

PUBLIC LAW BOARD NUMBER 3530

Award Number: 55

Case Number: 55

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM:

C.L. Bowens, Laborer, Box 244, Fort Gay, WV 25514, and others filing claim because outside contractor was performing maintenance of way employees' work. Employees request they be paid 50 hours straight time and 30 hours at the overtime rate of pay.

FINDINGS:

In 1981, Carrier Leased 4.2 acres of land to Addington Brothers Mining, Inc. The Mining Company used an outside contractor to construct trackage up to the point of Carrier's switch. The Organization filed claim on behalf of Claimants on the grounds that the work performed by the outside contractor properly belonged to the Claimants.

The issue to be decided in this dispute is whether Carrier violated the Agreement by allowing outside labor to perform the work in question.

The Organization's position is that Carrier violated Appendix D of the current Agreement, by contracting out work

that should have properly been given to the Claimants. The Organization refutes Carrier's allegation that the leasing of the land in question exempts it from any responsibility concerning the contracting out of work on that land. The Organization maintains that Carrier was still obligated to follow Appendix D, regardless of the status of the land.

The Organization cites awards which it alleges support its position in this case. The Organization concludes that Carrier violated the Agreement through its unilateral actions in leasing the land and agreeing not to require its employees to perform service on that land.

The Carrier's position is that Appendix D of the Agreement has no relevance in this dispute. Carrier maintains that Appendix D applies only when it plans to contract out work. Carrier argues that since it was not a party to the contract between Addington Brothers and the contractor, it cannot be deemed to have violated Appendix D. Carrier cites awards holding that the Agreement applies only to work which Carrier has control over. Carrier maintains that once it leased the land, it had no "control" over Addington Brothers' employment practices. Carrier alleges that no work performed by the outside labor was on land outside of that leased by Addington Brothers.

Carrier further contends that it acted within its managerial discretion in leasing the land to Addington Brothers. Carrier cites an award holding that it may lease land without agreement when such land is not involved in Carrier's operations under the Agreement. Carrier maintains that this type of leasing is common and has been done without objection for several years. Finally, Carrier alleges that all work related to operations on its property was performed by its employees. Carrier denies that Claimants were damaged in any event, since they were all fully employed during the claim period.

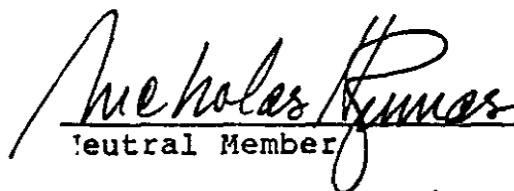
After review of the record, the Board finds that the Organization's claim must be denied.

The Organization has failed, as is its burden, to establish any contractual prohibition concerning the contracting out of work on property leased and operated separately from Carrier's property. Appendix D only applies when "Carrier plans to contract out work within the scope of the...Agreement." We agree that Carrier may not use a third party merely to sidestep the Agreement. However, we find that in the present case Carrier merely leased what it was not presently using, with the understanding that the lessee (Addington Brothers) would use the land according to its needs. Therefore, any work performed on the leased property was the

responsibility of the Lessee. If the work in question did not affect Carrier's operations, Carrier could not legitimately require the Lessee to use Carrier's employees to perform such work. The awards cited by the Organization are unpersuasive for the purposes of this claim. Those awards deal with situations where work provided for by the Agreement is contracted out by Carriers. The Organization has failed to establish that the work in this case involved any aspect of the Agreement between itself and Carrier. To the contrary, the evidence suggests that Carrier's connection with the land, and accordingly, the work performed at that land, ended when it signed the lease with Addington Brothers. The Organization has not demonstrated that the contracted out work would have otherwise been performed by the Claimants, or that the lease was otherwise improperly entered into by Carrier.

AWARD

Claim denied.


Neutral Member


Carrier Member


Organization Member

DATE: 1-21-87