Contract - unload switch panels

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31871
Docket No. MW-30836
97-3-92-3-662

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

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"(1) The Agreement was violated when the Carrier contracted with an outside concern (All Erection and Crane Rental of Cleveland, Ohio) to furnish a truck crane with operator and one (1) ground support employee to unload switch panels at the south end of No. 12 and No. 14 Bridge Yard tracks at the Harbor Yard, Ashtabula, Ohio on January 3, 1991. (System Docket MW-2057).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out said work as required by the Scope Rule.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Class 1 Machine Operator D.J. Tredent and Foreman C.J. Campbell shall each receive four hours' pay at their respective straight time rates of pay."

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 were given due notice of hearing thereon.

On January 3, 1991, without notice to the Organization's General Chairman, Carrier utilized the services of an outside contractor, All Erection and Crane Rental (hereinafter referred to as "the Contractor") to unload #10 switch panels of track at Harbor Yard in Ashtabula, Ohio.

The Organization submitted a claim on behalf of Messrs. Tredent and Campbell alleging that Carrier had violated the Scope Rule of the Agreement between the Parties "by denying a work opportunity to the named furloughed employees" by allowing the Contractor to unload two panel turnouts without giving prior notice to the General Chairman.

Carrier denied the claim maintaining that it did not possess a 50 ton crane, the "necessary equipment in question." Carrier went on to note that the work at issue had been "consistently" contracted out in the past, without "notice or protest" from the Organization.

The Organization replied to Carrier's denial noting:

> "A #10 turnout consists of three track sections (panels). The heaviest section being the frog which weighs just under 12 tons. One has to wonder why the Carrier would even consider contracting a 50 ton crane when every Locomotive Crane (list enclosed) owned by the Carrier, 45 in total, can easily lift the heaviest #10 turnout panel. The Carrier has numerous Model 40 Burro Cranes throughout its system which too can easily lift the heaviest panel. Model 40 Burro Cranes are standard equipment on all of the Carrier's Divisions. It just doesn't make any sense for the Carrier to even consider contracting out the lifting of the panels."

The Organization responded further that it had "ardently objected to any and all contracting transactions on the property of work that falls under the scope of the prevailing agreement and/or work that has ordinarily, customarily and traditionally been performed throughout the years" by employees represented by the Organization.

Various Awards of Special Board of Adjustment (SBA) No. 1016 establish the authoritative precedents which guide the decision in this matter. See SBA 1016, Awards 9, 10, 11 12 and Third Division Award 27012, cited therein. Appropriate study of the entire record persuades us that the work in dispute was "within the Scope" and did fall under the umbrella of the Scope Rule of the controlling Agreement by custom, practice

tradition and actual performance on the effective date of the Agreement. See also Third Division Award 27636.

In accordance with the holdings of decision 66-A of SBA 1016, the December 11, 1991 Letter Agreement does not enter into our deliberations. At the very least, however, Carrier was obligated to give due notice and discussion rights to the General Chairman before contracting out the work in question. In that connection, there is no question that Carrier failed to give the General Chairman notice of the contracting out as required by the second and third paragraphs of the Scope Rule. The essence of those portions of the Scope Rule is in the opportunity it affords members of the Organization to "convince" Carrier to assign them the work which is being considered to be contracted out. Third Division Award 27636, supra. Carrier's affirmative defense of lack of necessary equipment was effectively rebutted by the Organization on the property.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 4th day of March 1997.

CARRIER MEMBERS' DISSENT
TO AWARD 31871 (Docket MW-30836)
(Referee Eischen)

In 1990 prior to this claim, System Docket MW-1002 resolved a very similar dispute on this Carrier concluding:

> "...account the Carrier allegedly violated the Scope and Rule 1 when a contractor was used to unload switch panels at Ashtabula, OH. No notice was given to the involved General Chairman prior to this work being contracted...
>
> Furthermore, the record is clear that the Carrier has consistently contracted this type of work in the past, without notice to or protest by the Organization. Thus, clearly, under these circumstances, we deem a notice was not required, nor would it have been practical or economical to attempt to have such work done by our employees. While, as you state, the Carrier does possess a locomotive crane that could have handled the switch panels, it is not regularly used for this work and, in any event, was not available at the time of this claim."

That disposition was not challenged and became precedent on this property.

Carrier's need for the 50-ton crane was that it wanted to install the switch panel in one move and not have to sectionalize it.

Finally, Claimants were furloughed at the time and it obviously would have taken substantially longer to recall them than it took to accomplish the task.

P. V. Varga

M. W. Fingerhut

M. C. Lesnik