



Award No. 15503
Docket No. MW-16104

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

THE CINCINNATI UNION TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned the work of repairing station furniture at the Cincinnati Terminal Building to outside forces without benefit of prior discussion and agreement with the General Chairman. (Carrier's file 115-T M-W.)

(2) B&B Carpenters H. Drahman, Francis Hill, Preston Graham, C. Plummer and James Hill each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours consumed by outside forces in performing the work referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Commencing on November 10, 1964 the Carrier, without prior negotiations with or the concurrence of the General Chairman, assigned the work of repairing (upholstering) office and station furniture at the Cincinnati Terminal Building to J. B. Schaaf Company.

The contractor's employees consumed a total of 463 man hours in the performance of this work.

Work of this nature has heretofore been assigned to and performed exclusively by the Carrier's B&B forces.

The claimants were available, willing and fully qualified to have performed the subject work had the Carrier so desired.

Claim was timely and properly presented and handled at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated May 19, 1954, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

were no furloughed employes who would return for the short time necessary to perform this work, and that the named claimants all held regular full time assignments between November 10, 1964 and January 13, 1965, the dates mentioned in the claim letter.

The status of James E. Hill, the only furloughed Carpenter, is shown by Carrier's Exhibit No. 5. Page 1 of Exhibit No. 5 is a letter jointly addressed to the three furloughed Carpenters holding seniority at that time. Of the three, only James E. Hill replied. He visited Mr. Hopton's office on January 11, 1965 and stated he would return for a regular position but did not want any part time work at present. He confirmed this by letter dated February 20, 1965, shown as Page 2 of Exhibit No. 5. Pages 3 and 4 of Exhibit No. 5 is a letter to Mr. Hill, dated May 26, 1965, with attached bulletin of a regular job. Mr. Hill did not answer this letter and there being no bidders and Carrier unable to hire anyone, the job was abolished as shown by Page 5 of Exhibit No. 5.

The employes rejected the position of the Carrier in letter dated February 27, 1965 and Mr. Hopton confirmed the conference and denied the claim in letter dated March 10, 1965 (Carrier's Exhibit No. 3).

The claim was appealed to Manager G. S. Gray in letter dated April 1, 1965 and was denied in letter dated April 6, 1965. Conference was held on April 19, 1965.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim as filed on the property in a letter dated January 13, 1965 says:

"It is our understanding that during the period from November 10, 1964 to the present date your Company has contracted the repair of approximately 136 pieces of office and station furniture, and which repairs have been made.

It is our position that such work is covered by the effective agreement between your Company and this organization, therefore, claim is filed herewith in the amount of 463 hours in behalf of and to be divided equally between B&B employes H. Draham, Francis Hill, Preston Graham, C. Plummer and James Hill at their respective rates of pay.

This is filed as a continuing claim applicable to any additional work of the nature referred to above.

This will confirm our conversation of January 11, 1965 at which time you indicated the desire of your Company for agreement to contract the above mentioned work. However, the procedure followed heretofore in the application of Note 2 of the Scope Rule has been for your Company to address a letter to the General Chairman of your desire to contract certain work and the need for doing so. I feel that the present case should not be made an exception."

Carrier argues that the Claim submitted to this Board is vague and indefinite and that it is not the same claim as the claim handled on the property and that it was never handled on the property. This argument is

based on the fact that the Claim as presented to the Board alleges that Carrier violated the agreement on some unspecified dates, which, according to Carrier, might have referred to any times from the opening of the Cincinnati Union Terminal in 1933 to January 4, 1966, the date of the Employee's letter filing the claim with this Board. The claim as filed with this Board refers to Carrier's File 115-T M-W, which includes, according to Carrier, all union matters between the Carrier and the Brotherhood from the opening of the terminal in 1933 forward. Carrier tells us in its Ex Parte Submission, that "The one and only claim ever submitted to the Cincinnati Union Terminal Company, alleging violation of the Agreement by assigning work of repairing station furniture to outside forces," was the claim in the letter dated January 13, 1965. Thus the Claim before us is identified as of the same substance as the one originally filed on the property. Its generalized statement did not make it any more vague and indefinite than the original claim since the details contained in the original claim are incorporated in the Claim as submitted to us by the reference to "the one and only" pertinent claim in Carrier's File 115-T M-W. The dispute on the property was joined and discussed about the issues and events raised in the claim as originally filed; those same issues and events, are raised by the Claim as restated in its submission to us. We find that the change in the statement of the claim does not require that we bar its consideration and disposition on its merits.

As asserted by Brotherhood in their claim letter dated January 13, 1965 and not denied by Carrier, during the period November 10, 1964 to January 13, 1965 Carrier contracted out the repair of approximately 136 pieces of office and station furniture.

Brotherhood argues that such work is covered by the Agreement and that it may be contracted out rather than assigned to employees covered by the Agreement only after negotiation under Note 2 of Rule 1 (Scope), request for which negotiation must be and was not made in writing by Carrier.

Notes 1 and 2 of the Scope Rule are:

"NOTE 1.

It is understood and agreed that the repair and maintenance of office and station furniture shall be performed by B&B forces.

"It is understood and agreed that when Management desires to contract work, a meeting will be arranged with the representative of the organization for the purpose of explaining the need of such contracting work, and the Management and General Chairman, or his representative, will negotiate an agreement to cover."

There is no serious dispute that the work involved was work covered by the Agreement.

Carrier stated, without contradiction, that upon receipt of the complaint of January 13, 1965, it "immediately issued orders that no work would be sent out and none of this upholstery has been performed by an outside company since that date." (to date of its Ex Parte Submission — May 6, 1966); and "... none of this type of upholstery work has been performed either by our own forces or outside companies since January 11, 1965 when the matter was first brought to the attention of the Maintenance Engineer . . ."

Carrier in its letter of March 10, 1965 denying the claim stated among other things that it had been the practice of many years that a portion of work of the kind involved had been contracted out. There is nothing to show that Brotherhood ever denied this on the property; Brotherhood denied it as a fact for the first time in its Ex Parte Submission, too late for the factual issue the denial creates to be resolved by evidence properly in this record; therefore, the assertion of Carrier in its letter of March 10, 1965 is adopted by us as the fact. And Brotherhood, we find, had had at least constructive knowledge of the fact.

Carrier argues that failure of Brotherhood to protest the performance of upholstery repair work on the office and station furniture during all the many years led the Carrier to believe "that its conduct was fully concurred in by the employes"; and that such long acquiescence should act to bar the claim. Carrier cited a number of our awards to support this argument. We find in one of the awards cited by Carrier (Award 2576):

"... Where one party, with actual or constructive knowledge of his rights, stands by and offers no protest with respect to the conduct of the other, thereby reasonably inducing the latter to believe that his conduct is fully concurred in and, as a consequence, he acts on that belief over a long period of time, this Board will treat the matter as closed, insofar as it relates to past transactions. But repeated violations of an express rule by one party or acquiescence on the part of the other will not affect the interpretation or application of a rule with respect to its future operation."

This aptly covers the problem in this case: Carrier's violation of Note 1 was unprotested over a long period of time; immediately on protest by Brotherhood, Carrier ceased the violation; there is no evidence that the violation continued or was repeated after the claim was first filed with Carrier.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

The question of the violation of the Agreement claimed is moot.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of April 1967.

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