RATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20656

THIRD DIVISION Docket Number MW-20664

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Chicago, Rock Island and Pacific Railroad Company

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

(1) The Carrier violated the Agreement when it assigned the work of rebuilding right-of-way fence between M.P. 516 Pole 10 and M.P. 516 Pole 28 to outside forces (System File 9-W-196/L-126-1439).

(2) The Carrier further violated the Agreement when it did not give the General Chairman prior notification of its plan to assign said fencing work to outside forces.

(3) Foreman A. R. Funk, Trackmen E. E. Grubbs, W. W. Defoor, 0. Morris, A. C. Greer and J. W. Lorentz each be allowed pay at their respective straight-time rates for an equal proportionate share of the one hundred twenty (120) man hours consumed by outside forces in performing the work referred to in Part (1) hereof.

OPINION OF BOARD: Carrier permitted a landowner (farmer) to repair and reconstruct a right-of-way fence which was contiguous with his property and Carrier's right-of-way. The fencing material was paid for by Carrier, but the hauling and actual labor was performed by the landowner.

The Organization urges a violation of its Scope Rule, and Section 13 of the June 2, 1955 Memorandum of Agreement.

The Scope Rule makes reference to "Fence Gang Foremen" and "Fence Gang Laborers." However, the wording of the entire rule does not suggest to us that the rule is specific in nature. The same conclusion was stated (concerning these parties) in Award No. 11791. In order to prevail under a general Scope Rule, Claimant must establish "exclusivity" as that term has been defined by this Board. Claimants have not demonstrated, by a preponderance of evidence, that they have performed the work in question on an exclusive basis. Thus, Claim (1) will be dismissed for failure of proof.

Section 13 of the June 2, 1955 Memorandum of Agreement states:

> "The parties agree that if the Carrier is faced with conditions and circumstances which present difficulty of any nature in the use of Maintenance of Way forces on a

"specific project, the designated representative of the Organization will be notified, a conference will be held, and the parties will cooperate to devise ways and means of resolving the dispute."

Carrier states that Claimant may not prevail under Section 13 because of the lack of a showing of "exclusivity" and argues that Awards dealing with Article IV of the May 17, 1968 National Agreement are not pertinent to this dispute.

It is established that when Article IV was negotiated, it contained a provision which allowed a retention of existing rules rather than incorporating Article IV, and the Organization elected to retain the June 22, 1955 Agreement. Thus, the Carrier states that having made the election, Petitioner may not now take advantage of interpretations of Article IV holding the exclusivity doctrine to be inapplicable.

We do not concur with Carrier's conclusion. It is obvious that Section 13 and Article IV speak to the same basic subject matter, as is evidenced by the option to retain prior rules. While Article IV may be more detailed, both Agreements require notification, conference and cooperation. It is well established that an Organization is not required to show that work has been performed exlusively, in order to prove a violation of Article IV, as long as the work is within the scope of the Agreement. See Award 19899 and Awards cited herein.

In this case, regardless of the concept of exclusivity, the work in question is contained in the scope of the Agreement. There was no notification or conference. Thus, we feel that Section 13 was violated.

Carrier suggests that the dispute should not have been presented to this Board because of Section 14:

"Upon compliance with Item 13 and assuming the Carrier will administer its part of this Agreement in harmony with the statements made in the Preamble hereof, the Organization agrees that it will not progress beyond the property any claims for work which the Carrier may contract....".

Section 14 does not control. It cannot be argued that Carrier complied with Item 13 when it failed to give notice and confer when faced with ". ..conditions and circumstances which present difficulty....". Carrier's admission that it could not comply with State Laws with existing forces if landowners did not construct fences, would surely appear to require recourse to Section 13. While it may well be true that Carrier could have avoided a monetary penalty, by virtue of Section 14, it was required to comply with Section 13 in order to enjoy said avoidance.

Finally, we consider the monetary claim. It is well established that "full employment" does not deter an award of damages, and that concept is equally applicable when the violation deals with a failure to give notice of contracting-out work because of the "lack of work opportunity" concept. See Award 19899.

The Organization submitted a claim for 120 hours on behalf of certain employees, for all man hours consumed by the farmer in performing the work. The basis for that claim is not explained. However, on the property, Carrier failed to dispute the specific number of hours involved, but did concede that the labor was performed between November 1 and November 15. In Award 19899, we specifically stated that the Board would not entertain speculative claims which were not advanced and/or developed on the property. However, because Carrier failed to dispute (on the property) that 120 hours were reasonably required to perform the labor involved, we are inclined to sustain the Claim (3).

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

Claim (1) is dismissed for failure of proof.

Claim (2) is sustained.

Claim (3) is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 21st day of March 1975.