NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26220
Docket Number MW-26283

Herbert L. Marx, Jr. Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Seaboard System Railroad

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

(1) The Carrier violated the Agreement when, without an understanding having been reached between the Carrier and the General Chairman setting forth the conditions under which the work will be performed as required by Rule 2, it assigned the work of constructing an agency office building at Pecan, Florida to outside forces beginning October 25, 1982 [System File C-4(36)-Tampa Div.-15/12-2(83-77) H2].

(2) Because of the violation referred to above, each employe holding seniority rights on the Jacksonville and Tampa Divisions Seniority District in B&B Groups, A, G and H in the Water Service Fuel and Air Conditioning Subdepartment and in the Maintenance of Way General Group A-Roadway Machine Subdepartment during the claim period shall be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside forces in the performance of the work referred to in Part (1) hereof."

OPINION OF BOARD: By letter of March 27, 1982, the Carrier notified the General Chairmen as follows:

> "At Pecan, Florida, approximately three miles north of Palatka, we propose to construct an agency office building of approximately 2,200 square feet.
>
> The building will be constructed under a permit issued by Putnam County requiring a licensed contractor and usual inspections. The building will be one story with exterior walls and roof of steel, interior will be finished with steel studs and sheetrock partitions, concrete floors with vinyl asbestos floor tile, except in the toilet, where walls and floor will be ceramic tile. Site work will involve clearing, grading, utilities, sewage disposal, walks, curbs and asphalt paving.
>
> In addition, a deep well will be required with possible addition of aeration equipment.

> To meet the County's requirements, we propose to contract the entire project, as our forces are not equipped nor licensed to perform certain of the work. Your early concurrence is requested in order that the construction may be scheduled."

This letter is typical of such correspondence over the years in which the Organization is advised of construction work proposed to be contracted to outside forces. Such correspondence is clearly and directly related to the provisions of Rule 2, CONTRACTING, Section 1, which reads as follows:

> "This Agreement requires that all maintenance work in the Maintenance of Way and Structures Department is to be performed by employees subject to this Agreement except it is recognized that, in specific instances, certain work that is to be performed requires special skills not possessed by the employees and the use of special equipment not owned by or available to the Carrier. In such instances, the Assistant Vice-President, Engineering and Maintenance of Way, and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed.
>
> It is further understood and agreed that although it is not the intention of the Company to contract construction work in the Maintenance of Way and Structures Department when Company forces and equipment are adequate and available, it is recognized that, under certain circumstances, contracting of such work may be necessary. In such instances, the Assistant Vice-President, Engineering and Maintenance of Way, and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed. In such instances, consideration will be given by the Assistant Vice-President, Engineering and Maintenance of Way, and the General Chairman to performing by contract the grading, drainage and certain other Structures Department work of magnitude or requiring special skills not possessed by the employees, and the use of special equipment not owned by or available to the Carrier and to performing track work and other Structures Department work with Company forces."

Pursuant to that portion of Rule 2, Section 1, second paragraph as to the requirement to "confer", Representatives of the Carrier and Organization met on April 6, 1982, and on several other dates in the ensuing months. No "understanding" as to the project was reached, and on September 30, 1982, the Carrier advised the Organization in pertinent part as follows:

> "We regret that we have been unable to reach a mutual understanding with you in this instance. In order for this company to fully and effectively meet its obligations to the shipping public, we believe that the Pecan agency facility should be built without further delay. Accordingly, it is necessary to proceed with contracting this project. We hope you will reconsider your position and concur in our action."

Subsequently the Claim here under review was filed as to whether "the subject work met the circumstances set forth in Rule 2", and further alleging that construction of the building "is construction work . . . reserved exclusively" to employees in the Carrier's Maintenance of Way and Structures Department.

There is no question that, in this instance and unlike many previous instances, the parties did not "reach an understanding setting forth the conditions under which the work will be performed." Thus, it is the Organization's principal position that the Carrier has failed to comply with Rule 2, and the construction work was in consequence improperly contracted to an outside contractor. In response, the Carrier argues that it fully met the requirement to "confer" on the project and that the Rule does not give the Organization "veto power" to prevent such contracting simply by failing to "reach an understanding."

The Board was not made aware by the parties of any previous Awards providing resolution of this precise point. In support of its position, the Organization cites sustaining Third Division Award No. 18287, interpreting the same Rule. In that Award, however, the facts disclosed that there was no conference, a necessary preliminary to reaching an understanding. Third Division Awards Nos. 13349, 14982 and 16693 are to similar effect.

In support of its view, the Carrier cites a number of Awards (Second Division Award No. 10964 is an example) involving interpretation of language such as, "The time and length of the lunch period shall be subject to mutual agreement with the committee." Where no such Agreement was reached in these instances, the Awards uniformly permitted the Carriers therein to adjust lunch periods to changing work conditions. The Board finds, however, that this language, while similar, is clearly not identical to the "confer and reach an understanding" of Rule 2.

To answer the question posed here, the language in question must be viewed within the entire context of Rule 2, Section 1. The first paragraph states that all maintenance work will be performed by employees subject to the Agreement -- with certain specified exceptions. The second paragraph proceeds from a different starting point, establishing as to construction work that it "may be necessary" to contract such work. The paragraph gives guidance as to when such is "necessary:" the intent not to contract construction work where

"forces and equipment are adequate and available;" the recognition of limitation of doing so, based on the magnitude of the work; special skills required; and special equipment.

All these factors are clearly intended to be considered in conference and "understanding" between the parties. The Board does not read the second sentence of paragraph two simply to mean that the Organization may grant or withhold its approval of contracting construction work. If this were true, an Organization could effectively prevent any contracting of construction work. On the other hand, a good faith effort is required of the Carrier; failure to confer is a Rule violation (see Third Division Award No. 18287 and related awards). In this instance, the Board perceives that the parties failed to agree as to whether the work should be contracted or performed by Carrier employees or a combination of both. The requirement of Rule 2 is not that strong, however. Is "reach an understanding setting forth the conditions under which the work will be performed" the same as requiring Organization approval or consent to any contracting of construction work? The Board finds that it is not, relying on the preceding phrase, which states "under certain circumstances, contracting, of such work may be necessary."

Thus, the Claim is not sustainable solely on the basis that conferences failed to result in the Organization's acknowledgement that it had reached an understanding with the Carrier.

This does not mean, however, that the Carrier is free to contract construction work under any and all circumstances (assuming it has conferred and sought understanding with the Organization). The Rule says it is not the intent of the Carrier to contract construction work when forces are "adequate and available" -- except under "certain circumstances." Were such "certain circumstances" present in this instance? It is the Board's conclusion that they were and that Rule 2 was not violated when the Carrier contracted the construction of the agency office building at Pecan, Florida.

The "circumstances" include the Carrier's contention, expressed to the Organization in conference and correspondence, that building construction for public use of this type requires "certified and licensed tradesmen" under county regulations. The Carrier argues that its forces do not meet this requirement. The Organization expresses doubt as to this legal requirement, but the Board is not in a position to dispute this interpretation of local law.

Aside from this, the Carrier claims, in correspondence to the Organization, that its forces lack certain "special skills" for the work. These include employees proficient in performing duct work for heating and air conditioning; ceramic tile work; and certain plumbing work. Many Awards have established that a Carrier need not fragment construction work between its own forces and necessary outside forces. (See Third Division Award No. 20785, citing numerous other awards.)

There is the further Carrier contention that the time requirements for construction and use of the new building did not permit it to divert its already fully occupied forces to undertake the project, even conceding that much of the work was within the employees' capability.

Rule 2, Section 1, second paragraph places meaningful restrictions on the Carrier. These include a stated intention not to contract construction work except under "certain circumstances." There is the basic binding requirement to confer with the Organization and to "reach an understanding", although the latter can obviously not be achieved on a unilateral basis. Further, guidelines are provided in the final sentence as to what factors may provide for exceptions. Only in the context of all this does the Board find that the Carrier did not violate Rule 2. Thus, the resolution of this dispute rests on the particular circumstances reviewed herein and is not of general application.

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: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 15th day of January 1987.