NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19948
THIRD DIVISION Docket Number MW-19865

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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 it used outside forces to fill in bridge at M.P. 418.16 after B&B forces installed a Large steel pipe and removed the bridge (System File 9-0-58/MW-9-71).

(2) The Carrier also violated Article IV of the National Agreement of May 17, 1968 when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) Machine Operator Wm. F. Gulliford be allowed forty (40) hours of pro-rata pay and five (5) hours of punitive pay at his machine operator's rate because of the aforesaid violations.

OPINION OF BOARD: This claim is predicated upon a violation of Article IV of the May 17, 1968 National Agreement. Claimant is a regularly assigned machine operator within the Road Equipment Subdepartment. He claims compensation for filling work performed by an outside concern, using its operator and a front end Loader of a type claimant was qualified to operate.

The work resulted when, in connection with fire damage to a bridge, Carrier decided to replace the bridge with a steel culvert rather than to repair it. B&B forces installed a steel corrugated pipe for the project; however, without giving written notice to the Organization, Carrier contracted out the filling work in dispute.

Carrier contends that: (1) the claim is not the claim handled on the property; (2) Article IV is inapplicable because the work was of an emergency nature; and (3) compensation is not allowable because claimant was fully employed during the claim period.

Carrier's first contention is correct. In paragraph (1) of the claim presented here, a scope rule violation is asserted; however, on the property, the Organization predicated its entire case on an alleged violation of Article IV, Possibly the Organization viewed the assertion of an Article IV violation as automatically bringing the scope rule into issue. There is some logic to this view. However, in view of the many authorities concerning the necessity for having the same claim considered throughout the proceeding, we think it would be unwise to permit a specific provision, raised on the property, to serve as an umbrella under which to raise other related provisions

for the first time before this Board. Consequently, not having been raised on the property, the scope rule shall not be considered here. The insertion of new matter in the ex parte submission to the Board does not, however, preclude consideration of the claim actually progressed on the property and, thus, we come now to the Article IV issues.

As regards the emergency facet of these issues, we conclude that none existed and, thus, we do not determine whether an emergency would have rendered Article IV inapplicable. The principal fact relating to the emergency issue is a slow order which was issued on the date of the fire, April 11, 1971, and which restricted train speed over the bridge to ten (10) miles per hour. However, this slow order alone does not Lead to the ultimate conclusion of emergency. The controlling consideration concerns the urgency of the fill work and this was not affected by the slow order. The Carrier decided on the steel culvert plan about two days after the fire and the work of hauling dirt to the site, not in dispute here, did not commence until more than a week after the fire. From April 26 through May 5, a ten day period, the outside firm performed disputed fill work on five days: April 26 and 30, May 3, 4, and 5, 1971. Overtime was worked on May 3 only. Thus, three regular work days and two rest days were omitted from the work schedule. These facts, especially the pace of the work, do not reflect a policy of immediate action by the Carrier and, thus, the facts are insufficient to establish that an emergency existed.

With regard to the remaining issue, it is not disputed that Carrier did not give any notice about the outside work and, therefore, on the whole record, we find that Carrier violated the notice requirements of Article IV. A series of well known Awards hold that full employment precludes a compensatory Award in an Article IV dispute. Awards No. 18305 (Dugan) and No. 19399 (O'Brien). However, this Board has awarded compensation for overtime worked by outside forces. (Award No. 19155 (Dugan). Here, four hours of overtime were worked by outside forces on May 3, 1971 and we shall therefore sustain the claim to the extent of such overtime.

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 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 of overtime worked by outside concern on May 3, 1971, as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago; Illinois, this 28th day of September 1973.

CARRIER MEMBERS' DISSENT TO AWARD 19948, DOCKET MW-19865

(Referee Blackwell)

We believe this award is arbitrary and void to the extent that it purports to allow monetary damages to the Claimant for a mere failure of Carrier to give a notice and opportunity to negotiate under Article IV. In handling the claim on the property, Petitioner did not assert that Claimant had any existing agreement right to the work, and based the entire claim on the mere fact that an Article IV notice was not given. At most, failure to give an Article IV notice would simply deprive the Petitioner of an opportunity to negotiate for a right to work; thus, no recognizable "work opportunity" was involved.

While a right to negotiate for particular work not covered by the existing agreement may be enforceable in other forums, it is not enforceable by this Board, either directly or by the indirect means of creating punitive allowances. See our Dissent to Award 19899 (Sickles).