SPECIAL BOARD OF ADJUSTMENT 1110

Award No. 68
Case No. 68

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

CSX Transportation, Inc. (former Louisville and Nashville Railroad Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned outside forces (Queen City Construction) to build five (5) miles of track and a No. 10 132# turnout at Campbell Street in Louisville, Kentucky beginning October 11, 1994 and continuing [System File 10(26)94/12(95-0233) LNR].

2. The Agreement was further violated when the Carrier failed to give the General Chairman fifteen (15) days' advance written notice of its intent to contract out said work as required by Article IV of the May 17, 1968 Agreement.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, the Claimants* listed below shall each be allowed an equal proportionate share of the total number on man-hours expended by the outside forces at their respective rates of pay beginning October 11, 1994 and continuing until the project is completed.

T. H. Ashby	J. M. English
W. J. Wess	M. T. Willett
G. A. Campbell	M. E. Langford
V. D. Russell	J. M. Bowling
J. W. Yocum	F. L. Thomas
D. B. Bowling	R. S. Fahringer
C. Simmons	B. P. Louden
C. G. Armenta	D. R. Vincent

F. Vincent
S. T. Reid
J. D. Ice
J. J. Savage
S. M. Sanders
G. D. Sanders
D. Dellarosa
E. L. Castleman

FINDINGS:

This Board, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and the Employees involved in this dispute are, respectively, Carrier and Employees within the meaning of the Railway Labor Act, as amended,; and

2. That the Board has jurisdiction over this dispute.

OPINION OF THE BOARD:

Article IV, Contracting Out, provides:

> 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 the 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.

The record indicates that the City of Louisville originated the idea to perform the disputed work. Nevertheless, the Carrier participated throughout the project to such an extent that the Carrier had an affirmative obligation to provide advance notice to the Organization about the possible contracting of the referenced work.

As this Board indicated in Award No. 24:

> A careful review of the record substantiates that the Carrier failed to provide advance notice to the Organization. The failure to provide such advance notice of work within the scope of the Agreement precluded the parties from discussing possible alternatives to address the Carrier's needs in the context of the requirements of the Agreement and the interests of the members of the bargaining unit. The Carrier violated the Agreement by failing to provide such notice to the Organization concerning the Carrier's intent to contract out the disputed work.
>
> Furthermore, the Carrier's failure to provide the required advance notice further undermines the Carrier's position because such a discussion might have produced an agreement between the parties that met their respective needs. The Organization therefore proved that the Carrier violated the Agreement by using the outside forces without providing advance notice to the Organization.

The analysis set forth in Award No. 24 applies to the present dispute and is hereby adopted. In particular, the Carrier has a special obligation to provide advance notice to the Organization during the planning stages of a project, such as the present one, initiated by a municipality. The Carrier's contractual obligation to provide such advance notice is separate and distinct from the ultimate determination of whether the employees represented by the Organization ultimately perform the actual work to be completed.

A difference exists between the early planning stages and the later planning stages of a project. In accordance with Article IV, the Carrier has an affirmative obligation even in the early planning stages to provide advance notice to the Organization.

The present record proves that the Claimants were fully employed. No evidence exists in the record that the advance notice could have led to a change in the plans of the municipality. Nevertheless, the Carrier had a contractual duty to provide the advance notice.

Under these circumstances an award of the full remedy claimed would be inappropriate. Nevertheless, the Carrier's failure to provide the required notice at the appropriate time during the early planning stages warrants a significant monetary remedy to each Claimant of $1800 as the best measure of the damage to each Claimant for the absence of the contractually required notice.

AWARD:

The Claim is sustained in accordance with the Opinion of the

Board. The Carrier shall make the Award effective on or before 30 days following the date of this Award.

Robert L. Douglas
Chairman and Neutral Member

Donald D. Bartholomay
Employee Member

Dated: Feb 26, 2001

Mark D. Selbert
Carrier Member

Dissenting

Carrier Member's Dissent to Award No. 68 of Special Board of Adjustment No. 1110

The Majority erred in finding that Carrier violated the subcontracting rules because it did not notify BMWE that a third party, the City of Louisville, intended to build 5 miles of track as part of its plan to reroute the railroad. Although it is true that four (4) years later the City gave CSXT the right of way on which the new track was built in exchange for the original right of way, the reroute and the exchange of property was for the benefit of the City's Waterfront Development Project, not for the benefit of CSXT. Quite simply, the City wanted the property owned by CSXT, so they built an alternate route and made the exchange.

Carrier did not approach the City for new tracks or initiate the project in any other way. The pertinent rule regarding contracting work on the former L&N Railroad, Article VI of the 1968 National Agreement, begins with this sentence: "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. " Obviously, there must be a condition precedent to initiate the obligation to notify the General Chairman, and that condition must be in the event the carrier plans to contract out work.

Unfortunately, the Majority strained to reach the conclusion that CSXT "participated throughout the project to such an extent that the Carrier had an affirmative obligation to provide advance notice to the Organization about the possible contracting of the referenced work." While it is true that CSXT provided some of the materials for the project and that the contractor was required to meet CSXT's requirements for track construction, that is not the same as contracting the work. In fact, the record was very clear that CSXT did not contract the work, and CSXT had every right to require that the tracks the City was constructing met applicable track standards.

Further, the Majority cited Award No. 24 of this Board in reaching its decision in Award No. 68. However, in Award No. 24, after finding CSXT had violated its obligation to notify the Organization that an outside contractor would paint buildings owned by the railroad, the Board declined to pay the Claimants, as follows:

> *With respect to remedy, however, the Carrier provided sufficient evidence in the record to prove that the Claimants would receive a windfall if they were to receive any monetary compensation under the extenuating circumstances in the instant case. The record proves that the Claimants were fully employed at the time of the violation of the Agreement and did not suffer any cognizable loss under the special circumstances of the present dispute, which involved work mandated by government representatives. As a result, no monetary remedy shall be awarded in this particular situation.* (emphasis added)

Award No. 24 involved a claim for 506 hours straight time, or about $7,500. Award No. 68 allowed $1,800 each for 24 Claimants (22 of whom were proven to be fully employed), for a total of $43,200. That's a windfall, albeit a reduction of the total amount claimed. The point being that CSXT had less involvement in the contracting by the City than in contracting the painting of its own property, yet is substantially penalized for failure to notify the Organization that the City was contracting the work. Further, the Board conceded in Award No. 68 that, "No evidence exists in the record that the advance notice could have led to a change in the plans of the municipality" to contract out the track construction. In other words, the Majority paid Claimants for work they had no reasonable expectation of performing, even had the Organization been notified, because CSXT did not contract that work.

This is the first Carrier dissent to an award issued by this Board, and the decision to write it was very difficult because of the great respect I have for the other Members. In this instance, however, the conclusion of the Majority is erroneous as to merits and remedy, and is therefore without any precedential value. I respectfully but vigorously dissent.

Mark D. Selbert

Mark D. Selbert, Carrier Member
SBA 1110

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBER'S DISSENT
TO
AWARD 68 OF SBA NO. 1110
(Referee Douglas)

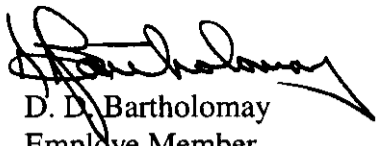
The Majority in Award 68 was correct in its analysis of the facts of the case and properly found the Agreement rules were violated. If anything can be said in the negative it was that the remedy was reduced.

As evidenced by the information developed on the property, the Carrier participated in the contracting out of Maintenance of Way work and as such were required to provide the Organization with advance written notice. It failed to do so and the Board properly found that to be a violation.

While the remedy requested was not allowed in total, the amount paid to the Claimants was by no means a "windfall" or "penalty" as asserted in the Carrier's dissent. Unless it was clearly established during the on-property handling that the contractor's forces had not expended the number of hours claimed, the claim should have been allowed as presented for the contract violation. When work is withheld from those contractually entitled to perform that work a loss of work opportunity exists which requires a full remedy.

The conclusion of this Board was not erroneous except for failing to provide the proper remedy and the award does stand as precedent.

Respectfully,



D. D. Bartholomay
Employe Member