PUBLIC LAW BOARD NO. 3445

Award No. 10
Case No. 10

PARTIES TO DISPUTE:

Brotherhood Of Maintenance Of Way Employees

And

Southern Railway Company

STATEMENT OF CLAIM:

Mechanic Leroy Bates and Larry Robb, Foreman Frank Baker and Terry Hoesyle, Apprentices E.K. Mason and John Beasley and Pile Driver Engineer Larry Walston have filed claim for each to be paid at their respective rate of pay for a total of 160 hours, due to Carrier violating Agreement when a contractor was used to reconstruct a trestle between September 27 and October 19, 1982.

FINDINGS:

Between September 27 and October 19, 1982, Carrier used contracted-out labor to perform reconstruction work. The Organization filed Claim on behalf of Claimants, seeking compensation on the grounds that Carrier violated the Agreement by using contracted-out labor.

The issue to be decided in this dispute is whether Carrier violated the Agreement by using contracted-out labor to perform the services in question.

The position of the Carrier is that the Agreement clearly allows it to contract out work such as that performed in the present Claim. The Carrier contends that it has a long-standing

and established practice of contracting out work, and cites several awards decided between the parties holding that the Carrier is not restricted under the Agreement from contracting out work. The Carrier contends that these awards also indicate that the Organization has the burden of proving that the contracted-out work was exclusively reserved to Claimants. The Carrier maintains that the Organization has failed to do so.

The Carrier contends that the work performed by the contracted-out laborers was not exclusively performed by the Claimants. The Carrier cites a letter dated May 4, 1983, outlining 128 previous trestle reconstruction projects performed by contract labor. The Carrier submits that this clearly establishes non-exclusivity of the work in question.

The position of the Organization is that the work in question was improperly contracted out under the Agreement. The Organization contends that Claimants possessed sufficient skill and were available for service on the dates in question. The Organization further contends that Carrier should have notified Claimants as to the availability of the work performed by the contract labor.

After review of the applicable contract provisions, the Board finds that the Claim must be denied.

We agree with Carrier that nothing in the Agreement prohibits it from contracting out work. The Scope Rule of the Agreement does not define the type of work to be performed by

particular employees and does not exclusively reserve work for any particular group of employees. The Organization has not demonstrated that any part of the Agreement prohibits Carrier from contracting out work when it deems it necessary.

We agree with Award No. 9 of P.L. B. 2556, wherein the Board stated "In order for the Employees to here prevail they must offer probative evidence to prove that the work contracted out is of the type that by tradition, custom or practice has been performed exclusively by employees covered by their agreement." The Organization has failed to present any evidence that the work contracted out by Carrier was exclusively performed by its employees.

To the contrary, Carrier has demonstrated that on several occasions it has contracted-out labor to perform services similar to those performed in this case. Therefore, we must conclude that the work in question was not exclusively performed by Claimants and that they are not entitled under the Agreement to the compensation sought.

AWARD:

Claim denied.

Nicholas Duncan
Neutral Member

J. M. Mellon Jr.
Carrier Member

Bruce R. Hall
Organization Member
Dissenting - see attached Page 4.

Date: 6/2/86

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DISSENTION TO AWARD NO. 10

Third Division Award 757, Docket MW-745 dated November 18, 1938 involving contracting out of Bridge and Building work by the Missouri Railroad Company. This is one of the earlier precedent awards of the Third Division of the NRAB. I will quote in part:

> "It is well settled by many decisions of this and the First Division of this Board and predecessor Boards that as an abstract principle a Carrier may not let out to others the performance of work of a type embraced within one of its collective agreements with its employes. This conclusion is reached not because of anything stated in the scheduled agreement but as a basic legal principle that the contract with the employes covers all the work of the kind involved except such as may be specifically exempted. Ordinarily such exceptions appear in the Scope Rule but the decision likewise recognizes that there may be other exceptions very definite proof of which however is necessary to establish that status as a limitation upon the agreement. Mere practices alone is not sufficient for as often held repeated violations of a contract do not modify it.
>
> It should be necessary to say that if the reason for contracting out the work is that the contractor can do it cheaper by reason of paying his employes a lower scale of wages or subjecting to them to less advantageous working conditions than those stipulated by the collective bargaining agreement with the employes that such letting out to contract would constitute a flagrant violation of the collective agreement."

For these reasons we are dissenting the decision on this Award.

Bryce L. Hall

B. L. Hall
Organization Member