been performed by them, and that since it was not, the Carrier specifically violated the Scope Rule of the Agreement, among others.

The pertinent Scope Rule is general in nature, merely listing the various categories of workers covered. It does not describe the work covered by the Agreement. By way of a prefatory remark, it states that "These rules govern the hours of service and working conditions of the following employees in the Maintenance of Way and Structures Department", etc., and then lists the types of employees covered.

The language of the Scope Rule is clear and unambiguous. It does nothing more than govern the hours and working conditions of the employees. It does not delineate nor grant to the employees a specific type of work to be done by them exclusively. Combined with this is the fact that the evidence reveals that it has been the practice for years for the Carrier to contract this type of work with outside firms. In this connection, it is apparent from

a reading of Rule 61, that the Agreement in evidence does not alter past, accepted and agreed-to practices. Further, it has been firmly established that in the absence of some proscription by law or contractual limitation, the Carrier can manage its business according to its own best judgment.

There are many awards of this Division involving the same subject matter, that is, the right of the Carrier to contract out work. It is true that while the findings of the Board are not unanimous, the majority of the awards have held that the Petitioner must show with convincing probative evidence that under a Scope Rule such as we have in this dispute, the type of work here involved is by history, custom and practice reserved to the Petitioner. There is no evidence in the record that by history, custom and tradition employees covered by the Maintenance of Way Agreement alone did this type of work. There are statements by employees that they have done this type of work, but not to the exclusion of outside contractors.

Considering the record as a whole, the Board finds that the Petitioner has not met the burden of proof in establishing the fact that the work involved was historically, traditionally and customarily performed by them. We must, therefore, deny the claim.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1964.