

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30780  
Docket No. MW-30067  
95-3-91-3-482*Horrible award  
Contracting*

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(St. Louis Southwestern 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 (Pat Baker Contracting Company) to perform Roadway Machine Subdepartment work (building a road, removing a bridge, hauling fill material and filling in earth embankment in place of removed bridge) at Mile Post 507.2 between Gilmer and Pittsburg, Texas, on the Tyler Subdivision beginning July 16, 1990 and continuing until the violation ceased (System File MW-90-55-CB/495-53-A).
- (2) The Agreement was further violated when the Carrier entered onto a contracting transaction without giving the General Chairman at least fifteen (15) days advance written notice of its plan to do so.
- (3) As a consequence of the violation referred to in either Part (1) and/or Part (2) above, Claimants M. B. Hays, L. D. Goodson, N. L. Kemp, J. L. Dora, C. C. Wiley and J. A. Jenkins shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by the outside contractor performing the work 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 employee or employees involved in this dispute are respectively carrier and employee 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.

Pertinent Articles of the Agreement which the Organization alleges have been violated are: Article 1 - Scope, Article 2-Seniority Rules, Article 6-Seniority Rosters, Article 8-Promotions and Filling of Vacancies, Article 17-Roadway Machines and Article 33-Contracting Out.

On June 7, 1990, Carrier issued Notice No. 7 which stated:

"Please accept this as Carrier's notice pursuant to article 33 of the BMW Agreement of our intent to contract the following work: Replacement of 325 feet of timber trestle with earth embankment near Gilmer, Texas, BR 507.21.

Carrier forces will perform all track construction. Carrier does not have the equipment or personnel available to perform the fill placement and related work. This work will begin on or after June 25, 1990."

The following day, the parties met and conferenced with regard to the above matter at which time the Organization advised that it did not agree to outside contractors performing this work. On June 11, 1990, Carrier contracted with Pat Baker Contracting Company to perform machine operating in connection with dirt work and construction of a roadway leading to the bridge site. The work in dispute commenced on July 16, 1990.

The Organization alleges a violation of the Scope Rule, which is "general" in nature in that it does not specifically describe and reserve work to employees in the listed classification, in this case Roadway Equipment Operators. It is too well settled to require citation that under such contract language the Organization has the evidentiary burden of proving reservation of the claimed work by a custom, practice or tradition of exclusive performance.

The Organization was unable to shoulder its burden with regard to exclusivity/past practice on this record. Carrier offered evidence in handling on the property of no fewer than ten prior occasions dating from 1968 through 1980 when "dirt work" of the type in dispute was contracted out following notice and conference. The Organization did not refute Carrier's list but stated that "the employment situation was completely different prior to the year 1980 than it is at this time." No violation of the Scope Rule is made out on this record.

The Organization alleges an independent violation of the meaning and intent of the notice requirement by "bad faith" negotiations by Carrier. Specifically, the Organization asserts that the subcontracting was already a fait accompli prior to the notice and conference. However, that contention is not borne out by the record evidence. Carrier sent the Organization notice of its intent on June 7, conferenced the issue on June 8 and did not enter into an agreement with the Pat Baker Contracting Company until June 11, 1990. The preponderance of evidence on this record does not support the conclusion that Carrier manipulated the notice requirement or engaged in bad faith negotiations.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 6th day of April 1995.