

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 20275
Docket Number **MW-20082**

Dana E. **Eischen**, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(**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 repair the roof on Pier **12** (System Files **700-5, 700-19, 700-23, 700-57, 700-66**).

(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) C&M Foreman C. **Moore**, Assistant Foreman C. **Mlcak**, Mechanics T. E. Curtis, J. Meyer, Jr. and P. **Fontono** each be allowed fifty-six (56) hours of pay at their respective time and one-half rates for October 17, 18, 24, November 7, 8, 21 and 22, 1970 because of the aforesaid violation.

OPINION OF BOARD: This claim **is** grounded in part upon Petitioner's assertion that Carrier violated the Scope, and Hours Paid For, provisions of the Agreement between the parties when it used employes of an outside contractor to repair the roof on Pier 12 located at its facilities in Galveston, Texas. It is undisputed that employes of the outside contractor performed repair of the roof from mid-October to mid-November, 1970. The pertinent provisions of the Agreement read as follows:

"ARTICLE **1.**, SCOPE

Rule 1. The **rules** contained herein shall govern the hours of **service**, working conditions and rates of pay of all employes in any and all sub-departments of the Construction and Maintenance Department represented by the Brotherhood of Maintenance of Way Employee. This agreement shall not apply to the following:

1. Construction and Maintenance Supervisors or other comparable supervisory officers and those of higher rank.
2. Clerical, office and civil engineering forces.

"3. Electrical Department employees as now constituted."

Article 14 of the above-mentioned Agreement reads as follows:

"ARTICLE 14., HOURS PAID FOR

Rule 1. **Except** by mutual agreement between the management and employes' representative; hours of work of employes shall not be reduced in order to permit company to employ those not members of organization represented or to let by contract work of maintenance, construction or demolishing."

In order to sustain its position on the merits of its claim, Petitioner must demonstrate that the Agreement clearly reserves unto it an exclusive right to the work complained of; or in the absence of such Agreement reservation, probative evidence that custom, practice and tradition have reserved such work to it exclusively. (Awards 18471, 19032, 19421, 19516, 19576, et al.) In this context, the provision of the Agreement **primarily relied** upon by Petitioner is a general Scope rule. No exclusive reservation of work is found in this rule. Accordingly, Petitioner must demonstrate such reservation by force of custom and past practice. In this connection, Petitioner has shown that similar work was being performed by Carrier's **M** of **W** employes on Pier 11 at the time that the contractor **was** repairing Pier **12**. This evidence is probative but not determinative of the issue of exclusive practice. **On** this point the record is more compellingly persuasive that roof repairs in the past have been systematically and regularly subcontracted to outside roofing contractors by Carrier. Accordingly, we must conclude that Petitioner has not met the burden of proof requisite to claim the work is exclusively reserved to it.

In asserting Agreement violations, Petitioner also relies on the prohibition against unilateral reduction in hours of work for reasons listed in Rule 1 of Article 14. **On** the record before us we are not persuaded that employes' hours of work were reduced as a result of the roof repair subcontracting. **Moreover**, to whatever **extent** this Article 14 agreement is premised upon the claim of exclusivity dealt with supra, it similarly must fail.

Petitioner also alleges an independent violation of the procedural requirements of Article IV of the National Agreement of **May 17, 1968**. The record shows and Carrier admits that no advance written notice of its intention to contract the roof repair work was provided the General **Chairman**. A clear violation of Article IV is **thereby** shown.

Finally, Petitioner requests monetary damages for the alleged breaches of agreement. On this point we must advert to our recent Award 20071 (**Eischen**) involving the **same** parties and essentially the same issue:

'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 occasions, 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, **e.g., 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 **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.

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:


Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1974.