

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23203
Docket Number MW-23172

Rodney E. Dennis, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
(The Denver and Rio Grande Western Railroad Company

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

(1) The Carrier violated Article IV of the National Agreement of May 17, 1968 when, on March 1978 without giving the General Chairman of the Organization advance written notice, it contracted work coming within the scope of our Agreement to an outside construction company (System File D-8-78/MW-22-78).

(2) The claimants* listed below each be allowed an equal proportionate share of the straight time and overtime worked by the employees of the Lowdermilk Construction Company to compensate them for the violation referred to in Part (1) hereof.

*Adams, C. R.
Anderson, T. C.
Baggett, J. C.
Bevill, E. R.
Bland, R. F.
Bolton, D.
Bolton, F.
Bowers, G. L.
Burke, M. D.
Carlson, J. R.
Caviness, T. L.
Crespin, S.
Crook, J. W.
Crowe, S. E.
Delmonico, D. J.
Drake, D. L.
Ebaugh, L. E.
Gifford, R. L.
Graves, W. A.
Grinde, D. W.
Grishman, B.
Gulliford, W. F.
Haynie, W. C.
Iacovetto, C. R.
Inglis, J. E.
Ingraham, G. T.

Jiminez, R.
Johnson, T.
Kendrick, W. D.
Larsen, S. P.
Lein, J.
Lopez, L. J.
Maestes, J.
Magee, T. R.
Martinez, R. C.
Matlock, J. I.
Matthews, A. T.
McCreight, D. S.
Meitzler, T. C.
Moore, L. D.
Murray, B.
Pennington, S. W.
Phillips, B. Jr.
Phillips, R. C.
Poorman, D. C.
Ratliff, O.
Rich, R. A.
Ross, E. M.
Rowe, G. B.
Smith, W.
Thompson, D.
Webber, E. D.

"Webber, J. E.	Wright, M. T.
Webber, J. J.	Wright, W. E.
Whaley, J. L.	Wyckoff, R. D."
Williams, C. G.	
Wiswell, J. L.	

OPINION OF BOARD: The organization has filed a claim on behalf of sixty members of the Brotherhood who are employed by carrier in the Maintenance of Way Department. The organization alleges that carrier violated Article IV of the May 17, 1968, National Agreement when it failed to notify the general chairman that it intended to contract out clearing and grading work 15 days prior to the time it contracted out the work to the H. E. Lowdermilk Company.

On March 7, 1978, a rock and mud slide caused a derailment at Webster Hill cut. Carrier contracted with the H. E. Lowdermilk Company to clear the slide. At the conclusion of this clearing work on March 9, 1978, carrier concluded that a hazardous condition still existed and that further slides were imminent. It therefore retained H. E. Lowdermilk Company from March 9, 1978, to March 23, 1978, to finish the ditching and sloping of the area.

Carrier contends that an emergency existed, that it informed the general chairman as soon as it could, that it did not have the necessary equipment to do the work required, and that, in the final analysis, the work was not exclusively reserved to claimants under the agreement. Carrier maintains it had the right to subcontract the work without conferring with the general chairman. It also argues that all carrier maintenance of way employees were assigned to other jobs. All were fully employed and no one lost any pay because of the subcontract.

The organization contends that after the train was rerailed and the tracks cleared from the initial mud slide, the emergency was over. The organization argues that on March 9, 1978, the emergency had ended and all work performed by the contractor between March 9, 1978, and March 23, 1978, was work that could have and should have been performed by carrier employees. It argues that carrier does possess the necessary equipment to do the required work and that carrier employees have the necessary skills and were available to perform the job.

After a thorough review of the record and discussion thereof, this Board finds that the work performed by the contractor was work properly belonging to carrier employees. Once the emergency was over on March 9, 1978, carrier should have conferred with the general chairman prior to continuing

with the project. The organization should have been given its contractual right to discuss such projects with carrier and offered an opportunity for the general chairman to secure the work for his members.

Carrier argues that the organization did not have exclusive rights to the work in question and therefore it need not confer with the general chairman. This Board has addressed the exclusivity issue in previous awards and has rejected the argument that the organization must prove exclusivity prior to carrier being required to give notice under Article IV (Third Division Award No. 19574, Lieberman).

In the instant case, carrier notified the general chairman of the subcontract by letter after the contract had been given to an outside contractor. The Board finds it difficult to consider this to be proper notice under Article IV. Carrier asserted that it did so because it considered that an emergency still existed and it needed to get the work done promptly. The record is barren of any evidence to support the notion that an emergency occurred after the rock and mud was cleared from the track. Carrier states that it did and the organization states that it did not. Carrier has more of a burden when it offers a positive defense. Some evidence must be presented. None is apparent in the record. Based on the foregoing, this Board will sustain item one of the claim.

In item two, the organization requested that a list of 60 men share equally the straight time and overtime worked by employees of the subcontractor. This Board has a great deal of difficulty in justifying such a claim based on the record before us. The Board is mindful of the fact that an award that declares carrier in violation of the agreement and then does not compensate claimant is, in a real sense, a shallow victory. The difficulty, however, is that the record is barren of sufficient facts on which this Board can base a monetary award to be divided among 60 men.

However, the Board does find that Carrier did have certain equipment that was used during the period March 7-9 but was then removed and held in reserve. Carrier, in its November 17, 1978 denial by the Director Personnel, states:

"The D-8 cats which you refer to are all specially equipped for wreck and derailment work and when not engaged in such work are strategically located at various points on the Carrier's main lines, kept poised and ready to move to the scene of wrecks or derailments as quickly as possible when and if needed."

Obviously, if the equipment was needed during the emergency of March 7-9, it was also needed during the subsequent emergency situation. To assert that there was no available equipment while admitting that equipment was kept idle does not support the Carrier's contention of lack of necessary equipment. Carrier can't have it both ways. Thus, the Carrier should have continued to use the two D-8 Caterpillar dozers and the operators used to rerail the train and clear the main line after the slide. Clearly this equipment could have been continued in use.

The Board is bound by its many previous awards on the issue of employees being compensated for Article IV violations on the basis of actual losses only. We, therefore, will award the two D-8 Caterpillar operators overtime at two hours per day, Monday through Friday, plus 10 hours for each Saturday and Sunday worked by the construction crew from March 9, 1978, to March 23, 1978 (Third Division Award 19619, Blackwell).

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

Claim sustained in accordance with the Opinion.



NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 16th day of March 1981.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 to AWARD 23203

DOCKET NO. MW-23172

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employees

NAME OF CARRIER: The Denver and Rio Grande Western Railroad Company

Upon application of the representative of the Employees involved in the above Award, that this Division interpret the same in light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (M), of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

A dispute arose between the parties as to the meaning and intent of our decision wherein we stated that the claim is sustained per opinion of the Board. The pertinent language of the opinion is as follows:

"We, therefore, will award the two D-8 Caterpillar Operators overtime at two hours per day, Monday through Friday, plus 10 hours for each Saturday and Sunday worked by the construction crew from March 9, 1978 to March 23, 1978."

It was the intent of the Board when this Award was rendered that all payments to Claimants would be on a time-and-one-half basis. Referee Rodney E. Dennis, who sat with the Division as a neutral member when Award No. 23203 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 10th day of March 1982.