



Award No. 18687
Docket No. MW-18988

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Thomas Rimer, Jr., Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when, without prior notice to General Chairman Fraser as required by Article IV of the May 17, 1968 Agreement, it assigned machine operator's work in connection with and incidental to relaying rail work on June 17, 18, 19, 20, 23, 24 and 25, 1969 to outside forces (System File MW-29-69/D-9-6).

(2) Machine Operator J. M. Ross be allowed fifty-six (56) hours' pay at his straight time rate because of the violation referred to within Part (1) of this claim.

(3) The Carrier shall also pay the claimant six percent (6%) interest per annum on the monetary allowance accruing from the initial claim date until paid.

EMPLOYEES' STATEMENT OF FACTS: Claimant Ross, who holds seniority within the Road Equipment Subdepartment, is a regularly assigned machine operator. Employees holding seniority within this subdepartment and so assigned have customarily and traditionally performed all machine operator's work in connection with and incidental to building, repairing and maintaining the Carrier's tracks as well as other machine operator's work required within the Carrier's Maintenance of Way and Structures Department.

The work involved in this dispute consists of machine operator's work in connection with and incidental to replacing approximately 100 rails on the Creede branch line at a point near Wagon Wheel Gap which was performed by outside forces holding no seniority whatsoever within the Road Equipment Subdepartment. Instead of using its own crawler crane, which was idle during the period involved here, and assigning the claimant to perform the work of operating same, the Carrier contracted with Henry Southway and Sons Contractors for the use of a 25D Northwest Crawler Crane and an operator therefor. On June 17, 1969, the outside forces loaded their crawler crane onto

All of Carrier's work equipment operators were working on other projects and Carrier, therefore, rented a Northwest crawler crane with operator, from the Southway and Sons Construction Company to assist the section men change this rail.

Carrier desires to call your attention to the Statement of Claim submitted to your Honorable Board by the Organization. This Statement of Claim has never been presented to the Carrier.

OPINION OF BOARD: The Brotherhood alleges a violation of Article IV of the Agreement by failing to give notice to the General Chairman before contracting out the work of relaying rail.

"ARTICLE IV. CONTRACTING OUT

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 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 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.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement."

It is further contended that the Claimant was available and fully qualified to perform the work and that, even though in service and under pay on the days involved, is entitled to be compensated for the lost work opportunity.

In support of its position as to the notice requirement it is argued that the qualifying phrase of Article IV "... work within the scope of the applicable schedule agreement ..." was fully met in these circumstances and that it need make no showing of exclusivity as to the work assignment. The contention is made that the language quoted is intended only to mean that the work be of a type which has been generally assigned to employes coming under the scope of the Agreement. Further, it is said that, had the parties intended the notice requirement to apply only to work reserved to the craft by history, custom and tradition throughout the Carrier's system, it would have been so stated.

The Carrier first sets up the defense that the alleged violation of Article IV was never presented to the Carrier on the property and therefore the claim should be dismissed as procedurally defective. The record does not support this contention. The General Chairman made repeated reference in his letters of appeal to the Carrier's failure to give the required notice and the issue presented was clearly understood by the parties during the handling on the property. This Board finds no procedural deficiency in the processing of the claim.

While this Board is without authority to enforce the negotiations required by Article IV, after notice is given, we are empowered to interpret the Agreement with respect to the Carrier's responsibility to give notice as the first step in the bargaining process.

The Carrier did not provide such notice, having made the judgment that the work involved was not within the scope of the Agreement. For the limited purpose of providing notice to the General Chairman we find that the Carrier erred in its first judgment and concur with Award 18305 (Dugan) in this regard. That award states on this point:

"The first paragraph of said Article IV deals with the contracting out of work 'within the scope of the applicable schedule agreement'. It does not say the contracting out of work reserved exclusively to a craft by history, custom and tradition. This Board is not empowered to add to, subtract from, or alter an existing agreement. We therefore conclude that inasmuch as Maintenance of Way Employees have in the past performed such work as is in dispute here, then said work being within the scope of the applicable Agreement before us, Carrier violated the terms thereof by failing to notify the General Chairman within 15 days prior to the contracting out of said work. . . ."

Part two of the claim requests monetary damages for the alleged breach of the Agreement. We are well aware of the line of awards which have granted punitive damages to the injured party where no pecuniary loss was in evidence; we are equally aware of the many awards which have held that the Board is without authority to assess damages where the Claimant suffered no loss. We will adhere to the latter principle which we consider to be sound, absent any provision in the Agreement which specifically provides for monetary relief for a breach of the Agreement or where a loss of earnings is demonstrable through Agreement violation.

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

That the Agreement was violated as set forth in the Opinion.

AWARD

Part (1) of the claim is sustained.

Parts (2) and (3) of the claim are denied.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: E. A. Killeen
Executive Secretary**

Dated at Chicago, Illinois, this 10th day of September, 1971.