NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21409
THIRD DIVISION Docket Number SG-21260

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(The Washington Terminal Company

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on The Washington Terminal Company:

On behalf of signal employees C. S. Rhodes, A. L. Watkins, M. D. Hawley, J. A. Payne, B. J. Lucas, C. A. Dent, E. J. Lang, and E. F. Horney, Jr., for compensation at the punitive rate of their respective positions for time consumed by Foley Electrical Company employees in performing work covered by the Signalmen's Agreement on May 4, 6, 7, 9, 13, 14, 15, 16, 17 and 20, 1974, this to be divided equally between these signal employees.

(Carrier's file: Claim BRS-74-17

OPINION OF BOARD: This case involves alleged Scope Rule violations when certain work in connection with the relocation and installation of a temporary lighting system, as part of the overall construction of the National Visitor Center (NVC) on the site of Union Station in Washington, D. C., was performed by employes of Foley Electrical Company rather than by Carrier's Signal employes covered by the Agreement. The NVC was created pursuant to Act of Congress (P.L. 90-264) whereby the Secretary of Interior contracted in March 1972 with the corporate owners of Union Station to renovate and improve that facility for use by visitors to the Nation's Capital. In February 1973 a general contractor, George Hyman Construction Company, was retained to furnish all services in connection with the necessary alterations and addition to Union Station. BY letter dated March 7, 1973 Carrier advised the Organization that construction commencement was imminent and stated further as follows:

> "The project will include renovation of the existing railroad station into a Visitor Center complete with a motion picture theatre. Behind the station and over the top of the existing tracks, a parking garage will be built; behind that, roughly parallel to "H" Street, N.W., a new passenger terminal will be constructed. As information in connection with the project, enclosed is a booklet entitled 'Status II - National Visitor Center.'
>
> The major projects are all of such magnitude that Terminal employees could not adequately handle them. Nor do our employees possess the required skills to undertake such a project . Furthermore, it would not be practicable to have the work subdivided to determine whether certain portions of it could possibly be handled by Terminal employees.

"It is anticipated that the position of employees represented by your organization will not be worsened during the construction period. In this connection, we are willing to consider retention of existing forces during the period of construction provided your organization will agree to avoidance of contracting out claims in connection with this project.

While we feel that from a claim-liability standpoint that such agreement is not mandatory under the circumstances involved, we believe it most desirable and in the best interest of all concerned to obtain such an agreement.

Accordingly, for the purpose of supplying additional details and receiving questions, we invite your attendance at a conference tentatively scheduled for 2 p.m., Monday, March 26, 1973."

Meetings were held and on April 18, 1973 Carrier sent to the Organization a proposed Letter Agreement reading in pertinent part as follows:

"As explained in conference, this project could not adequately be handled by Washington Terminal employees due to the required skills, the available force and time allotted for completion.

It was agreed that this project; covered by Public Law 90-264 dated March 12, 1968, may be contracted out, and during the period while contractors' forces are building the new passenger terminal facility and for six months after its completion, there will be no reduction in the number of Washington Terminal employees represented by your organization. During this period, vacancies occurring because of death, retirement; resignation, etc., will be filled promptly.

If you concur, please affix your signature in the space provided below and return the original to Mr. Gwen, Director of Labor Relations.

Very truly yours,

C. W. SHAW, JR. /s/
Manager"

This proposed agreement was not executed by the Organization. Shortly thereafter, construction of the NVC began and Foley Electrical Company was awarded the electrical sub-contract.

By letters dated May 23, 1974 the Organization on behalf of named Claimants submitted claims reading in pertinent part as follows:

"1. The Washington Terminal Company contracted to Foley Electrical Company work co-d under the Signalman's scope rule consisting of furnishing 120 volt AC energy to signal location which will feed track circuits in the station area.

2. The Washington Terminal Company contracted to Foley Electrical Company work covered under the Signalman's scope rule consisting of installing telephone lines and pipe in the station area.

3. The Washinton Terminal Company contracted to Foley Electrical Company work consisting of relocating and installing train starting light systems on tracks in the station area...."

It should be noted that the third claim supra listed specific claim dates of May 4, 6, 7, 9, 13, 14, 15, 16, 17 and 20, 1974 but also stated: "This claim is to be on a wntinuous basis until such violation is corrected." The other listed claims (1 and 2) specified no claim dates at all. On June 10, 1974 Carrier's Engineer Roadways, Signal and Communications denied all three claims as follows:

"All work complained of in the above three claims is directly connected with the National Visitor Project.

As was explained to you in conference held April 2, 1973, and later confirmed in letter of April 3.8, 1973, the National Visitor Center Project, which is cowered by the National Visitors Center Facilities Act of 1968 (Public Law 90-264), shall include, but not be limited to, demolition of umbrellas over station platforms; alterations of existing tracks, catenary, signal, electrical, and communication systems, and air, steam and water lines; construction of a parking garage structure; construction of a passenger terminal facility and all component parts incidental thereto; and renovation of the existing station 8s planned for a National Visitor Center. The entire project is expected to be completed in approximately 2 years at a cost of about $21,000,000.

As was further explained, this project could not adequately be handled by Washington Terminal employees due to the required skills, the available force and time allotted for completion.

"Furthermore, Claims No. 1 and No. 2 are considered vague and indefinite in that no dates of occurrence are shown therein.

In view of the aforementioned, the claims are hereby denied."

Thereafter, the Organization appealed the denial to Carrier's Manager, in a letter of June 21, 1974 reading in pertinent part as follows:

"Please consider this an appeal of Mr. M. J. Rose's, Engineer Roadway, Signal and Communication, denial of our claim of May 23, 1974.

Please consider this a claim for the members of The Brotherhood of Railroad Signalman because The Washington Terminal Company violated the current Signalman's agreement, in particular the scope rule when the Company unilaterally assigned Signalman's work to other than Signal Department employees. This claim to be on a continuous basis until such violation is corrected.

The Washington Terminal Company contracted to Foley Electrical Company work consisting of relocating and installing train starting light systems on tracks in the station area on the following dates.

* * * * *

In Mr. M. J. Rose's denial he states, 'This project could not adequately be handled by Washington Terminal employees due to the required skills, the available force and time allotted for completion.'

We feel that the members of The Brotherhood of Railroad Signalman do possess the required skills and the available force could complete the work in the allotted time economically.

Mr. M. J. Rose also states, 'Furthermore, Claims No. 1 and No. 2 are considered vague and indefinite in that no dates of occurrence are shown therein.'

In our claim for the starting lights in the station area the schedule of dates, number of employees etc. covers claim No. 1 and No. 2 as these electricians performed all of the work outlined in our claims on the dates listed."

By letter dated August 26, 1974 Carrier denied the claim again as follows:

"THE WASHINGTON TERMINAL COMPANY
Union Station Washington, D. C. 20002

August 26, 1974

Mr. William R. Matthews, Jr.
General Chairman, Brotherhood of
Railroad Signalmen
3544 Herbert Street
Broyhill Crest
Annandale, Virginia 22003

Re: Claim BRS-74-1

Dear Mr. Matthews:

This refers to your June 21, 1974 appeal of subject claim filed in behalf of various Signalmen for various dates in May 1974 for 8 day's pay at the punitive rate of their respective positions for the time consumed by the Contractors (Foley Electrical Company) performing work of relocating and installing train starting light systems.

In our July 18, 1974 conference, the position of the parties remained the same as reflected in the claim and in Mr. Rose's June 10, 1974 denial. Mr. Rose's denial, by reference, is incorporated herein and made a part of this decision.

Your appeal is accordingly denied.

Very truly yours

C. W. SHAW, JR. /s/
Manager

cc: Mr. M. J. Rose"

Review of the record of handling reveals a number of procedural irregularities and inadequacies by both parties. In the first place, only one of the three original claims of May 23, 1974 (that numbered supra as "3") properly is before our Board for review. So far as we can see by the record, that claim was appealed to the Manager, denied by him and thereupon submitted to our Board for adjudication. Neither of the other claims, to wit ". . ..furnishing 120 volt AC energy...." and "installing telephone lines and pipe" were handled to impasse on the property and may not be determined by us. Further, the one remaining claim for "relocating and installing train starting light systems on tracks in the station area" alleges violations on specific dates beginning May 4 and ending May 20, 1974 and there is not a bit of evidence to support the Organization's characterization of 8 "continuing claim".

Turning to the claim properly before us, we find that Carrier's substantive position on the property consisted solely of the following: ". . . that project could not adequately be handled by Washington Terminal employees due to the required skills, the available force and time allotted for completion." There is no dispute, and indeed Carrier conceded on the record, that the work in question comes under the Scope Rules of the Signalmen's Agreement. Thus the issue before us is joined when we confine our view, as we must, to the arguments raised on the property. Several other more elaborate theories were raised de novo in Carrier's ex parte submission and advanced by able advocacy in argument before our Board but none of the voluminous material relative to ownership, dominion and control may be considered by us because it was never aired on the property. For the same reason the myriad Awards on these subjects are irrelevant to the issue before us. Rather, the basic principles determinative of this case are found in our early Award 5563 wherein we stated as follows:

> "First, as a general rule the Carrier may not contract out work covered by its collective bargaining agreements.
>
> Second, work may be contracted out when special skills, equipment or materials are required, or when the work is unusual or novel in character or involves a considerable undertaking. (See Awards 757, 2338, 2465, 3206, 4712, 4776, 5028, 5151 and 5304.)
>
> Third, the work contracted out is to be considered as a whole and may not be subdivided for the purpose of determining whether some of it could be performed by the employees of the Carrier. (See Awards 3206, 4776, 4954 and 5304.)
>
> Fourth, the burden of proof is on the Carrier to show by factual evidence that its decision to contract out work is justified under the circumstances. (See Awards 2338, 4671 and 5304.)"

Adverting to the principles clearly enunciated in Award 5563 we see that Carrier has the burden of proving by factual evidence justification for contracting out the work concededly covered by the Scope Rule: to wit "the relocating and installing train starting light systems on tracks in the station area." Review of the record shows that Carrier has failed to carry this evidentiary burden. Mere assertions are not "factual evidence" and Carrier has offered nothing more than assertions that the overall project was an unusual, novel and considerable undertaking costing several millions of dollars. Moreover, Carrier's assertions about the magnitude and cost of the overall project are irrelevant to the claimed violation of the Signalmen's Scope Rule by subcontracting specifically identified electrical work. (Emphasis added) The focus of this dispute and of Carrier's evidentiary burden must be that electrical work and Carrier

offered not one scintilla of factual evidence on the property to justify its decision in terms of the mitigating circumstances cited in Award 5563. The work in question is covered by the Scope Rule, Carrier has failed to justify the contracting out and there can be no doubt that the Agreement thereby was violated.

We turn finally to the question of appropriate damages for the proven violation. In processing the case on the property, the Organization alleged a violation on each of 10 days and sought that the "Company now be required to compensate the Signal Department Employees listed, at the punitive rate of their respective positions for the time consumed by the Contractors performing work covered by the Signalmen's Agreement. This compensation to be divided equally between the listed Signal Department Employees." The Carrier before our Board presented vigorous argument that the employes were occupied in their regular work throughout the claim period and, in any event, the punitive rate is not justified. As with so much of Carrier's position in this case, however, the arguments were raised belatedly at this appellate level but not on the property and therefore are blocked from our view. Nonetheless we are guided by the basic principle that the Organization bears the burden of making a prima facie case on every material aspect of its claim, including the ad damnum portion. As we analyze this record the Organization has made no showing whatever that damages at the punitive rate are warranted herein. Moreover, the Organization has made no evidentiary showing of how much "time was consumed by the Contractor's performing work covered by the Agreement." Because of this evidentiary void we have no way of knowing whether each day's violation was for a full 8-hour day or some portion thereof. Since the burden was on the Organization to provide information on damages and it failed to do so we shall sustain the claim only to the extent of one call for each of the ten days i.e. two hours and forty minutes at the straight time rate for Maintainers prevailing at the time of the violation. (Emphasis added) This sum shall be divided-equally among the eight named Claimants.

FINDINGS: !Che Third Division of the Adjustment Board, upon the whole record and all the evidence, finds andholds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 violated.

A W A R D

Claim sustained but only to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February 1977.