

SPECIAL BOARD OF ADJUSTMENT NO. 287

PARTIES :

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and

THE BALTIMORE AND OHIO RAILROAD COMPANY

AWARD IN DOCKET NO. 8

STATEMENT

OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when it assigned a portion of the work of construction and erecting a new metal depot at Bellville, Ohio, to other than its B&B forces;

(2) Carpenter Foreman James E. Secrist, Carpenter B. A. Phalen, Jr., and Carpenter Helpers John G. Felton and Orville H. Sichiner each be allowed 54 hours' pay at their respective straight time rates because of the violation referred to in Part (1) of this claim."

FINDINGS: This is one of several cases before this Board involving the Scope Rule, (b)5(a).

Organization raises several questions with respect to these contract provisions, upon which we rule, respecting these contracting cases now before us, as follows:

1. Carrier has the right to determine, without prior conference with the Organization, that work which it desires to have performed under contracts let by the Company.
2. Under (b)5(a), its action can be justified by the existence of any one of the six circumstances therein listed.
3. Burden of proving the existence of any one of the six circumstances relied on rests with the Carrier.

Considerable argument was offered by the parties at the hearings before this Board, and by the Board Members in executive session, as to the critical time in such cases. Should judgment be made of Carrier's action upon the circumstances existing at the time Carrier signs a contract with an independent contractor to perform certain work, as Carrier contends; or should we judge these cases on the circumstances existing when the independent contractor begins the work, or while it is in progress, as contended for by the Organization?

We have every appreciation of Organization's efforts to seek the latter holding in behalf of its membership. The fact remains, however, that no one can foresee with any degree of accuracy that which may occur in the future. To hold otherwise would be to render an ex post facto indictment. We will therefore rule:

4. The circumstances to be considered in judging Carrier's action in contracting such work shall be those circumstances existing at the time Carrier executes a contract for the performance of such work.

With respect to the particular work which is the subject of this claim, we find Carrier relying on (b)5(a) 2, 4, 5 and 6.

With respect to Carrier's reliance on paragraph 2 of (b)5(a) -- "because of the requirement of special skills necessary in connection with performance of the work" -- we have Carrier statement that ARMCO crews "do nothing but erect buildings and they have become very proficient in the erection of the buildings."

We do not doubt this statement. There is, however, in this record an admission by Carrier's Assistant Chief Engineer, Maintenance (TP 184) that B&B men "can do it (erect a Steelex building), but it is the time element." He estimated it would take B&B forces "twice as long" as the ARMCO crews to erect such a building. It being a fact that 27 mandays were consumed by ARMCO men in erecting this building, it is possible that a B&B gang of 6 men could have done the job in 9 days. So the difference is of no great consequence with relation to Carrier's reliance on paragraph 5 -- "the time within which the work must be completed as related to other projects" -- or with relation to Carrier's reliance on paragraph 4 -- "where the work with Company forces would limit the extent of the supplier's guarantee." It is admitted this Carrier had used B&B forces before in erecting Steelex buildings.

Finally, we have Carrier relying on paragraph 6:

"Employees covered by the agreement on the seniority district involved cannot be assigned to the work without impeding the progress of other projects."

Carrier asserts that at the time the contract with ARMCO was executed, it did not have any furloughed men on the Newark Division. We do not charge that Carrier did not make this statement in good faith. However, we are mindful of many decisions of the National Railroad Adjustment Board which have held that the mere assertion of a claim is not, of itself, sufficient proof thereof.

This is particularly true here where Carrier may, under (b)5(a), contract out work which might ordinarily belong to these employees under any one or more of six sets of circumstances.

We have held, and properly, that the Carrier must carry the burden of proof on such of these six circumstances as it may rely in defense of its action. A mere assertion on its part does not meet that burden.

On the basis of the record before us, we must and will conclude Carrier -- has failed to carry its burden of proof under (b)5(a). This claim will be sustained.

AWARD

Claim sustained.

(s) Edward A. Lynch
Chairman

(s) A. J. Cunningham
Employee Member

(s) T. S. Woods
Carrier Member

Dated at Baltimore, Maryland,
this 28th day of March, 1960.