NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22391
THIRD DIVISION Docket Number MW-22490

George S. Roukis, 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 outside forces were used to remodel and paint the Carrier-owned Magnolia Hotel at Magnolia, Alabama (System File A-8322/D-9451).

(2) As a consequence of the above, B&B Foreman L. K. Nettles, First Class Carpenters B. G. Tribble and E. D. Turner, Second Class Carpenters D. E. Pickens and T. Carter, Jr., B&B Helpers E. Griffin III and J. L. McCollum each be allowed eight hours' pay at their respective straight-time rates for each day within the period extending from March 26, 1977 through May 1, 1977."

OPINION OF BOARD: In our review of some of the benchmark cases adjudicating similar factual situations, we find that complying with the notification requirements of Rule 99 does not automatically establish work exclusivity. We noted, for example, in Third Division Award 21287 (Referee Eischen) that "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."

This interpretive principle requires an additional showing that the contested work exclusively accrues to the aggrieved employes. If a positive demonstration is wanting, we invariably deny the petition.

In the instant case it is clear that Carrier explicitly observed the procedural specifications of Rule 99. It gave timely notice, conferred with Organization officials and implemented its contracting out decision, when it fulfilled these requirements. It recognized, of course, that these sequential actions did not bar a prospective grievance.

An important threshold question that now confronts us is whether or not Claimants possessed these exclusive work rights.

The broad and general Scope Rule does not provide the answer, so we must methodically examine the record.

A careful review of the parties' correspondence reveals that Claimants had adduced documentary evidence verifying prior work assignments at the Magnolia Hotel.

They were neither rebutted nor qualified to indicate that other employes, at times, performed this type of work at this facility.

Admittedly, this Hotel did not require an on going deployment of B&B forces, but limited as this work might have been, the Claimants, nevertheless, demonstrated they had performed this work at this building.

In fact, Carrier recognized by implication, Claimants' presumptive rights to this work, when it specifically noted in its letter of July 8, 1977 to the General Chairman, that the February 12, 1952 Agreement provided definable contracting out exemptions. It stated, "Since February 12, 1952, we have under agreement with the Organization had the right to contract out work where we did not have sufficient employes to perform the work during regular established working hours, or where the work could not be performed within the time limits required by the Ry. Co."

In view of this assessment, we must conclude that Carrier failed to refute effectively Claimants' work exclusivity assertions and acknowledged by implication that B&B forces performed this work.

Therefore, consistent with this finding we must determine whether Carrier satisfied the test requirements of the February 12, 1952 Agreement.

After reviewing the record on these points we do not find that Carrier adequately substantiated its averments that its forces were tied up or that the time constraints necessitated contracting out. By asserting these defenses, it was under an

obligation to come forth with more compelling evidence. Some form of quantitative measurements would have sufficed. As it did not meet its required proof burden under the February 12, 1952 Agreement, we must, of necessity, 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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 27th day of April 1979.