Award No. 2
Docket No. 2

PUBLIC LAW BOARD NO. 76

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

Roy R. Ray, Referee

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement beginning on or about June 9, 1961, when it assigned the work of demolishing an old fence and building a new fence 682 feet in length at Denison, Texas, to employes who hold no seniority rights (a private contractor) under the effective agreement.

2. That members of section crew No. 427, Denison, Texas, each be allowed pay at his own respective straight time rate for an equal proportionate share of the total man hours consumed by the contractor's employes in performing the work referred to in Part 1 of this claim.

OPINION OF BOARD: Carrier challenges the jurisdiction of the Board to hear and determine the present claim. It contends that the claim is barred because proceedings were not instituted with the Third Division of the National Railroad Adjustment Board (from which this Docket was withdrawn for presentation to the Public Law Board No. 76) within the time limit fixed by Article 5, Section 1 (c) of the August 1954 National Agreement. That section requires that proceedings be instituted with the National Railroad Adjustment Board within nine months after the claim is declined by Carrier's highest officer designated to handle such claims. The present Claim was declined by Carrier's highest officer, authorized to handle such claims, on February 19, 1962. On November 13, 1962 H. C. Crotty, President of the Brotherhood of Maintenance of Way Employes, sent to the Executive Secretary of the Third Division a letter stating that the Organization intended to file a submission within thirty days. The submission was filed more than nine months after the claim had been declined on February 19th.

Carrier contends that such notice of intent to file a submission is not a petition and statement of facts with supporting data as required by Section 3 (c) of the Railway Labor Act, and does not constitute an institution of proceedings before the Board. We find no merit in this argument. It has been advanced many times by this and other Carriers and has been rejected by the Third Division in a long line of Awards. A partial list includes: Awards 7144, 7961, 7962, 8035, 9059, 10075, 10500, 10438, 11656, 11665, 11897, 12092, 12398, 12999, 14353 and 14687. Awards from the Second Division to the same effect include 2342, 3688, 4040 and 4186. The Third Division Awards are accepted as controlling here and we, therefore, hold that the notice of intention filed on November 13, 1962 was an institution of proceedings before the Third Division within the nine month period giving the Third Division jurisdiction over the matter. It necessarily follows that the failure of the Organization to file its submission within the nine month period is no bar to the claim before this Board.

Carrier contends that the present claim is invalid because it does not identify by name the employes on whose behalf it is filed. Carrier argues that Article V, Section 1 (a) of the August 1954 Agreement requires that the Claimant be identified by name. That section reads in part

> (a) All claims or grievances must be presented in writing by or on behalf of the employe 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....

Carrier's interpretation of Article V, Section 1 (a) has been rejected by the National Disputes Committee. In a dispute which resulted in Decision 4, the Claimants were identified as "the Bridge and Building Foreman, Mechanics and Helpers in the Coast Division, who were assigned to Bridge and Building gang no. 1". The Committee ruled that "the Claimants are adequately identified

as the incumbents of the specific classifications named in paragraph (2) of the claim as of the dates mentioned in paragraph (1) of the claim". See also Decision 19 of the National Disputes Committee. Carrier's argument has also been rejected by many Awards of the Third Division. These include Awards: 8704, 9849, 10195, 9205, 9953, 10379, 10675, 10871, 10801, 11214. In Award 16 of Special Board of Adjustment No. 506, the present Chairman took a similar position. The language of Article V (1) (a) does not say that the employe must be identified by name. We think that a reasonable interpretation of that section is that the identity of the Claimant must be easily and clearly ascertainable. Here that is the case where claimants were identified as Members of Crew No. 427, Denison, Texas, as of a certain date. We hold, therefore, that the claim satisfies the requirements of Article V, Section (1) (a).

We turn to the merits. The material facts are not in dispute. On or about June 9, 1961 Carrier contracted with the Belmont Fence Company for the construction of a new chain-link fence (672 feet in length and 7 feet high) at Denison, Texas. The contractor furnished all the materials and labor used in the erection of the fence. The contractor's employes also dismantled an old fence on the property. Claimants constitute the entire force of Section Crew No. 427, assigned to the territory where the fence was constructed.

The Organization contends that by virtue of the Scope Rule the work of constructing the fence belongs to the members of the Section Crew No. 427, because the construction, maintenance and repair of fences has been customarily and traditionally performed by them. It asserts that when Carrier assigned this work to an outside contractor it violated the seniority rights of Claimants.

Carrier says that neither the Scope Rule nor any other rule of the Agreement gives the section crew an exclusive right to erect fences; and that to

establish such right the Organization must show that the construction of fences on this property has been traditionally and customarily performed exclusively by the section forces.

The Scope Rule of the present Agreement is general in character. It lists positions and does not specify duties or functions of those positions. Under such a general rule the majority and more recent decisions of the Third Division have held that in order to establish a contractual right to any work the Organization must show that the disputed work has been customarily and traditionally performed exclusively by the class of employes making the claim. Many of the Awards were rendered in disputes on this property involving the same parties. Awards 12098 (Dorsey); 12236 (O'Gallagher); 12425 (Dorsey); 14313 (Rambo); 14908 (Stark); 15335 (House); 15185 (Ives). More recent awards from other properties are 15539 (McGovern) and 16026 (House). Award 14908 (Stark) involved the contracting out of the building of a fence. In the present case the Organization has failed to sustain this burden. During the handling of the claim on the property Carrier produced documentary evidence showing that over a period of more than forty years, at various times, it had fences constructed by private contractors and adjacent landowners in addition to its own forces. This information included dates, locations, amounts of fence and identity of persons constructing the fence. This evidence has not been disputed by the Organization but it asserts that the vast portion of fence constructed over the years has been done by Section Forces. By some means it has arrived at a figure of 98% but there is no evidence to support this assertion. However, even if it be assumed that the 98% figure was correct this would still not support the present claim. Exclusive means all - not merely a high percentage. Proof that employes performed 98% of such work is not proof that they performed it exclusively.

The Organization has argued and cited awards for the proposition that Carrier must justify the contracting out of such work. It is putting the cart before the horse. Before any such burden is shifted to Carrier the Organization must prove that the work is reserved exclusively to the employes claiming it. Here it has failed to sustain the initial burden. We hold, therefore, that no violation of the Agreement has been established.

AWARD

The Claim is denied.

Public Law Board No. 76

Roy R. Ray
Neutral Member and Chairman

A. J. Cunningham
Employe Member

A. F. Winkel
Carrier Member

Dallas, Texas
June 19, 1968