NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20966
Docket Number MW-20808

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Chicago & Illinois Midland Railway Company

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

(1) The Agreement was violated when outside forces were used for "pushing rip-rap at a shoulder slide at Petersburg" on June 2, 3, 4 and 5, 1973 (System Case No. MP-BMWE-37 IHH 8/27/73).

(2) The Carrier vilated Article IV of the National Agreement dated May 17, 1968 when the subject work was contracted to outside forces without advance notification to and discussion with General Chairman G. W. Prior.

(3) As a consequence of the aforesaid violations, Roadway Mechanic J. V. Tanner be allowed 13 hours of straight-time pay and 22 hours of overtime pay.

OPINION OF BOARD: There is no dispute about the facts of this case. On June 1, 1973 abnormally high waters in the Sangamon River washed away a section of the river bank running parallel to Carrier's main track near Petersburg, Illinois. Carrier called in an outside contractor to haul rip-rap (large rock) to the site of the wash-out and move it into place along the riverbank. Some 4200 tons of rip-rap were hauled in and, by use of an end-loader, positioned by the contractor's forces in such a way as to stabilize the washed-out embankments.

The Organization herein claims that a portion of the work performed by the forces of the contractor, to wit, pushing the rip-rap by the end-loader, was work properly belonging to employes represented by the Organization in Carrier's Roadway Equipment Sub-department. Specifically, a claim was filed for 35 hours (13 at straight time and 22 hours at overtime rates) on behalf of Roadway Machanic J. V. Tanner who regularly operates a rubber-tired End Loader (M.E. 59) owned by Carrier. The claim was handled without resolution and denied at all steps on the property before referral to our Board for resolution.

Petitioner asserts that by using the outside forces to shove the rip-rap Carrier violated Rules 1, 3, 4 and 5 (Scope, Seniority and Classification rules, respectively). Also, Petitioner charges that, by contracting this work without prior notice and discussion with the General Chairman, Carrier violated Article IV of the May 17, 1968 National Agreement. Carrier resists the claim on several grounds, primarily relying on Supplement No. 1 to the controlling Agreement which reads in pertinent part as follows:

"BMWE SUPPLEMENT NO. 1

Supplemental Memorandum of Agreement

It is understood that the schedule agreement between the parties hereto signed May 23, 1952, effective June 1, 1952, is hereby supplemented as follows:

Such schedule agreement excludes all work which may be covered by or subject to the scope of agreements with other crafts or employe organizations, nor does it apply to the work hereinafter set forth:

1. Air, steam, and oil lines within shop buildings.

2. Soil conservation, erosion control, and landscape work, unless assigned from time to time."
(Emphasis added)

Thus Carrier urges that the rip-rap work in question is "erosion control" work and is expressly excluded from the scope of the Agreement, thereby obviating both the claimed violations of the schedule agreement and the National Agreement of May 17, 1968. Petitioner answers Carrier on this point primarily by contending that Supplement No. 1 predates Article IV, is superseded by the latter provision and therefore cannot bar the instant claims.

There is no serious argument herein that the work performed by the outside contractor was "erosion control". The only question presented by this record is whether such work is covered by the Scope Rule of the Agreement. That inquiry is central to a determination of both the claim of schedule agreement violation and of Article IV violation since the latter provision by its own express terms applies the contracting out of "work within the scope of the applicable schedule agreement".

As we read the clear and unambiguous language of Supplement No. 1 quoted supra "erosion control" work is expressly excluded from the coverage of the Scope Rule and thereby from the whole schedule agreement. Nor absent bare assertion can we find any merit to Petitioner's argument that this Supplement was superseded and somehow rendered ineffective by the May 17, 1968 National Agreement, Article IV. As we understand it, Petitioner argues in effect that the tail should wag the dog. In fact, it is the Scope Rule of the Schedule Agreement (as modified inter alia by the exclusionary clauses of Supplement No. 1) which controls the coverage of Article IV in this case, and not vice versa. We find that there is no agreement support for the alleged Scope, Seniority and Classification rule violations and, derivatively, there can be no basis for the alleged violation of Article IV and it too must fail. Accordingly we have no recourse but to deny both parts of 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 Agreements were not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1976.