NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23354
Docket Number MW-23190

Rodney E. Dennis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Milwaukee-Kansas City Southern Joint Agency

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

(1) The Carrier violated the Agreement when it assigned work of the Maintenance of Way and Structures Department 'on the new Coal Main Line' to outside forces July 17 through August 2, 1978 /Carrier's File 013.31-197 (1)/.

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

(3) As a consequence of the aforesaid violation, Crane Operators T. J. Evans and S. Terrazas each be allowed pay at the crane operator's straight time rate for an equal proportionate share of the one hundred four (104) man-hours expanded by outside forces."

OPINION OF BOARD: The Organization contends that Carrier subcontracted work to an outside firm (utilization of a 15-ton crane on a rail-laying job) in violation of Article IV of the May 17, 1968 Agreement. It also contends that Carrier failed to notify the General Chairman of its intent, as required by Article IV. The Organization asks that two crane operators be paid an equal share at straight-time rates for the 104 man-hours required of the outside contractor.

Carrier argues that it needed a 15-ton crane to lift the rail sections that were being installed; it did not have such a crane. It also maintains that the work in question (the installation of new track) was not exclusively reserved to unit members and that its failure to give 15-day notice of its intent to hire a crane to assist the track crew was in no way a contract violation.

At dispute here is the issue of whether Carrier has violated the Schedule Agreement or the May 17, 1968 National Agreement by its actions in this case and, if so, if this violation is of a nature that claimants should be paid their claim as submitted.

It is the opinion of this Board that Carrier has violated Article IV of the May 17, 1968 National Agreement by failing to notify the General Chairman in writing of its intent to utilize a crane from outside to lift the rail sections being installed.

Article IV clearly requires Carrier to notify the General Chairman in writing at least 15 days in advance of the date it contemplates a subcontract for work done by covered employes. This notification must take place when Carrier contemplates using outside forces to perform work normally reserved to Carrier employes.

For Carrier to ignore this requirement and move ahead with a subcontract because it either thinks that the work to be performed by the outsider is not work exclusively reserved to covered employes or claims it does not have the proper equipment is unacceptable. In the final analysis, the General Chairman, after receiving notification, may agree with Carrier as to the need to subcontract, but he must be given the chance to discuss the matter first. Proper notification under Article IV is a prerequisite.

In its submission to this Board, Carrier raised the argument that the work in question was not work exclusively reserved to the Organization. That argument was not brought up on the property, and therefore cannot be raised for the first time before the Board. Consequently, the issue will not be considered here.

Given this Board's decision that Carrier did violate Article IV of the 1968 Agreement, it remains to address the Organization's claim for compensation for two crane operators. While the Board is mindful of the hollowness of a sustaining award wherein no remedy is granted, a special situation exists in Article IV cases when all employes are fully employed. This issue has been addressed in a long list of awards by this Board and that list need not be recited again. This Board will rely in this case on the rationale it used in Award No. 21646 (Referee Ables) and deny the claim for compensation.

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 Carrier has violated Article IV of the May 17, 1968 -National Agreement.

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 14th day of August 1981.