NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20920
THIRD DIVISION Docket Number MW-20935

Louis Norris, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(St. Louis-San Francisco Railway Company

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

(1) The Agreement was violated when the Carrier assigned the work of constructing concrete diesel inspection pits at Tulsa, Oklahoma to outside forces (System File A-8322/D-7647).

(2) B&B Foreman D. J. Napier; First Class B&B Mechanics R. L. Hensley, J. L. Jennings, R. F. Breshears; Second Class Mechanics L. F. Rice, P. Greenfield and R. W. Ragland each be allowed pay at their respective straight-time 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.

OPINION OF BOARD: This claim arose as a result of Carrier's contracting out the work of constructing new Diesel inspection pits at Tulsa, Oklahoma. Petitioner contends that such contracting out violated the Scope Rule (Article 1, Rule 1) of the controlling Agreement, and that said work should have been assigned to Claimants based on their seniority rights. Demand is made for pro rata compensation as set forth in the Statement of Claim.

Carrier and Organization differ sharply not only as to which issues are pertinent to proper resolution of this dispute, but, also, on how these issues are to be applied to the confronting facts. We shall discuss these issues separately.

NEW MATTER

We have repeatedly held that "new matter" not previously raised on the property is inadmissible at this stage of the appellate process. See Awards 19101, 20064, 20121, 20255 and 20841, among a host of others.

Based on the foregoing principle, therefore, we sustain Petitioner's objection to our consideration of the "former contracting rule" contained in the 1952 Agreement. Such issue was not raised by Carrier on the property and is now asserted for the first time.

We do not however sustain Petitioner's objection that the exclusivity concept, as related to Scope Rules which are general in nature, constitutes inadmissible new matter. This issue is properly before us now since it was specifically raised on the property by Carrier letter of February 6, 1974.

SENIORITY RIGHTS

There is no dispute here as to the seniority rights of Claimants under the Agreement. Such rights however are not relevant to this dispute unless it can first be established that the disputed work was Claimants' to perform either under the express coverage of the Scope Rule or under an exclusive reservation of work rule. See Awards 15943 (Heskett), 17943 (Mc Govern), 18243 (Devine), 19032 (O'Brien) and 20841 (Norris), among others.

> "...with respect to the seniority rules, it is quite clear that seniority rights can only be considered when the right to perform the work is established (Award 15943 and 17943)..." See Award 20417 (Lieberman)

Thus, Awards 1314, 3822, 3955, 6136, 15640 and 17559, cited by Petitioner, are not germane to this dispute since they deal with seniority rights of employes covered by the same Agreement.

Additionally, we find no specific "work reservation rule" in the controlling Agreement. The Scope Rule, therefore, becomes a major issue of consideration.

SCOPE RULE

Article 1, Rule 1, (Scope), of the Agreement provides that "These rules govern the hours of service and working conditions of the following employes:" There then follows a listing of specific job titles including "B & B Foreman" and "B & B Mechanics".

We have held repeatedly that Scope Rules which merely list positions and duties are general in nature, and cannot be construed as exclusive job description rules or specific work reservation rules to a given class or craft, in the absence of precise language to that effect.

See Awards 12501 (Wolf), 12505 (Kane), 13638 (Engelstein), 17421 (Goodman), 18876 (Franden), and 20841 (Norris), among many others.

As we stated in Award 20841, supra:

> "We conclude, therefore, that the instant Scope Rule is non-specific and general in nature. In the latter context, we have held repeatedly that where the Scope Rule,

> as is the case here, is general in nature, the Petitioner has the Burden of proving by a preponderance of the evidence that the disputed work has traditionally and customarily been performed by Claimants (or the particular craft) on a system-wide basis to the exclusion of others 'including outside contractors'."

See Awards 10389 (Dugan), 13579 (Wolf), 15383 (Ives), 15539 (McGovern), 16609 (Devine) 18471 (O'Brien), 18935 (Cull), 19576 (Lieberman) and 19969 (Roadley), among a host of others.

Petitioner asserts that there was a "past practice" controlling the disputed work, as asserted in Petitioner's letter to Carrier of November 7, 1973. This is disputed by Carrier as to the magnitude of the project.

In any event, the record fails to establish that Petitioner has submitted substantial probative evidence sufficient to bring the disputed work within the exclusivity concept governing Scope Rules which are general in nature.

Additionally, Petitioner contends that the giving of notice as to the contracting constituted an admission by Carrier that the disputed work was covered by the Scope Rule.

We cannot agree. Such notice is required under the Agreement in the event Carrier plans to contract out work. The giving of such notice, therefore, merely serves as formal compliance with the Agreement; it does not of itself establish exclusive Scope Rule coverage of the disputed work, negatively or affirmatively. For example, had the Carrier elected not to give notice it would not logically follow that the work was not within Scope Rule coverage.

CONTRACTING OF DISPUTED WORK

In reaching the following conclusions we have placed no reliance upon the "former contracting rule" in the 1952 Agreement, since this issue was ruled inadmissible under "New Matter" above.

Accordingly, the controlling contract provision in this dispute is Article IV of the 1968 National Agreement, which reads as follows:

> "In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.
>
> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.
>
> Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.
>
> Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu f this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement."

Under the first paragraph, notice is required; this was complied with by Carrier. Under the second paragraph, "good faith attempt to reach an understanding" is required. Carrier asserts compliance; Petitioner disagrees. In such event, "Carrier may nevertheless proceed with said contracting" (which it did), and "the organization may file and progress claims in connection therewith" (which it did).

Petitioner asserts that it did not avail itself of its option under the fourth paragraph as to retention of "existing rules" "in lieu of this rule". Accordingly, since the Agreement is so written, "existing rules" were not retained. We are therefore relegated to paragraph three which specifically states:

> "Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out".
> (Emphasis supplied).

This provision is precise and clearly applies to both parties. However, as we have fully demonstrated, in order for Petitioner to prevail under the controlling principles and precedents cited above, it must sustain the burden of proving either that the Scope Rule was precise as to coverage of the disputed work, or that such work came within the exclusivity concept as applied to Scope Rules general in nature. This, the Petitioner has failed to do.

We conclude, therefore, that under the controlling circumstances of this dispute, and in view of the foregoing findings, Carrier was authorized under the Agreement to contract out the disputed work.

In Award 19823 (Dorsey) involving the same parties and the same agreement, we held:

> "The issue in this case is whether the work involved was, by application of principles of contract construction, exclusively reserved to employes within the collective bargaining unit. If the finding is affirmative it makes no difference as to what party stranger to the Agreement performed it; or, what machines, equipment or tools were employed in its accomplishment. If the finding as to exclusivity is in the negative, then the claim lacks support in the terms of the Agreement."
>
> "When it failed to make a prima facie showing of exclusivity, predicated upon introduction of a preponderance of substantial evidence of probative value, the case, at that point, ripened for decision."
>
> "We are cognizant of the enormity of the burden to prove exclusivity; but we are constrained to honor the hoary test imposed by the case law of the Board which causes the Board to dismiss for failure of proof."

See also Awards 20640 (Twomey) (which involved the same parties and the same Scope Rule), 19516 (Blackwell), 14965 (Ives), 14751 (Perelson), 16743 (Friedman), 18061 (Dugan), 18803 (Ritter), 19190 (Cull) and 19224 (Hayes), among many others.

Finally, as to Award 18305 (Dugan), that decision rested entirely upon Carrier's violation of Article IV of the 1968 Agreement in that it failed to give the required notice.

Accordingly, based on the record and the controlling principles and precedents cited above, we can find no basis upon which to sustain the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Panka
Executive Secretary

Dated at Chicago, Illinois, this 16th day of January 1976.