

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29592
Docket No. MW-27950
93-3-87-3-483

The Third Division consisted of the regular members and in addition Referee Gilbert Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance
(of Way Employes
(National Railroad Passenger
(Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces to erect and dismantle scaffolding, in connection with Bridge and Building Department work (painting and plastering) performed on the ceiling of the 30th Street Station, on November 7, 8, 20 and 21, 1985 (System File NEC-BMWE-SD-1484).

(2) The Carrier also violated the Agreement when it did not give the General Chairman advance written notice of its intention to contract out said work.

(3) As a consequence of the aforesaid violations, B&B Mechanics G. Hardy, E. Pewdo, R. Russell, G. Mattie, M. Lee, A DiCarne, A. Tiberi, J. Szczurowski, R. Darden, W. Robinson, J. Rocco, S. Holmes, W. Bady, W. Callahan, K. Coyle, T. Hudson and A. Gardner shall each be allowed eight (8) hours of pay at their respective straight time rates."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

The dispute in this matter arose from a project to repair the ceiling over the concourse level of Carrier's 30th St. Station in Philadelphia. The overall project involved the erection of scaffolding to ceiling height, the preparation, plastering and painting of a portion of the ceiling, and the dismantling of the scaffolding.

The Claim alleges that Carrier violated the Scope Rule in authorizing its lessee to contract out work that accrued to its B&B forces, and when it failed to give proper notice of the contracting plans.

It is undisputed that a third party lessee, running a food concession on a portion of the concourse floor, contracted for the ceiling repair. However, Carrier did not raise the usual lease-based defenses, e.g. that the work was the lessee's responsibility and did not benefit the Carrier. In fact, the record strongly suggests that the lease did not require the lessee to perform the work and it suggests that the Carrier was fully aware of the work, but took no steps to stop or assert control over the project. In the absence of argument and evidence that the work was the lessee's responsibility, and that the Carrier had no control and received no benefit, the Board must conclude that it is irrelevant that a third party contracted for the work.

Carrier's first level officer, the Division Engineer, wrote in his reply that the preparation, plastering and painting portion of the Claim "...has been found to be in order..." and he agreed to compensate Claimants for some 48 man-hours of time. His finding was not qualified in any way. However, he denied the portion of the Claim attributable to the erection and disassembly of the scaffolding on grounds of skill and historical practice.

There is no dispute that the Organization was not given advance notice of the ceiling repair work. Carrier says, in essence, that the scaffolding work is not Scope covered and, therefore, no notice was required. Carrier raises other contentions as well, including inaccuracies in the Organization's Claim.

The parties have raised a number of other contentions in their Submissions and Rebuttals. However, we have confined our analysis of the dispute, as we must, to those arguments and assertions made by the parties in developing their record on the property.

On the record before us, we find the Carrier's challenges to the accuracy of the Claim with respect to the identity of the contractors and precise dates of work to be without merit. Specificity requirements are intended to provide the Carrier sufficient information that it can identify the essential elements of the dispute so that it can adequately investigate the circumstances and, if necessary, prepare its defense. There is no doubt that the Claim provided the Carrier with ample information to pin-point the circumstances surrounding the instant dispute. The responses of the Carrier's officers at the first two levels reveal no apparent difficulty.

The posture of the dispute is unusual in light of the Division Engineer's action at the first level of the grievance process. The purpose of the project was to repair the ceiling. The scaffolding was the means by which access to the ceiling was achieved. As such, the scaffolding activities would normally be viewed as an integral and inseparable part of the overall project. Given the Division Engineer's unconditional finding regarding the validity of the work portion of the Claim, we believe the burden of proof shifted to the Carrier to show, by production of persuasive evidence, that the scaffolding portion of the project should stand on its own as a set of activities unrelated to the ceiling repair. Carrier has not met this burden. The Organization's assertions about past practice and Scope coverage counter the Carrier's assertions. As a result, Carrier's position is left unsupported by evidence. We must find, therefore, on the unique record before us, that Carrier violated both the notice and contracting of work provisions of the Agreement.

We turn now to the matter of damages. Carrier asserts full employment as a defense and contends that no Claimant suffered an actual loss. The Organization argues that the finding of a violation is sufficient to warrant an award of damages as claimed. We are aware of the divergent views on this subject. On this record, however, it is most significant that the Carrier fully paid the repair portion of the Claim without regard to actual loss by the Claimants. This action is also consistent with the remedy in Third Division Award 27614, involving these same parties. Accordingly, we find that the Claimants should be compensated for the actual time spent by contractor forces in erecting and dismantling the scaffolding. The unchallenged assertion of the Carrier shows this to be a total of 88 hours.

Form 1
Page 4


Award No. 29592
Docket No. MW-27950
93-3-87-3-483

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of March 1993.

CARRIER MEMBERS' DISSENT
TO
AWARD 29592, DOCKET MW-27950
(Referee Vernon)

This Award disregards two well-established principles of contract interpretation. Further, the errors in the Majority's analysis are compounded as they build one upon the other. The first and most basic principle of arbitration is that the moving party, in this case the Organization, has the burden of proving its case. However, the outcome of this Award was determined by the finding that:

"The Organization's assertions about past practice and Scope coverage counter the Carrier's assertions."

As the Board has "...long held that assertion does not take the place of evidence" (Third Division Award 21268) it is clear the Organization did not sustain its burden. However, the Majority turned the burden of proof upon its head. As defined by the Majority, the Carrier had the burden of proving:

"...that the scaffolding portion of the project should stand on its own as a set of activities unrelated to the ceiling repair."

Ostensibly, the basis for shifting the burden of proof was:

"...the Division Engineer's unconditional finding regarding the validity of the work portion of the Claim...."

However, the Division Engineer's actions are only relevant because the Majority had previously concluded:

"The purpose of the project was to repair the ceiling. The scaffolding was the means by which access to the ceiling was achieved. As such, the scaffolding activities would normally be viewed as an integral and inseparable part of the overall project."

As the moving party, the Organization had the burden of proving that scaffolding work had not, as a matter of practice, been separated from other work such as painting and plastering. The Majority's conclusions in this regard do not have a demonstrable basis in the record. Indeed, the "unchallenged assertion" which the Majority later relies upon in determining the proper amount of compensation, shows that the painting and plastering work and the scaffolding work were, in fact, contracted with two, different outside concerns. The unchallenged record shows that the disputed work was, in fact, separated. Even without this fact, shifting the burden of proof to the Carrier was inappropriate. This Award is demonstrably flawed and does not bring scaffolding work under the coverage of the Agreement.

The Majority compounded this error by awarding compensation to the Claimants. In order to do so, the Majority disregarded a second well-established principle. This second principle is that payments by operating officers, without the knowledge or final approval of the officer authorized to make and interpret the Agreement, are not binding. As the Board held in Third Division Award 21130:

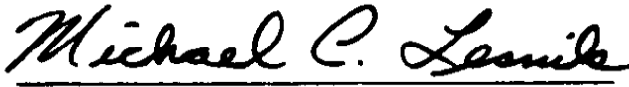
"Prior Board Awards have recognized that actions taken by an operating officer do not constitute a binding interpretation of the Agreement and that such an interpretation can only result from the actions of the General Chairman and the designated officer of the Carrier. Third Division Awards 18064 and 18045."


See also Third Division Award 21182. In complete disregard for this principle, the Majority made the Division Engineer's action at


the first level of the grievance process the "most significant" basis for awarding compensation. In so doing, the Majority failed to address a key argument which the Carrier raised during discussion on the property:

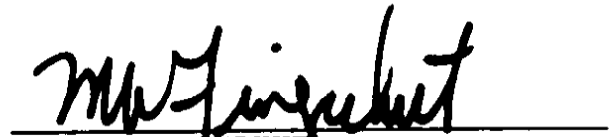
"Notwithstanding the Division Engineer's decision to pay a portion of this claim, Carrier submits that such payment by a subordinate officer was erroneous and without basis."


The Majority's failure to respond to this argument demonstrably flaws this Award.


M. C. LESNIK


R. L. HICKS


J. E. YOST


M. W. FINGERHUT


P. V. VARGA