

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5332

Parties to Dispute:

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS

-and-

NORFOLK SOUTHERN RAILWAY
COMPANY

AWARD

Case No. 181

Subcontracting Line-tending

STATEMENT OF CLAIM:

“Claim on behalf of Operators Spratley, Williams, Price, Land, Flowers, House, Mack, Old, Brown, Howe, Harrison, Barr, Dunham, Bellamy, Perry, Jones, Latham, Leib, Dobson, Davis and Sigafos in Norfolk, Virginia to be made whole due to violation under the current Controlling Agreement as amended, and Article II of the September 25 1964 Agreement, as amended. Claimants to be made whole for any and all losses sustained. These begin the date of the Subcontracting violation, continue to the present date and include, but are not limited to: agreement penalties, overtime, lost wages, vacation rights, health and welfare and insurance benefits, pension benefits such as Railroad Retirement and Unemployment Insurance, and any other benefits that would have been earned during the time the violation continued.”

FINDINGS:

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

The Organization here contests Carrier’s September 28, 2017, notice to the Organization of its intent to enter into an agreement with an outside vendor to subcontract its line-tending functions at Lambert’s Point Coal Pier in Norfolk commencing on November 1, 2017. Carrier’s action and the response it drew triggered the claim handling process under Appendix N and Article II of the Agreement. When the dispute was not resolved in a Data Conference at Carrier’s offices on October 26, 2017, it was advanced to this Board for arbitration.

The substantial record developed on the property indicates that as an initial matter the Organization objected to an alleged violation of Carrier's Rule 61 – *Coal Pier Workers* by engaging employees of Coastal Services to replace IBEW employees in performing line-tending services at Lambert's Point. The claim asserted an ongoing violation for wages lost on behalf of the named Claimants, attaching a summary of time tracking from observations made by employees totaling 77.6 hours during December, 2017, for various dates during that month. The Organization then submitted a series of ongoing claims thereafter purporting to document average monthly wage losses experienced by its members.

Rule 61 establishes terms of seniority on a common seniority roster; hourly pay differentials for time spent by qualified operators operating pier equipment; qualification periods; and other detail not relevant to subcontracting. Agreement Appendix N – *Subcontracting* sets forth the terms pursuant to which work may be contracted out, including applicable notice, data and conferencing provisions. Applicable criteria for subcontracting include the following:

Article II. Subcontracting

Section 1. Applicable Criteria.

“Subcontracting of work, including unit exchange, will be done only when genuinely unavoidable because...(5) such work cannot be performed by the carrier except at a significantly greater cost, provided the cost advantage enjoyed by the subcontractor is not based on a standard of wages below that of the prevailing wages paid in the area for the type of work being performed and provided further that if work is subcontracted...no employees regularly assigned at that facility at the time of the subcontracting will be furloughed as a result of such subcontracting.”

In response to its requests for payroll information as contemplated by Appendix N, the Organization asserts it was provided insufficient detail to assess exactly what wages paid to the subcontractors for line tending. Consequently, it argues it was unable to determine if those wages met applicable standards. Additionally, Carrier has used its standard equipment costs in its calculations, but that same equipment would have been utilized if Carrier employees had utilized. As a result, it was unable to determine if the total wages paid to the subs met the standard vs. prevailing standard of Appendix N.

Carrier takes the position that subcontracts have been utilized on line-tending for over 20 years, since 1997, a common practice among all industries given its unscheduled nature, its complexity and the dangerous nature of the work. Carrier not only is contractually permitted to subcontract, it provided timely notice in this instance, even going above and beyond requirements with its finance unit generating a comparison of wages paid to employees and subcontractors. Copies of the actual contracts implicated were provided to the IBEW, and there is nothing to suggest subcontractors were not paid prevailing wages for all services performed. It reasonably identified all information available in claim handling, and that data showed a 22% differential, which was in fact understated because some costs were not included.

Carrier further argues that some element of uncertainty is necessarily featured because line-tending is not full-time but sporadic work. Employees are pulled of their regular duties to do the tasks, teams of 3 or 6 employees driving either one or two hours per move before undergoing a briefing and then returning to their regular assignments. Additionally, time spent on such work can vary greatly, impacted by factors such as weather, delay and equipment issues, and the experience levels of the supervisors at the pier at the time the work is needed. The Organization's calculation of hours, Carrier asserts, purporting to represent time spent on line-tending moves by employees is seriously understated, reflecting an overall average of 35 minutes per move when actual averages correctly tallied are approximately 2 hours per move. It additionally overstates the number of moves in calculating the average time per move for a vessel, drawing down the average time per move. And it has reflected times represented as worked by the subcontractor which are not only inaccurate but support Carrier's estimates and suggest they are, if anything, conservative. Lastly, not only were no Carrier employees laid off as a result, but also Carrier was actually hiring at the site during the relevant timeframe.

As the Organization openly concedes, the computation of actual time spent on this activity is a complicated process. The record reflects that during the parties' October 26, 2017, meeting, Carrier reviewed with the Organization the direct cost differentials between its forces and those of the subcontractor as well as the indirect cost burdens represented by lost productivity and injuries. Succinctly summarized, the Organization, in turn,

questioned the volume of hours Carrier represented were required by the outside vendors and the accounting methods employed for assessing equipment costs, suggesting that in final analysis the cost differentials were not significant.

Claimants in this instance bore the burden of proof. Based upon a careful review of the record in its entirety, the Board concludes in light of the sporadic nature of the work; the methodology Carrier employed to construct its estimates of direct and indirect costs; the inherent difficulty of making precise estimates of hours; and the absence of any losses shown, Carrier's documentation was reasonable and proffered in good faith. No violation of Agreement terms has been established, and accordingly, the claim must be denied for failure of proof.

A W A R D

The Claim is denied.

Tom Owens
Tom Owens
Employee Member

James E. Conway
James E. Conway
Chairman and Neutral Member

Tara Arnett 02/11/2020
Tara Arnett
Carrier Member

Dated: January , 2020