NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20071

THIRD DIVISION Docket Number MW-20080

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Board of Trustees of the Galveston Wharves

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

(1) The Carrier violated the Agreement when it used outside forces to hang doors and install new door track at Pier 38 (System File 700-28-l).

(2) The Carrier also violated Article IV of the National Agreement of May 17, 1968 when it did not afford the General Chairman a conference to discuss the work referred to in Part (1) above.

(3) Lead Mechanics V. Manelli and G. Lucas, Mechanics W. Nemarich and F. Buchanan and Truck Driver L. J. Radin each be allowed pay at their respective straight time rate for an equal proportionate share of the total number of man hours expended by outside forces in performing the work described in Part (1) hereof.

OPINION OF BOARD: Claimants herein contend that Carrier is liable for violating applicable agreements by acts of commission and omission in connection with the subcontracting of certain work at its facilities known as the Port of Galveston. The first part of the claim is premised upon a violation of the Scope and Classification rules of the Agreement between the parties. Claim (2) alleges an independent violation of the procedural requirements of Article IV of the National Agreement of May 17, 1968. Finally the third part of the claim requests damages for each of the claimants because of the alleged violations. We shall treat these claims seriatim,

In order to sustain its position in Claim (1), Petitioner must show that the Agreement clearly reserves to it an exclusive right to the work complained of; or, in the absence of such Rules, must demonstrate by probative evidence that custom, practice and tradition have reserved such work to it exclusively. (See Awards 19576, 19516, 19421, 19032, 18471 and others). Petitioner in the instant dispute relies primarily upon Article I, Rule 1 and Article 32, Rule 1 of the applicable Agreement. These provisions are, respectively, a general Scope Rule and a Classification of Work Rule. No exclusive reservation of the work at issue to the employees herein is found in either of the foregoing Rules. Nor does this record convincingly show exclusive reservation of the work to these employes by force of custom, practice and tradition. Since the requisite burden of proof on these issues has not been met, we will deny Claim (1).

Article IV of the May 17, 1968 National Agreement reads in pertinent part as follows:

> "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 the 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 the 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 representative 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."

Since our first Award on this subject (18305) we have been called upon many times to interpret and apply the foregoing Article IV. A careful review of these awards indicates that to date the cases have dealt with alleged violations of the "notification requirement" set forth in the first paragraph thereof. The instant claim, however, concedes notification but presents for the first time an alleged violation of the "prompt meeting requirement" of paragraph two in Article IV.

The uncontroverted record shows that Carrier, by letter dated February 1, 1971 and citing Article IV, notified the General Chairman of its intention to subcontract certain work. Thereupon the General Chairman, by letter dated February 4, 1971 requested of Carrier that a time, date and place be established to discuss this matter, pursuant to Paragraph two of Article IV. By further exchange of letters the parties mutually scheduled a conference on this subject for February 18, 1971. On the day appointed for the conference, Carrier recessed the meeting until March 11, 1971. After cancelling the meeting, Carrier, on or about February 18, 1971, contracted with outside forces to do the work in question.

Petitioner states that the conference which was rescheduled for March 11, 1971 at Carrier's behest never occurred; nor was any other conference afforded its General Chairman on this subject. Carrier concurs that the March 11,

1971 meeting was not held but insists that a meeting did occur on March 10, 1971 wherein it discussed this matter with the General Chairman. In the face of this conflict in testimony, Carrier urges upon us the oft-repeated principle that this Board cannot weigh testimony nor settle questions of disputed facts and therefore should dismiss for failure to meet the evidentiary burden.

In the facts of this case however, Carrier can find no satisfaction in the above maxim. A close examination of the record before us and the contract language under construction reveals that we can reach the substantive issue of whether Article IV was violated, without necessarily resolving the conflicting testimonial evidence regarding the alleged March 10, 1971 meeting.

It is apparent that if, as Petitioner contends, no meeting was ever afforded after appropriate request by the General Chairman, Article IV was violated. On the other hand if we assume, without deciding, that the March 10 meeting occurred as Carrier contends, it cannot be gainsaid that such conference would have occurred some 35 days after the request for a meeting pursuant to Article IV. Moreover the uncontroverted record shows that the work in question was subcontracted during this intervening period after the request for a meeting. Article IV mandates a prompt meeting upon request of the General Chairman, i.e., "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". (Emphasis provided). A determination of what is prompt is not susceptible to rigid and immutable guidelines but necessarily must vary with the facts and circumstances of each case. On the record before us in the instant case, however we find that even if, arguendo, a meeting was afforded on March 10, 1971, such delay would constitute a violation of the prompt meeting requirement of Article IV. Accordingly, irrespective of the testimonial conflict, we are persuaded that under either contention Carrier violated Article IV of the May 17, 1968 National Agreement. We will sustain Claim (2).

The third claim herein requests monetary damages for the alleged breaches of agreements. We are aware of the divergence of awards on this difficult and often enigmatic problem as it relates to Article IV. As we have stated on prior occassions, we are loathe to treat contractual violations by simple reprimand. Nonetheless, this Board is not empowered to add to, subtract from or alter existing agreements. In regard to damages, the record herein shows no provision of the Agreement which specifies monetary relief for breach of Article IV; and, no proven loss of earnings or work opportunity. In these circumstances we are constrained to deny the compensation requested in Claim (3). (See, eg, Awards 19657, 19574, 19399, 19254, 19056, 18687, 18305).

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.

A W A R D

Part (1) of the claim is denied.

Part (2) of the claim is sustained.

Part (3) of the claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A W Paulus
Executive Secretary

Dated at Chicago, Illinois, this 14th day of December 1973.