

PUBLIC LAW BOARD NO. 3530

Award No.: 108

Case No.: 108

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

And

NORFOLK AND WESTERN RAILWAY COMPANY

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STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned outside forces to perform work steam and spray cleaning various Carrier equipment (machines, vans, trucks) at Salem, Virginia and Christiansburg, Virginia on Friday, October 31 and Saturday, November 1, 1986 (File MW-RMR-87-5).

2. The Carrier also violated Article IV of the May 17, 1968 National Agreement when it did not give the General Chairman advance written notice of its intention to contract said work.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Parts Truck Driver B. W. Songer shall be:

"... paid an equal proportionate amount of the man hours consumed each date involved account of contractor performing his work." (Employees' Exhibit "A-1")

FINDINGS

Claimant exercised his seniority on May 21, 1986 into a new position as a Parts Truck Driver, headquartered at Roanoke, Virginia. His duties consisted principally of transporting parts from the central warehouse in

Roanoke or various vendors to production gangs and line maintenance points. The Carrier decided that the intermittent nature of the work did not justify a full time position. Therefore, steam cleaning equipment was placed on Claimant's truck (at a time uncertain in the record) and Claimant commenced cleaning machinery on a variable and, according to the Carrier, "experimental" basis. The cleaning duties had historically been performed by an outside contractor. The underlying reason for these additional duties was to add enough work to the truck driver position to merit a full time position. Claimant's principal duty remained the delivery of parts by truck, as originally intended.

Despite the addition of the steam cleaning work, the Carrier determined that "a full time position was not economically feasible or justified." Therefore, effective September 30, 1986, the Parts Truck Driver position was abolished. On October 8, 1986, Claimant exercised his seniority to a position as a Front End Loader Operator, which position had an equal rate of pay as the Parts Truck Driver position. The steam cleaning work returned to the outside contractor.

Rule 1 of the Parties' Agreement provides:

"These rules govern the rates of pay, hours of service and working conditions of all employees in the track sub-department and bridge and building sub-department of the Maintenance of Way and Structures Department listed in this rule, and other employees performing similar work recognized as belonging to and coming under the jurisdiction of the crack and bridge and building sub-departments of Maintenance of Way and structures Department, but do not apply to supervisory forces above the rank of foreman.

The scope of this Agreement will also apply to employees used in the operation of power driven machines hereafter introduced in the

Maintenance of Way Department and in the Roadway Material Yard at Roanoke."

And Appendix F provides:

"APPENDIX "F" - CONTRACTING OUT

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by the organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement. (From National Agreement of May 17, 1968)"

The question to be resolved in this dispute is whether the Carrier violated the Agreement by contracting out the steam cleaning work and by not notifying the Organization of its intent to contract out; and if so, what should the remedy be.

The position of the Organization is that the Carrier violated the Agreement because Claimant's work was within the scope of the Agreement; it was wrongfully contracted out; and the proper procedure for contracting out was not followed. The Organization maintains that the steam cleaning was within the scope provisions of the Agreement pointing out that the cleaning was customarily assigned to and performed by Carrier forces. The Organization contends that work performed as little as one time by the Carrier forces becomes scope covered work.

Having established a scope violation, the Organization goes on to contend that the Carrier further violated the Agreement by failure to properly notify the Organization, pursuant to Article IV - Appendix F, that the Carrier intended to contract out work that was within the scope of the Agreement. The Organization maintains that the Carrier did not allow the Organization the required opportunity to persuade it that the work the Carrier proposed to contract out was within the scope of the Agreement and that the Carrier violated its duty to deal in good faith with the Organization.

The Organization rejects the Carrier's argument that there was no violation because the work in question has never been exclusively reserved to the Organization. The Organization lists five separate reasons for rejecting the "exclusivity doctrine" four of which have to do with variations on the notion that the work was within the scope of the Agreement or that there was a failure of notice for contracting out of work within the scope of the Agreement. The fifth reason is that the exclusivity doctrine is inapplicable to work to be performed by an outside contractor but rather

is a concept that deals with the potential conflict of work performance as between different crafts.

The position of the Carrier is that it did not violate the Agreement and that Claimant is not entitled to the relief sought.

First, the Carrier contends that the Organization has not sustained its burden of proof arguing that employes represented by the Organization do not have the exclusive right to perform steam cleaning duties, and no contract provision or past practice has provided them that right. The Carrier contends that the work in question is not mentioned in the contract and that no work is reserved for Organization-represented employes. The mere listing of employe positions in the Agreement does not reserve the work exclusively to any class or craft, because the listing of the employes covered by the Agreement is simply that: a list of employes covered.

The Carrier further contends that in the absence of explicit coverage, the Organization must show, and has failed to show, that the work in question was reserved to Organization-represented employes by some past practice. The Carrier maintains that the steam cleaning work has traditionally been contracted out and that the Organization has failed to meet its burden to prove otherwise. The Carrier contends that work can only be reserved to members of the Organization by "exclusive, systemwide practice of long duration." It rejects the Organization's contention that one instance of performance is sufficient to reserve the work to the members of the Organization. The Carrier points out that the Organization incorrectly asserts that the work of steam cleaning was part of the bulletin of the

position Claimant filled. Even if that were so, the Carrier cites authority for the principal that a bulletin is "merely an advertisement and not in the legal sense an offer...."

The Carrier also objects to the Organization's raising the scope argument in its brief because, it asserts, the argument was never made on the property.

Having established that the work was not within the scope of the Agreement, the Carrier contends that notice was not required when the work was subcontracted and that therefore, it committed no violation of Article IV - Appendix F. The Carrier asserts that no provision in the Agreement requires notice when the work to be contracted out was performed by members of the Organization on a "occasional," "sporadic" or "intermittent" basis; and if the parties had intended that infrequency in the notice requirement, they would have so stated.

After review of the entire record, the Board finds that the Carrier did not violate the Agreement.

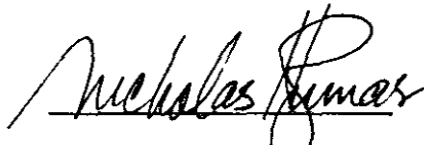
The Board need not sustain the Carrier's procedural objection to the scope argument, but rather will resolve this matter on the merits. It is well established that in claims of this sort, the Organization has the burden of proving a violation; it has not done so. The Organization has not shown that the work in question is within the scope of the Agreement. The Carrier correctly contends that the work is not reserved to the Organization's members in the Agreement, and that no past practice has reserved it.

The past practice must be more sustained and regular in order to establish a reservation. Here, the record indicates that the work was neither regular nor prolonged and, indeed, was assigned in an effort to determine what could or should be the extent of the position. The record is also clear that the work involved was historically contracted out.

Since it did not sustain its burden of proving that the work contracted out was within the scope of the Agreement, all of the Organization's contentions as to notice must fail because they presume that the work was within the scope of the Agreement. Without that foundation, the compliance with the notice provisions is moot.

AWARD

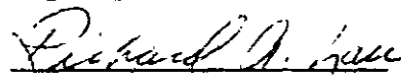
Claim denied.



Neutral Member



Carrier Member



Organization Member

Date: JAN. 25, 1991