NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19635
THIRD DIVISION Docket Number MW-19440

Thomas L. Hayes, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Texas and Pacific Railway Company

STATEMENT O? CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when, without advance notice to the General Chairman as required by Article IV of the May 17, 1968 National Agreement, it assign-d the work of cutting ballast from the ends of the ties near Alexandria, Louisiana to outside forces (System File 3336).

(2) Roadway Machine Operator W. R. Delacerda be allowed pay at his straight time rate for a number of hours equal to that expended by the outside forces in the performance of the work referred to within Part (1) of this claim beginning on December 1, 1963.

OPINION OF BOARD: Claimant W. R. Delacerda holds and maintains seniority as a roadway machine operator of February 13, 1955 as displayed on the 1969 Seniority Roster for Roadway Machine Operators and Helpers of the Texas and Pacific Railway.

Since December 1, 1963, a contractor's employe has been cutting ballast away from the end of the ties near Alexandria. Louisiana. This contractor's employe holds no seniority with the Company.

The Employes contend that the work referred to above belongs to the Maintenance of Way Employes in the Roadway Machine Department and they submitted a claim on behalf of Mr. Delacerda for payment amounting to the number of man hours used by the contractor to plow ballast from the ends of the ties beginning December 1, 1969, which, according to Carrier, amounted to two dates of eight hours each.

The Petitioner argues that Carrier violated the Agreement, when without advance notice to the General Chairman as required by Article IV of the May 17, 1968 National Agreement, it assigned the work of cutting ballast to an outside contractor's employe. Article IV reads in part as follows:

> "In the even: 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." (Emphasis supplied.)

Article N makes it clear that notice to the General Chairman is necessary only when the work Carrier plans to contract out is "within the scope of the applicable schedule agreement."

The record persuades us that the work which is the subject of the claim falls within the ambit of the Agreement. We note, among other things, that Claimant's equipment was capable of performing the disputed work and that Claimant had performed similar work in the past.

Carrier, however states that the Scope Rule is general in nature, and that the Employes, to support their claim, must prove that they have performed the work exclusively by history, custom and past practice. In our judgment, Carrier's contention war laid to rest in Award 18305 (Dugan). This Award, followed by others, holds that past practice is not controlling when, as here, we are concerned with a violation of Article IV of the May 17, 1968 Agreement. Award 18305 says in pertinent part:

> "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 traditon. This Board is not empowered to add to, subtract from, or alter an existing agreement. We therefore conclude that inasmuch as Maintenance of Way Employes 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. In reaching this conclusion, we are not asserting that the work here in question cannot be contracted out later after the giving of the required notice. We are only saying that since the work in question came within the scope of the Maintenance of Way Agreement, Carrier was obligated to give said advance notice. Failing to do so, Carrier violated the terms of Article IV of the May 17, 1968 National Agreement governing the parties to this dispute."

When Carrier failed to give advance notice to the General Chairman of its plans to contract out the work of plowing ballast away from the ends of ties, in the case before the Board, it violated the clear and unambiguous provisions of Article IV.

We now come to the matter of whether the violation warrants an award of damages. It is clear that the Organization was deprived of the right to bargain and that we do not know what success, if any, the General Chairman would have had in getting additional work for his men if Carrier had lived up to its agreement. A number of prior awards hold that where no specific earnings loss can be shown to have resulted from a violation of Article IV, no damage award is permitted. Awards 1830.5 (Dugan), 18687 (Rimer), 18773 (Edgett), 18714 (Devine) and others.

If the Board follows these prior awards it will be holding in effect that a Carrier may violate with impunity the provisions of Article IV and be subject only to a verbal wrist slapping by the Third Division.

Where the Carrier's wrongful act of contracting out work without notification to the Employees in breach of contract may have led to an injury, and the facts are in such a state that neither the Organization nor the Carrier can conclusively prove that an injury did or did not occur as a result of the breach, who should suffer from the difficulty of proof? As one Arbitrator put it, should it be the wholly innocent employees or the employer whose breach of contract has created the possibility of injury? Past awards require the employees to endure the consequences of Carrier's breach but it would seem wiser for the Board to chart a new course less favorable to the initiator of the wrongful act.

In Award No. 16 of Public Law Board 249 (Bailer) that Board said:

> "It may be that no employees covered by the Schedule Agreement were available to perform this work, as Carrier now contends, but this is not a valid reason for depriving the Organization of its procedural rights under the above-cited Article IV. We will therefore sustain the claim to the extent of one-half the amount of compensation requested for each of the claimants."

The Board believes that many prior awards may have the result of discouraging good faith compliance by the Carriers with contractual provisions when they know that non-compliance makes damage proof difficult. In the light of all the circumstances, we sustain the claim to the extent of one-half the amount of compensation paid to outside forces for the work of cutting ballast near Alexandria, Louisiana, which work commenced on December 1, 1963.

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

That the parties waived oral bearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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.

AWARD

Claim sustained to the extent indicated in the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1973.