

SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NO. 146

CASE NO. 146

PARTIES TO
THE DISPUTE:

Brotherhood of Maintenance of Way Employees

vs.

Consolidated Rail Corporation

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained in accordance with the Findings.

DATE: July 27, 2001

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces to remove fence and posts from the Pitcairn Material Yard Compound beginning April 9, 1996 and continuing (System Docket MW-4379).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out said work and discuss the matter as required by the Scope Rule.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. J. R. McGrath, R. R. Eshenbaugh, G. Watkins, J. Weisgerber, R. Ogden, R. L. Beam and A. B. Roney shall each be allowed ten (10) hours' pay per day at their respective straight time rates plus all overtime at their respective time and one-half rates with proper credits for benefits and vacation purposes beginning April 9, 1996 and continuing until the violation ceased."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

The instant Claim alleges failure to comply with the Agreement provisions governing the contracting out of the work associated with removal of some 3,000 feet of fencing at Pitcairn Yard. The fence removal was necessary to permit the construction of an Intermodal Terminal on the site.

A procedural objection by the Carrier requires discussion at the outset. Carrier contends that this Board has no jurisdiction over the dispute because it was not handled in the usual manner on the property. Specifically, Carrier maintains that the Organization submitted new information and expanded previous arguments after the appeal was handled by the final appeal officer on the

property.

The Carrier's objection must be rejected. Section 26(d) of the parties' Agreement establishes a nine-month time limit in which a claim may be progressed to this Board following the decision of Carrier's highest designated officer. A primary purpose of this relatively lengthy time period is to permit the parties to reflect on the merits of their respective positions, do additional investigation and refine or augment their positions accordingly. Were it not for this capability, there would be little practical reason for the nine-month time limit. It is well settled, therefore, that the on-property record remains open for continued development until the time limit expires or a Notice of Intent to File an Ex-Parte Submission is served.

Although contentions relating to scope coverage were volleyed back and forth, the primary skirmishing in this dispute occurred on the notice issue.

Regarding scope coverage, it is noted that the Scope Rule explicitly mentions "... inspection, construction, repair and maintenance of ... fences, ..." In addition, the parties entered into an April 24, 1989 letter of agreement whereby "routine fencing work" was to be performed by employees represented by the Organization. Finally, it was asserted by the Organization, and not refuted by the Carrier, that Carrier's employees have performed identical work in the past. Indeed, photographs were provided in the record by the Organization.

Carrier, however, said the work was not covered because it was "demolition." Just as a rose by any other name is still a rose, so too is fencing removal work still fencing removal work despite attempts to call it demolition work.

Carrier also claims that the piecemealing of work doctrine takes the work out from scope coverage. We disagree. The piecemealing doctrine applies only where an element of a larger project is so inextricably intertwined with the scheduling and conduct of the overall project that it cannot be separated for performance by others without unreasonably impeding the timely and cost effective completion of the main work. The instant record does not establish such constraints. Instead, it appears that the fence removal could have been accomplished well in advance of any work by the contractor. On this record, therefore, we find the work to be adequately covered by the scope rule.

On the question of notice, we find Carrier's position cannot be sustained on this record. Our careful review of the evidence raises serious questions about whether certain documents included in Carrier's submission were, in fact, exchanged on the property. Nonetheless, for purposes of the following discussion, we accord Carrier the benefit of the doubt that they were.

Carrier maintains that it provided notice by letter dated February 13, 1996. While that letter does reference certain removal work (i.e., a transformer building), it does not mention the fence removal. Carrier's Division Engineer conceded this lack of specific mention in his June 12, 1996 response to the Claim. He went on, however, to claim the work was incidental with grading work, which was mentioned. Our review of the original Invitation For Bid ("IFB"), however, shows that such was not the case. In the IFB, the fence removal work was a discrete category to be bid separate

from "Grading" and separate from "Clearing and grubbing." While the fencing removal work was changed to a sale "as is" item in Addendum 1 to the IFB, the record shows that the IFB and Addendum 1 were not provided to the Organization until Carrier issued its March 28, 1996 letter. But this was nine days after a Notice to Proceed was issued to the successful bidding contractor on March 19, 1996. Our review of the record, therefore, shows that the fencing removal work was effectively concealed from the Organization, whether unintentionally or otherwise, at all times prior to awarding the contract. This, we find, violated the notice provisions of the Agreement.

Carrier also maintained that the Organization signed its March 28, 1996 letter which manifested its agreement with the contracting transaction. Careful examination of that letter, however, reveals that the Organization agreed only to limit claims pertaining to the use of the Fairmont NTC (New Track Construction) machine.

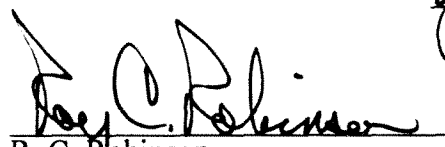
Carrier's other defenses to the merits of the Claim, such as lack of specificity regarding the dates the work was performed by the contractor, are rejected for lack of merit. The Claim was sufficiently precise to identify the disputed work.

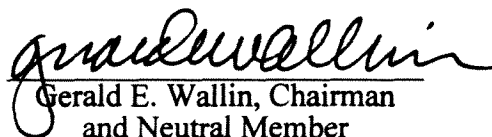
Carrier also asserted, without dispute in the record, that the Claimants were all on duty and under pay during the Claim period. As we said in Award No. 144 of this Board, where proper notice is not served and discussion meetings are not held, the Carrier effectively denies itself the benefit of the full employment defense. Had the parties engaged in the kind of good faith discussions contemplated by the Scope Rule, who knows what scheduling arrangement could have been developed to accommodate the Claimants involved and permit them to perform the work. In the absence of such discussions, the fact that employees may have been assigned elsewhere during the Claim period is not persuasive.

Carrier did, however, assert that the Claim was excessive because the contractor used only three employees for forty hours each (4 ten-hour days). The Organization did not provide any probative evidence in response to this assertion to prove the greater amount of time sought by the Claimants. Accordingly, the remedial relief available must be confined to this total of hours. Under the circumstances, we direct that Claimants divide equally between them the total of 120 hours to be paid at their respective straight time pay rates in April of 1996.

AWARD:

The Claim is sustained in accordance with the Findings.


R. C. Robinson,
Organization Member


Gerald E. Wallin, Chairman
and Neutral Member


D. L. Kerby,
Carrier Member