Award No. 28
Case No. 28

Special Board of Adjustment No. 1016

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Consolidated Rail Corporation

STATEMENT OF CLAIM:

"(1) The Agreement was violated when outside forces were used to construct 'Trail Van' buildings at Buckeye Yard from September 27, 1985 to November 27, 1985 (System Dockets CR-2267, CR-2269, CR-2271, CR-2273 and CR-2274).

(2) The Carrier also violated the Agreement when it did not give the General Chairman proper advance written notice of its intention to contract out said work.

(3) Because of the aforesaid violations, Messrs. J.K. Lafferty, R.N. Williams, S.A. McDade, C.T. Julian and M.G. Carmean shall each be allowed three hundred fifty-two (352) hours of pay at their respective straight time rates."

FINDINGS:

It is Petitioner's position that Carrier used an outside firm to perform work belonging by agreement to Carrier's Maintenance of Way employees. Charges of that nature are extremely serious since wrongful subcontracting may undermine

the collective bargaining agreement and in some instances, render its benefits illusory.

The critical question in subcontracting cases is whether the charges are supported by substantial competent evidence. General assertions and suspicions are not, of course, to be equated with competent proof. Particularly in subcontract cases, involving as they often do heavy liability, it is important that these elementary principles be heeded. We emphasize this point because it is still not uncommon in the cases that come before us to find that they are lost by one party or the other because of a lack of evidence.

The work involved in the present case concerns the construction of four new buildings and an intermodal (Trailran) yard facility at Carrier's Buckeye Yard in Columbus, Ohio. That construction work was required in order to replace Carrier facilities at East Columbus that were being displaced by a new interstate highway. The overall cost of the project, which was paid for by the State of Ohio, amounted to $13.5 million dollars.

Construction work is mentioned in the Scope Rule. That provision covers Maintenance of Way employees

> "engaged in work generally recognized as Maintenance of Way work, such as, inspection, construction, repair and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences and roadbed, and work which, as of the effective date of this Agreement, was being performed by these employees."

With respect to subcontracting, the following procedure is prescribed in subsequent provisions of the Scope Rule:

> "In the event the Company plans to contract out work within the scope of this Agreement, except in emergencies, the Company shall notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. "Emergencies" applies to fires, floods, heavy snow and like circumstances."
>
> "If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the Company may nevertheless proceed with said contracting and the Organization may file and progress claims in connection therewith."

Carrier was placed on notice in 1984 that the State of Ohio planned to construct the new interstate highway which would intersect yard facilities at Buckeye Yard. It was also informed at that time that it would have to relocate and reconstruct buildings, structures and tracks and that 13.5 million dollars would be allocated by Ohio for that purpose.

By letter of October 5, 1984, Carrier notified General Chairman Dodd that it was contracting out the work. That letter reads as follows in its entirety:

> "The State of Ohio is planning a new highway IR 670 through the area of our Store Department and Intermodal Facility at East Columbus, Ohio.

The State is paying to contract new facilities at our Buckeye Yard at a cost of $13.5 Million.

Track work will be done by Conrail forces.

Grading, building, paving and lighting will be done by Contract.

All B&B forces on the Columbus Division will be maintained while the contract covering B&B work proceeds.

If you wish to confer please advise by October 20, 1984."

General Chairman Dodd replied as follows:

"This letter is in response to your letters of October 5, 1984 regarding the contracting out of MW work in the Southern Region. The work referred to was a side track extension at Vandalia, IL and construction of new facilities at Buckeye Yard, E. Columbus, OH.

I wish to confer with you concerning both sites. Please contact my office to arrange a time and date for our conference."

In line with the General Chairman's request, a conference was held on October 31, 1984, in order to discuss the matter. The meeting was attended by Mr. Dodd and Chief Engineer Clark, the Carrier official who had signed the letter of October 5.

Petitioner contends that it was not notified in timely fashion that Carrier was contracting out the work. In that regard, it relies on General Chairman Dodd's statement that Mr. Clark informed him at the October 31, 1984 conference that Carrier was already committed to contract out the

construction of the facilities in question and was unwilling to alter those plans. In Petitioner's view, Carrier was only trying to give the impression of compliance with the prescribed procedures while having violated the letter and spirit of the Scope Rule by prematurely contracting the work to outside forces.

Petitioner also contends that Carrier's letter of October 5, the first notice Carrier had given to Petitioner of its subcontract plans, was nothing more than "a blanket notice," the equivalent of "no notice at all." Petitioner points out that the October 5 letter did not identify the specific work and dates and times it would be performed.

While the claim was under consideration on the property, Carrier denied the claim for the following reasons:

1. It complied contractually by advising General Chairman Dodd of the intent to contract the new facilities at Buckeye Yard.
2. The Scope Rule was not violated.
3. The claims failed to give essential facts such as a descriptive nature of the work involved, definite dates and hours of work performed on each such day. The vagueness and indefiniteness of the claim is fatal.

4. Claimants were on duty and under pay on the dates claimed, and suffered no monetary loss. There is no penalty provision in the Agreement. Claimants therefore are not entitled to the compensation claimed under any circumstances.

Carrier's fourth objection, just mentioned, is unimpressive. In order to preserve the integrity of the agreement and enforce its provisions, liability may well flow from wrongful contracting out of work, even if claimants were on duty and under pay when violations occurred. The point will be discussed in depth if a violation is found in the present case.

The third objection raised by Carrier is frivolous for the claim letters apprise Carrier of the nature and basic facts of the employees' complaint and Carrier has the best access to all the details in this situation.

With respect to the first objection to the claim, Carrier denies that the Organization was ever told on October 31, 1984, that it had committed itself to contract out the work. While General Chairman Dodd stated that he had been so advised by Chief Engineer Clark, his statement stands alone and is uncorroborated by evidence. On the other hand, Carrier's position is supported by evidence that the contract was not executed until July 24, 1985 and actual work on the

project did not start before September 1985. The facts presented by Carrier in rebuttals were not untimely submitted; Mr. Dodd's statement was first made to Carrier by letter of March 4, 1987 and the Organization listed the case with our Board just a few days later, on March 12. Carrier was entitled to reply to a newly raised issue that had been presented until near the close of discussions on the property.

Accordingly, we find no sound basis for concluding that Carrier had informed Petitioner that it was committed by October 31, 1985, when the parties first met regarding the matter to contract out the work. Nor does the record establish that Carrier declined to explore in good faith with Petitioner alternative possibilities or to furnish details requested by Carrier. This is not a situation where the first notice was given to the Organization just a short time before work started or the project contract was signed. Ample time was available for Petitioner to attempt to clarify particulars and persuade Carrier to use its own forces to perform the work.

In this setting, we are not persuaded that the notice given to Petitioner was inadequate or that it was deprived of an opportunity to explore the situation in a meaningful way with Carrier. Nor are we persuaded that the Scope Rule has

been violated in any other respect. The record does not show that claimants, all of whom were under pay and on duty during the period in question, could have satisfactorily attended to the work demands of this project which clearly was of major dimensions. There is no indication that they had previously been called upon to handle similar work under such conditions. Awards that deal with much less complicated projects and clear violations of the notice, meeting and other requirements of the Scope Rule are to be distinguished from the present case.

AWARD: Claim denied.

Adopted at Philadelphia, PA July 28, , 1989

Harold Weston, Chairman

Carrier Member

Steven V. Powers
Employee Member