PUBLIC LAW BOARD NUMBER 3530

Award Number: 54
Case Number: 54

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM:

D.A. Sorrell, et al, 1866 Andrea Drive, Rt. 2, Wheelersburg, OH 45694, et al, were furloughed while outside contractors performed B&B work. Employes request pay for 344 hours each due to contractor performing their work.

FINDINGS:

In November 1982, Claimants were furloughed when their regular duties were interrupted by inclement weather conditions. On January 4, 1984, The Organization filed claim on behalf of Claimants, seeking compensation on the grounds that Carrier improperly used an outside contractor to perform work that Claimants were entitled to perform.

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

The Organization's position is that Carrier violated Appendix D of the Agreement by using an outside contractor to

perform the work in question.

The Organization first alleges that Carrier's original justification for using the outside labor was that it did not have the necessary manpower to perform the work on the facility in question (a new yard office/agency building in Columbus, Ohio). The Organization maintains that this excuse constitutes a concession on Carrier's part that the work in question is normally performed by Claimants. The Organization further contends that the excuse of lack of manpower lacks any basis, since Claimants were furloughed from service in November 1982. The Organization alleges that Carrier agreed to the outside contractor on the condition that is members would not be furloughed as a result, and that it now is reversing its position.

Finally, the Organization cites several awards allegedly holding that Carrier must show that when work is contracted out, there was a legitimate reason for so doing. The Organization concludes that Carrier has failed in the present case to establish that the contracted out work was necessary for its operations. To the contrary, the Organization maintains that Claimants were available and qualified to perform the work in question, and therefore should have been used for such work.

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The Carrier's position is that it did not violate Appendix D or any other part of the Agreement when it used outside labor to perform the services in question.

Carrier initially alleges that it never agreed that other employees would not be furloughed during the period under which outside labor was used. Carrier cites a letter dated May 23, 1983, which informed the Organization that it would not agree to a ban on all furloughs. Carrier maintains that the Organization has failed to point to any evidence establishing that the parties had agreed on this issue.

Carrier further contends that the outside labor was properly used. Carrier alleges that it did not contract out any work covered by the Agreement where employees were available to perform service. Carrier contends that the Organization has failed to establish how the work belongs to the Claimants. Carrier maintains that the Scope Rule in the current Agreement is general in nature and confers no exclusivity of work. Carrier cites awards which it alleges support the position that, absent specific language or evidence of past practice, an employee group may not claim exclusivity

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of work. Carrier contends that the Organization has not established either contracted or historical support for the claim.

Finally, Carrier argues that it contracted out the work in question "as a whole." Carrier maintains that it cannot breach the contract by allowing Claimants to perform part of the work it contracted out for. Carrier cites several awards holding that Carrier need not break-down or "piecemeal" a project it has contracted out.

After review of the record, the Board finds that the Organization's claim must be denied.

The Organization's claim is flawed in several respects. Most significantly, the claim lacks any specific contractual support. We find no violation of Appendix D in this case. Carrier notified the Organization of its plans to contract out work, and met with the Organization to discuss such plans. Appendix D specifically states that "...if no understanding is reached the Carrier may nevertheless proceed with said contracting..." No evidence of understanding has been produced

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by the Organization. To the contrary, Carrier has demonstrated that no such agreement existed with regard to the furlough issue.

The Organization's claim additionally lacks any basis in reference to the work in question. The Organization has not demonstrated the precise nature of the work performed by the outside labor that the Claimants were entitled to perform. Therefore, any inquiry into Claimants' rights to perform that work is extremely uncertain. In any event, we find that the Organization has failed to establish that the work in question belonged exclusively to Claimants' employee group either contractually or by evidence of a consistent past practice. Absent evidence of entitlement to the work in question, the claims cannot be sustained.

Finally, the Board agrees with Carrier and those awards cited that it is not obligated to break its contract with the outside firm in order to allow Claimants to perform "piecemeal" work. This is a well-established principle, and should not be disturbed absent evidence that the "piecemeal" work is exclusively within the domain of a particular employee group. It would be extremely problematic to require Carrier to allow such "piecemeal" work, both from a contract law standpoint and, more significantly, from a log'stical standpoint. The outside labor is designed to operate on a particular project, and it

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would create an administrative nightmare for Carrier to have to reinstate and remove employees whenever the outside labor performed certain duties.

AWARD

Claim denied.

Nicholas Rumes
Neutral Member

D. A. Abbatiello Jr.
Carrier Member

Bryce L Ball
Organization Member

Date: 1-21-87

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