Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD THIRD DIVISION

Award No. 29331
Docket No. MW-29060
92-3-89-3-494

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Kansas City Southern Railway Company

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

(1) The Carrier violated the Agreement when it assigned outside forces (Herzog Construction) to build head walls and wing walls at Bridge 163.8 on September 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29 and 30, 1987 [Carrier's File 013.31-320(274)].

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to notify the General Chairman in advance of its intention to contract out said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B employes T. Foresee, C. Briggs, B. Stafford, B. Cagle and W. Clinton shall each be allowed eight (8) hours of pay at their respective rates for each day the outside forces performed the work identified in Part (1) above."

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.

This Claim alleges several provisions of the Agreement were violated when Carrier contracted out certain concrete forming and pouring work in replacing a timber trestle bridge with a new concrete bridge near Joplin, Missouri. In addition, equipment was leased, with outside operators, to assist Carrier's forces in the setting of the new bridge girders.

The Organization alleges violations of the Scope Rule, Seniority Rule, Addendum No. 9, which contains Article IV - Contracting Out of the May 17, 1968 National Agreement, and finally, the good faith requirements of the December 11, 1981 National Letter of Agreement regarding the contracting of work. The Organization asserts Carrier failed to provide proper notice of its intent to contract the work, that such work was within the scope of the Agreement and was, thereby, reserved to the employees, and that the Claimants suffered a future lost work opportunity as a result. It cites several prior Awards in support of its positions.

Carrier denies any alleged violation of the Agreement. It says the employees have never performed the type of work involved. In addition, it says the use of hired equipment to augment its forces has traditionally and historically been the practice on the property. Carrier also asserts that all Claimants were fully employed during the dates of the Claim and suffered no lost work opportunity. It also cites prior Awards in support of its positions.

In reviewing the instant dispute, we have confined our consideration, as we must, to those matters raised by the parties on the property.

Our examination of the record reveals that the Organization's allegation of improper notice is not well founded. Carrier gave notice on May 29, 1987, some three months prior to commencement of the work, of its intention to contract out the work. The notice specifically named "... old timber trestle Bridge 163.8 (A-164) ..." as the structure being replaced. The parties' Agreement, in Addendum No. 9, only requires notice of the "contracting transaction." Our review of the language does not disclose additional requirements that the notice also provide dates and details of the specifics of the project. Presumably, that information would be discussed at the conference contemplated by the provision. Such a conference was held in this matter. The prior decisions cited by the Organization do not call for a different result here. In the three matters cited, the Board sided with the Organization in rejecting blanket type notices that listed only vague descriptions of work to be performed over a wide geographical area. Such was not the situation here.

The parties also dispute whether the work was within the scope of the Agreement and reserved to the Organization. In view of such a dispute, the Organization has the burden of proving, by either explicit Agreement language or by persuasive evidence of traditional and historic performance, that the work is reserved to its members. The Rules cited by the Organization are general in nature. Its burden, therefore, is to demonstrate traditional and historic performance of the type of work in dispute.

The Carrier cited Third Division Award 22367, involving these same parties, as an endorsement of the exclusivity doctrine on this property. Whether the exclusivity doctrine remains a viable standard of proof, in light of the December 11, 1981 National Letter of Agreement on contracting of work, is a matter of some controversy. As a minimum, however, proof that a type of work has been traditionally and historically performed requires substantially more than a mere demonstration of past performance.

Detailed review of the Organization's evidence of past performance reveals only two instances of construction of new concrete bridges. The remainder of its evidence deals with either unrelated work or repairs to existing structures. In our view, such evidence falls short of demonstrating the regularity, consistency and predominance in the performance of the disputed work to warrant a finding that the Organization has traditionally and historically performed the work. In short, on this record, we find the Organization has not established a prima facie case of scope coverage for reservation of work purposes. The Claim must, therefore, be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1992.