Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37976
Docket No. SG-38237
06-3-04-3-137

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Texas Mexican Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of F. Nevarez IV, for all hours worked by the contractor from April 4, 2003 through April 17, 2003, in addition to his normal pay and any overtime pay he might have made during this time period, account Carrier violated the current Signalman's Agreement, particularly Rule 1 (SCOPE), when on April 4, 2003, through April 17, 003, Carrier allowed a contractor to come onto Carrier's property and perform Signal Maintainer work without first making an agreement to do so with the Organization. Carrier's File No. #231, General Chairman's File No. UPGC-S-SR-417, BRS File No. Case No. 12815-TexMex."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

This dispute involves the use of an outside contractor to perform scope covered work between April 4 and April 17, 2003 without the concurrence of the Organization.

Aside from the propriety of the subcontracting, the instant case raises the issue of the effect of the parties' failure to hold a conference on the property.

The Organization's May 14, 2003 claim was progressed throughout the claims procedure on the property without resolution. After receiving the Carrier's second level denial of the claim on July 10, 2003, the Organization in a letter to the Carrier dated August 26, 2003 confirmed that the parties had agreed to meet in conference at the Carrier's offices in Omaha, Nebraska, on September 15, 2003.

The conference did not take place. Each party blames the other for the failure to confer.

Based on the exchange of correspondence between the parties on September 27 and October 17, 2003, there appears to be no dispute that the General Chairman was informed by the Carrier in a telephone call on the morning of the scheduled conference that the Carrier wanted to conduct the conference over the telephone. The General Chairman responded that he was already in Omaha and preferred to have a conference in person. He indicated that if the conference did not take place in Omaha, then it would have to be held in Shreveport, Louisiana, or Reno, Nevada. The Carrier did not agree to either of these locations.

The General Chairman then contacted the Carrier's General Manager and informed him of what had transpired. According to the General Chairman, he was told that the parties would set a time and place to meet concerning the claims conference. The General Chairman stated that he did not hear anything further and thereupon forwarded the matter for further handling before the Board.

The Carrier takes the position that claim conferences are not required to be conducted in person and it has not been uncommon to handle limited claims over the telephone. Considering the fact that this matter involved only one claim, the Carrier is of the view that it was permissible to conduct a conference in a simple and cost savings manner by telephone. The Carrier states emphatically that it did not reject or refuse to conference the claim, but simply disagreed with the means by which the conference was to be conducted. It contends that this claim is barred from further consideration because it was not conferenced, a failure that must rest with the Organization.

The Organization argues that the Carrier violated the intent and purpose of the Railway Labor Act by foreclosing the possibility of conferencing the claim. The Organization asserts that the Carrier repeatedly refused to meet with the Organization

face to face as contemplated by the Railway Labor Act's requirement to conference claims. The Carrier should not be permitted to assert a jurisdictional impediment to the claim when it was the party that refused to meet and conference the matter.

The provisions of the Railway Labor Act speak directly to the necessity of holding a conference between the parties to a dispute. In Section 152, Second, it states:

> "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

In Section 152, Sixth, it states:

> "In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute; to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

Section 153, First (i) of the Act requires that:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle

> such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

It is well established by a long line of Awards that the failure to have a conference precludes consideration of the merits of the claim. This is so because the foregoing statutory language in the Railway Labor Act, as well as Circular No. 1 of the Board, requires that a conference be held and, absent such a conference, the Board lacks jurisdiction to decide the dispute. See, Second Division Award 12823; Third Division Awards 19738 and 15880; and Fourth Division Award 5074.

An exception to this line of cases developed in recognition of the fact that a party should not be permitted to evade the Board's jurisdiction by refusing or avoiding its obligation to confer. This "clean hands" exception was set forth in Third Division Award 15880:

> "There is an obvious and proper qualification to the rule that this Board may not vest itself with jurisdiction where there is no conference on the property. If one of the parties refuses or fails to avail itself of a conference where there is an opportunity to do so, it cannot then assert the defense of a lack of jurisdiction. To allow otherwise would do violence to and frustrate the intention of the statute."

It is our judgment that the instant circumstances fall within the exception stated above. The Organization sought to conference this matter, confirming in writing a scheduled claims conference for September 15, 2003 in Omaha. On the day of the conference, however, its representative was told that there would be no meeting and that only a telephone discussion would suffice. Later attempts to reschedule the conference went unanswered.

The Carrier sought to justify its actions by suggesting that a telephone call was sufficient to meet the statutory conference requirements. However, a meeting of the parties is contemplated in Section 2, Sixth of the Railway Labor Act wherein it is stated that ". . . within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held. . . ." Of course, the parties are permitted to handle the conference arrangements in their "usual manner," but there is no evidence that the "usual manner" for handling conferences has been to conduct telephone discussions.

The parties have a mutual obligation to conference a claim. They are permitted to devise an orderly, agreed upon procedure for conference handling. In the absence of such a procedure, however, one party cannot be permitted to unilaterally refuse to hold the conference as scheduled on the property. As the Board in Fourth Division Award 5074 so aptly stated: "An action that snuggles up to 'sandbagging,' in our judgment, should not be rewarded by immunizing from the Board's jurisdiction the party who frustrates the process." Agreeing, as we do, with that logic, the Carrier's jurisdictional challenge is rejected.

On the merits of the claim, the Carrier admits that it used an outside contractor's employee to perform scope covered work. Under Rule 1 of the parties' Agreement, work that falls within the Scope Rule ". . . will not be contracted out or permitted to be performed" except by agreement. The Carrier does not dispute the fact that it failed to obtain agreement from the Organization prior to using an outside employee during the relevant time period.

The Carrier's position was succinctly set forth in its claim denial dated June 9, 2003, as follows:

> "There is no dispute that an RCL employee was utilized to assist in the normal duties of a Signal Maintainer. The need was due to an employee's absence, which has been a common practice in the past.
>
> The time frame of use by the sub-contractor is not correct and in Carrier's view the monetary portion of the claim is excessive. Accordingly, the claim as presented is denied."

It is not altogether clear whether the Carrier meant that to say that an employee has been commonly absent in the past or whether the use of an outside employee to provide assistance to Signal Maintainers was common in the past. In any event, it must be emphasized that when the Organization made out a prima facie case based on the plain language of the Scope Rule, the burden then shifted to the Carrier. Unsupported assertions of a past practice do not satisfy that burden. See, e.g., Third Division Awards 15444, 18447, and 20107.

We must further note that the Carrier expanded upon its arguments in its Submission and at the Referee Hearing before the Board. Had these arguments been presented during the on-property handling, they would have been fully considered. As

the record stands, however, we are forced to conclude that the Carrier did not produce probative evidence to support its claimed affirmative defense.

The Carrier disputed the number of hours worked by the outside contractor's employee. Accordingly, the remedy is remanded to the parties to determine the amount of time worked by the outside contractor on the dates claimed and to compensate the Claimant accordingly.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of October 2006.