

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29596
Docket No. MW-29688
93-3-91-3-31

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 Employees
(
(CSX Transportation, Inc. (formerly
(The Chesapeake and Ohio 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 Company) to perform track work (loading track material) on the Allegheny Subdivision of the Huntington Division beginning November 1, 1989 through December 11, 1989 [System File C-TC-5100/12(90-206) COS].

(2) The Agreement was further violated when the Carrier failed to discuss the matter with the General Chairman prior to contracting out said work as required by the October 24, 1957 Letter of Agreement (Appendix B).

(3) As a consequence of the violations in Parts (1) and/or (2) above, Messrs. C. W. Carper and O. L. LaRue shall each be allowed one hundred twenty-five (125) hours of pay at the Class (A) Equipment Operator's rate."

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 employe 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 the Carrier violated the Agreement when it used an outside contractor to load scrap and second-hand rail on its Allegheny Subdivision in November and December of 1989.

The Organization also alleges that the Carrier failed to give notice and meet with the employees to discuss its intention to contract out the disputed work. A review of the record, however, reveals that the issues relating to notice and meeting were raised by the Organization for the first time in its submission to this Board. We have said, in a multitude of prior decisions, that we will not consider matters that were not part of the record developed by the parties in their deliberations on the property. Accordingly, we find the Organization's allegations regarding notice and failure to meet to be improperly before the Board. For that reason, the allegations are dismissed.

The contracting Rule of the effective Agreement reads as follows:

"RULE 83 - CONTRACTING WORK

(b) It is understood and agreed that maintenance work coming under the provisions of this agreement and which has heretofore customarily been performed by employees of the railway company, will not be let to contract if the railway company has available the necessary employees to do the work at the time the project is started, or can secure the necessary employees for doing the work by recalling cut-off employees holding seniority under this agreement. * * *

Distilled to its essence, the Claim alleges that the Claimants were qualified and readily available to perform the disputed work.

In its defense, the Carrier asserted, among other things, that it did not have sufficient qualified employees to operate the equipment required for the job. In addition, Carrier produced extensive payroll documentation tending to show that Claimants were unavailable because they were either on vacation or actively employed on other work which generated considerable overtime during the time frame in question. The Organization did not respond to Carrier's assertion about the lack of qualified employees or the evidence of Claimants' non-availability.

In matters of this nature, it is well settled that the Organization has the burden of proof to establish the basis of the Claim. It must satisfy this burden by producing probative evidence. Mere assertions of availability of qualified workers, unsubstantiated by evidence, are not enough. On the record before us, we find that the Organization has not met its burden of proof.

Form 1
Page 3

Award No. 29596
Docket No. MW-29688
93-3-91-3-31

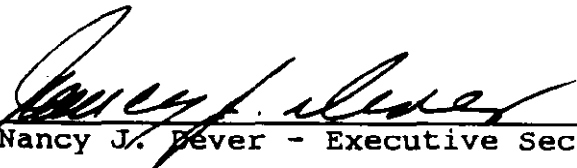
The Claim, therefore, must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of March 1993.