AWARD NO. 1
Case No. 1

Organization File No. Contracting Out
Carrier File No. 013-295-27

PUBLIC LAW BOARD NO. 5384

PARTIES) TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS
)
TO)
)
) INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON
DISPUTE) SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS

STATEMENT OF CLAIM:

1. That the Terminal Railroad Association of St. Louis, referred to as the Carrier, violated Section 2, Article II of the September 25, 1964 Agreement when failing to give notice of intent to subcontract work, that of welding rail on the Carrier's Illinois Transfer, to the Norfolk & Western Railroad and Holland Welding Company.

2. That the Carrier further violated said Article II by subcontracting work belonging to the Boilermaker Craft.

3. That, accordingly, the Carrier be ordered to make T. Shylanski, R. Sheppard, R. Wilder and A. Sak whole by compensating at the pro rata rate of pay and time and one-half rate of pay equal to the divided number of respective hours of labor expended by the subcontractor in said rail welding. In addition, R. Wilder and A. Sak be made whole for all compensation lost as a result of their being furloughed immediately after said subcontracting was consummated.

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated February 12, 1993, that this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

The Organization claims Carrier violated Section 2, Article II of the September 25, 1964 Agreement when it subcontracted track welding work to the Norfolk & Western Railroad and Holland Welding Company, and failed to give the Organization notice of its intent to do so. According to the Organization, boutet welding work was performed by persons who were not in the Carrier's employ between November 11 and 17, 1991.

Carrier has not disputed the material facts in this case, except that it denies that such work was performed on November 17, 1991, a Sunday. Specifically, Carrier admits the work performed is within the scope of the Agreement between it and the Organization, that it was performed by Norfolk & Western employees and by employees of Holland Welding Company, and that it failed to notify the Organization of its intent to subcontract the work. Carrier has denied this claim primarily on the basis that no claim was filed until February 3, 1992, which Carrier argues constitutes a violation of the time limit rule found in the August 21, 1954 National Agreement, providing, in pertinent part, as follows:

> (a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be

considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

Carrier bases this argument upon a January 7, 1965 Letter of Understanding between J. E. Wolfe, Chairman, National Railway Labor Conference, and Michael Fox, President, Railway Employes' Department, AFL-CIO,[1] which reads, in its entirety, as follows:

> **Memorandum of Understanding re Article VI of Mediation Agreement of September 25, 1964 by and between the participating carriers listed in Exhibits A, B and C of said agreement represented by the National Railway Labor Conference and the Eastern, Western and Southeastern Carriers' Conference Committees, and the employees of such carriers shown thereon and represented by the railway labor organizations signatory thereto, through the Railway Employes' Department, AFL-CIO.**
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> Under the provisions of Article VI, Section 19, disputes arising under Article III - Assignment of Work, Article IV - Outlying Points, and Article V - Coupling, Inspection and Testing, are to be handled in accordance with Section 3 of the Railway Labor Act. It is clear that with respect to such disputes subject to handling under Section 3 of the Act any claim or grievance is subject to the time limits and procedural requirements of the Time Limit on Claims Rule.
>
> A different situation exists with respect to disputes arising under Article I - Employee Protection, and Article II - Subcontracting. Article VI provides a "Shop Craft Special Board of Adjustment" for the purpose of adjusting and deciding disputes arising out of those two Articles (Article VI, Section 1), and specifically provides (Article VI, Section 8) that the Board shall have exclusive jurisdiction over disputes between the parties growing out of grievances concerning the interpretation or application of those two Articles.

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[1]The National Railway Labor Conference serves as the bargaining agent for the nation's rail carriers, including the Carrier herein. The Railway Employes' Department, AFL-CIO, was composed of the various "shop craft" organizations, including the Organization herein, and conducted bargaining on their behalf.

During our negotiations, it was understood by both parties that disputes under Articles I and II need not be progressed in the "usual manner" as required under Section 3 of the Railway Labor Act, but could be handled directly with the highest officer in the interest of expeditious handling. Sections 10 through 13 set up special time limits to govern the handling of submissions to the Special Board, thus providing special procedures which are intended to supersede the provisions of the standard Time Limit Rule. Therefore, such disputes being processed to a conclusion through the Shop Craft Special Board are not subject to the provisions of the standard Time Limit Rule.

However, if there should be any claims filed for wage loss on behalf of a named claimant arising out of an alleged violation of Article II - Subcontracting (See Section 14 of Article VI), such claims for wage loss should be filed promptly and within sixty days of the filing of the alleged violation of Article II - Subcontracting, with the same carrier officer as to whom such violation of Article II was directed by the General Chairman of the craft or crafts involved, or his representative. [Emphasis added.] If such a claim is a continuous one, it cannot begin to run prior to the date the claim is presented. If the alleged violation of Article II - Subcontracting, is then submitted to the Shop Craft Special Board of Adjustment, it will be considered that the special procedural provisions of Article VI have been complied with.

Failure to handle as set forth in the preceding paragraph shall not be considered as a precedent or waiver of the contentions of the carriers or employes as to other similar claims.

This understanding is a supplement to Article VI of the September 25, 1964 Agreement and will become effective as of this date.

In addition, Carrier relies upon Awards 124 and 126 of Special Board of Adjustment No. 570, both with Gene T. Ritter serving as Neutral Member. Both disputes involved alleged violations of Article I of the September 25, 1964 Agreement. In the former, the

Organization did not file its notice of intent to file a submission within nine months of the decision of the highest designated officer on the property. In the latter, the Organization did not make its claim within sixty days of the alleged violation. Both claims were dismissed for lack of jurisdiction. In Award 124, the Board wrote:

> This neutral has carefully examined each of the above awards together with the dissenting opinions and has come to the conclusion that Awards 68 and 69 contain the better reasoning and comply with the standards of contract interpretation. It is thus found that the special time limits set up by Sections 10 through 13, "to cover the handling" of disputes while before the Board supersede prior provisions while such disputes "are being processed to a conclusion" by it. While such disputes are "being processed to a conclusion" they are not subject to prior provisions. However, the memo of understanding in re Article VI of the Mediation Agreement of September 25, 1964, does not release the Organization from being subjected to prior time limits or other provisions. It is further found that the Mediation Agreement did not supersede the 60 day provision for presentation in decision on the property; nor did it supersede the 9 month limitation for progression to the Board. In the 4th paragraph of the Memorandum of Understanding, it states that both parties understood that disputes under Article I and II were not required to be progressed in the "usual manner" as required under Section 3 of the Railway Labor Act but could be handled directly with the highest officer in the interest of expeditious handling. [Emphasis in original.] This paragraph further states that Sections 10 through 13 set up special time limits to cover the handling of submissions to the Special Board, thus providing special procedures which are intended to supersede the provisions of the standard Time Limit Rule. This paragraph concludes that, therefore, such disputes being processed to a conclusion through the Shop Craft Special Board are not subject to the provisions of the standard Time Limit Rule.

> Since no mention was made of superseding the 9 month limitation for progression of claims to the Board, and since this Memorandum of Understanding was evidently made "in the interest of expeditious handling", it is concluded that this Memorandum of Understanding did not eliminate either the 60 day provision for presentation and decision by the Carrier or the 9 months for progression to the Board. It in no way superseded Rule 31-A, paragraph c, of the schedule agreement with the System Federation No. 17.

The Organization has argued that time limit rules are not applicable to disputes involving Article II of the September 25, 1964 Agreement. In support of its position, it has offered numerous Awards of Special Board of Adjustment No. 570. The most persuasive of these is Award 335, on which Gene T. Ritter again served as Neutral Member. In that dispute, which involved a violation of Article II, the Board wrote:

> Carrier's contention that this claim is barred barred [*sic*] by the Time Limit Rule is hereby rejected. Although disputes arising under Articles III, IV and V of the September 25, 1964 Agreement must be presented in writing by or on behalf of the employe involved to the officer of the Carrier authorized to receive the same within 60 days from the date of the occurrence on which the claim or grievance is based. (see Article VI, Section 19 - Disputes Referred to Adjustment Board.) By not specifying that the same procedure would apply to disputes arising under Articles I and II, then it must be presumed that the parties to the Agreement did not intend for the standard time limit procedure to be applied to disputes arising under Articles I and II of the Agreement. Articles I and II are subject to the Memorandum of Understanding dated January 7, 1965, which takes these two Articles out of the realm of the standard time limit rules. In the past, this referee has held that the Memorandum of Understanding only did away with the necessity of going through the usual appellate procedure on the property by allowing the Organization to progress a claim directly to the highest officer. This referee has in the past held that the claim must be filed

> within 60 days after the occurrence and must be appealed within nine months after final declination on the property. However, this referee has found himself in the distinct minority, and in the interest of consistency, will bow to the majority opinions contained in Awards Nos. 8, 44, 53, 140, 158 and others.

Clearly, then, Awards 124 and 126 of Special Board of Adjustment No. 570 are no longer considered "good law," if they ever were. The highlighted sentence of the January 7, 1965 Letter of Understanding must have some meaning, though. Taken in context, it is evident to this Board that Messrs. Wolfe and Fox recognized that claims of subcontracting might be difficult to file on a timely basis when the carrier fails to inform the organization that it has contracted out covered work, particularly when such work is performed off the property. Accordingly, the parties agreed the organization would not be subject to a sixty day time limit. However, in the underlined text, the parties further agreed that there would be a time limit for claims for wages lost by named claimant arising out of such subcontracting. The time limit, though, is sixty days from the filing of the original grievance that the work was improperly subcontracted. Therefore, once the organization is aware of the possibility of a subcontracting violation, it must file wage loss claims promptly. To eliminate any question as to when the organization has such notice, the parties agreed that the filing of the original claim will govern.

In the case before this Board, the General Chairman filed the claim that the Carrier improperly subcontracted the work on

February 3, 1992, some 72 days after the work was performed. Because the time limit rule was not applicable to this portion of the claim, it is not barred. The claims for wage loss were contained in the same letter, thereby complying with the requirement that they be filed within sixty days of the filing of the original grievance.

Carrier next asserts Claimants are not entitled to monetary relief because they were employed and under pay at the time the work was performed by the contractor's forces. According to Carrier, Claimants were working ten hours per day, six days per week at the time of this claim. Two of the Claimants were on paid vacation on November 15, 1991. Carrier relies upon the language of Section 14, Article VI of the Agreement, which states:

> If there is a claim for wage loss on behalf of a named claimant, arising out of an alleged violation of Article II, Subcontracting, which is sustained, the Board's decision shall not exceed wages lost and the other benefits necessary to make the employee whole.

Citing Award 61 of Special Board of Adjustment No. 570, Carrier argues Claimants suffered no wage loss, and would be entitled to no additional compensation.

The Organization does not dispute the fact that Claimants were fully employed between November 11 and 16, 1991, but insists work was also performed Sunday, November 17, 1991, a day on which Claimants did not work. According to a summary prepared by Claimant Shylanski, in his capacity as Local Chairman, one thermit

welding team of three men worked for seven hours on that day. The Organization also notes that two Claimants, Sheppard and Wilder, were furloughed following this work. Bulletin No. 2, issued November 19, 1991, indicates their jobs were abolished at the end of their tour of duty on November 25, 1991. While acknowledging these jobs are subject to seasonal abolishment, the Organization argues these abolishment would have been delayed had the work not been subcontracted.

We agree with Carrier's assertion that Claimants must show a wage loss to be compensated. We find, however, that a wage loss, at least to some extent, existed. Despite Carrier's denial, we find there is sufficient evidence to conclude 21 hours of work was performed on November 17, 1991. If no work had been performed, as Carrier contends, documentation from either Norfolk & Western or Holland Welding could have been obtained as evidence to refute the Organization's assertion.

While it is possible, Sheppard's and Wilder's jobs might have been abolished later than November 25, 1991, had the Carrier not subcontracted this work, we cannot make such a presumption in light of the fact that these jobs are regularly subject to seasonal abolishment. Here, the burden of proof of actual wage loss falls on the Organization. There is insufficient evidence to carry that burden.

To remedy these losses, we will award each of the four Claimants 5.25 hours pay at the rate specified in the Imposed Agreement following Presidential Emergency Board No. 219, for November 17, 1991, to equal the 21 hours worked by the subcontractors' employees.

We also find that Carrier violated the Agreement by failing to give the Organization advance notice of its intent to subcontract the work. This remedy is also provided by the Imposed Agreement following Presidential Emergency Board No. 219, and we will award Claimants pay for the 594 hours worked by the subcontractors' employees at the rate of pay set forth in the Imposed Agreement.

At the hearing before the Board, the Carrier questioned the applicability of the Imposed Agreement as the contract to have the work performed was executed on July 26, 1991, before the Imposed Agreement was effective. However, the Board finds the violation occurred when the work was performed, which was subsequent to the Imposed Agreement.

AWARD: Claim sustained in accordance with the above Findings.

Barry E. Simon
Chairman and Neutral Member

Robert Reynolds
Employee Member

R. P. Mathewson
Carrier Member

Date: July 7, 1993
Arlington Heights, Illinois