

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Delaware and Hudson Railway Company

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

(1) The Agreement was violated when the Carrier assigned outside forces to completely re-furbish the SK Yard Office at Buffalo, New York beginning September 12, 1983 (System File 11.84).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) As a consequence of the aforesaid violations, Bridge and Building Department employes J. Juliano, T. Woodyshek, J. Kurcharski, R. Ouimet, D. Welch, N. Wells, E. Dibble, R. Robinson, R. Fontaine, G. Swift, D. Wood, J. Mattice, Jr., R. Ford, J. O'Kelly, W. Lyker, W. Carvin, E. Miller and R. Brown shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside forces in performing the work referred to in Part (1) hereof."

FINDINGS:

The Third 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 employes 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.

On November 1, 1983, the District Chairman of the Organizations, Pennsylvania Federation advised the B&B Supervisor of the Carrier that he was enclosing with that correspondence Claims dated October 28, 1983. These Claims alleged that a general construction company and "sub-contracted companies" did major construction work at the Carrier's SK Yard Office and Tool House in violation of the Agreement. In response to the Claim the Assistant Chief Engineer responded that "...the building is owned by Hudson River Estates Company there is no B.M.W.E. Agreement applicable to Hudson River Estates Company"

and the Organization which covers the Claim. In his appeal the District Chairman states that the building on which the work was done houses "Delaware and Hudson personnel" and that "the Hudson River Estates Company is merely a paper company." The Chairman continues that the Hudson River Estates Company was established and is solely owned by the Delaware and Hudson Railway Company with which the Organization has an Agreement. It is the further position of the Organization that "all property in question including the building in question was included in the transaction...between the Delaware and Hudson Railway Company and the Consolidated Rail Corporation (and) is public record on file...in the Buffalo County...Courthouse." The Organization further states in its April 2, 1984, appeal the following which is included here verbatim from the record:

"The Carrier's contention is that the SK Yard Office is owned by Hudson River Estates Co., and that Organization was not a signatory to the D&H-BMWE schedule Agreement. The Organization contends that the ownership of this property by Hudson River Estates, if the Carrier's contention is true, is a mere subterfuge to abrogate the Scope Rule of the D&H-BMWE schedule Agreement. The SK Yard Office was sold by the Consolidated Rail Corporation to the Delaware and Hudson Railway. Subsequently, the Yard Office was 'sold' to Hudson River Estates, a wholly owned subsidiary of the Delaware and Hudson Railway.

Commencing September 12, 1983, the owner of SK Yard Office, either the D&H or Hudson River Estates, had an outside contractor, Eagen Construction Company, begin renovation of the Yard Office. This Yard Office is used by D&H personnel and is used for the benefit of the D&H in its railroad operations. The Organization asserts that the Carrier has violated the Scope Rule and the notice provisions Rule 44 of the schedule Agreement. The 'sale' of this property to a wholly owned subsidiary of the Carrier should not enable the Carrier to wilfully disregard the schedule Agreement between the D&H and the BMWE."

The Organization claims that work of this type had historically been done by its members. It documents this by citing work it had done of a similar nature at the Carrier's facilities at Colonie, New York; at Delanson, New York (which is a leased building); and at the Tool House and Yard Office at Cocklin Yard, New York. BMWE forces had also "...completely refurbished the Tool House at Kingsley, Pennsylvania," according to the Organization.

The Board has closely studied the record before it, including the submissions by both parties. The following conclusions are warranted. The Carrier admits on the property that the building on which the work was done

was "owned and the contractor hired by Hudson River Estates Company." In its submission the Carrier argues, however, that the facilities were never owned by either the Carrier or Hudson River Estates Company, but that Conrail "leased its SK Yard Office to Hudson River Estates, Inc. by agreement dated March 1, 1983." The latter information was never presented during the handling of this case on the property and is, in fact, contradicted by the Carrier in its denials of the Claim on the property. This Board has ruled on numerous occasions that as an appellate forum it cannot frame its conclusions on information or evidence which was not submitted by the parties during the handling of a case on the property. Such doctrine is codified by Circular No. 1 and articulated by Awards emanating from various Divisions of this Board (See Third Division Awards 20841, 21463, 22054; Fourth Division Awards 4132, 4136, 4137). The Board is constrained to accept both the Organization's and the Carrier's contentions, on the property, that the SK Yard Office at Buffalo was owned by Hudson River Estates, Inc. Was the Yard Office directly bought from Conrail by Hudson River Estates (since the Carrier claimed the latter "owned" it), or from the Delaware and Hudson Railway which had purchased it earlier from Conrail? The latter is argued by the Organization and is not factually contradicted until the Carrier presented its submission to this Board. Who are the Officers of Hudson River Estates? Its Board of Directors consists entirely of "...top-level (D&H) Carrier officials" according to the Organization. This is not disputed in the record. What is the function of Hudson River Estates? It is a corporate entity which occupies and controls the SK Yard Office for the sole use, as far as the record shows, of the Carrier in its railroad operations.

On the merits, the Carrier does not argue that work of this type had not fallen under the Scope of the operant Agreement in the past. The thrust of its argument is that the SK Yard at Buffalo does not fall under the Agreement between the Carrier and the Organization because the Yard is controlled by a legal entity different than the Carrier. The Organization responds that the Railroad and the Hudson River Estates are factually the same thing because management is the same, and all functions of the property controlled by the Hudson River Estates is for the sole function of the Carrier's railroad operations. The evidence of record supports this contention.

Based on the "facts" of record before it, which are those exchanged by the parties on the property, Hudson River Estates is a corporate entity different than the Carrier, but it is completely controlled by Carrier Officers and is engaged in a type of business which is the same as the Carrier's. The type of work in dispute here is that which has historically been covered under the Scope Rule of the Agreement. The record shows that such work had been done by the craft on facilities which were both leased by the Carrier or owned by it. This is not disputed in the record.

What the Carrier did was to create a separate legal entity which was run by its Officers. This entity engaged in the same business as the Carrier's other railroad operations. The entity was factually either wholly owned by the Carrier as a holding company, or it leased property directly from

another railroad. In either case it was a separate legal corporation. The Carrier argues that such legal entity does not pro forma come under the jurisdiction of its labor Agreement with the Organization.


The Board must reasonably conclude that if the Carrier were to be permitted to withdraw itself from its Agreement obligations in the manner described above it could logically continue to use such means with its other facilities and thus withdraw, in whole or in part, its operations from jurisdiction of the Agreement with the Organization. The procedures espoused by the Carrier are variants of so-called double-breasting. In the estimation of the Board such represents a violation of the Scope Rule of the Agreement. The Claim must be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1988.