

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23402
Docket Number MW-23242

Martin F. Scheinman, 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 the Agreement when, without prior notice to the General Chairman as required by Article IV of May 17, 1968 National Agreement, it assigned the carpentry and repair work of the Carrier's house at Helper, Utah to outside forces starting January 17, 1978 and continuing through March 30, 1978 (System File D-22-78/MW-28-78).

(2) B&B Gang #6331 employes B. P. Evans, R. C. Cesarlo, A. C. Lunelli and R. V. McKendrick each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man-hours expended by outside forces in performing the work referred to in Part (1) hereof."

OPINION OF BOARD: Prior to January 17, 1978, a fire seriously damaged the trainmaster's house at Helper, Utah. The building was a Carrier-owned house located some distance from the yard or main line of Carrier. As a result of the fire, Carrier contracted out the repair of the house. The Organization was informed of Carrier's decision in a letter dated January 17, 1978. It stated:

"Ben Ochca, Gen. Chm.
Brotherhood of Maintenance Way
4236 Tennyson Street
Denver, Colorado 80212

Dear Sir:

Due to a fire which severely damaged the trainmaster's house at Helper, Utah, it is Carrier's intention to contract out the repairs to this house.

These repairs will not only include carpentry work but also electrical and plumbing repairs.

I am informed that at the present time all Utah Divn. B&B employes are employed and it is not possible to divert them to perform these repairs.

Yours truly,
/s/ J. W. Lovett
Director of Personnel"

The Organization claims that the carpentry work referred to in the letter fell under the Scope Rule. Therefore, it argued that the work properly belonged to its membership. It also argues that Carrier violated Article IV, Contracting Out, by failing to give the General Chairman advance written notice of its plan to contract out the work.

Claimants members of B&B Gang #6331 hold seniority in their respective classes within the Bridge and Building Subdepartment. According to the Employees, Claimants are fully qualified to perform all the carpentry work involved in repairing the house. The Organization asserts that Claimants, B. P. Evans, R. C. Cesario, A. C. Lunelli and R. V. McKendrick each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man-hours expended by the outside forces.

Carrier, on the other hand, insists that it did not violate the Agreement. First, Carrier asserts that the disputed work is not the exclusive work of the Employees under the Agreement. Second, since it argues that work is not within the Scope rule, it urges that Article IV is not material. Third, Carrier maintains that even if Article IV did apply, the notice requirement should be excused because of the unexpected nature of the work. Fourth, Carrier insists that since Claimants were all employed and working elsewhere at the time, that they are not proper Claimants. Certain procedural arguments were also raised.

To begin with, it appears clear that the work in question falls within the coverage of Rules 1 and 2. Clearly, whether this work has traditionally been performed by the Employees or has, in fact, been contracted out, the fact remains that the character of work performed is encompassed within the scope of the May 17, 1968 National Agreement which sets forth Carrier's obligations before it may contract work within the scope of the applicable schedule agreement. St. states:

"ARTICLE IV

contracting out

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 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 representatives 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."

Thus, it is **clear that Article IV** requires advance notice be given to the **General** Chairman at least **15 days** before contracting outwork covered by the scope. **Carrier** is required to give such notice **in** order to allow the Organization the **opportunity** of reaching an understanding with **Carrier** relative to contracting out. **Each side is** to be **provided** sufficient opportunity to explain the reason for their respective positions. The provision **is** intended to encourage the free exchange of **information - prior to the decision to contract out** - so as to diminish the **possibility** for **conflict and** misunderstanding.

Here, it **is** unrefuted that Carrier failed to provide **15 days** advance **written notice** to the **General Chairman**. In fact, it is **generally** clear that **notice** of the contracting out was not given in writing until months after the work was being performed by the contractor. **This constitutes a violation** of the express **terms** of Article IV.

Carrier's explanations for not provided notice are not convincing. **They** cannot be perceived as mitigation in any sense of the word. See PLB No. 249, Award 16 and Awards 19552, 19635 and 20158. As such, we must conclude **that Carrier's** action violated the express terms of Article IV.

The **Employee** argued that **Claimants** are **entitled to receive** straight time rates for **an equal proportionate** straight time rates as a result of Carrier's violation of Article IV. **This** contention must be rejected. This **Board** has generally held that full employment precludes compensation for an Article IV violation, unless overtime has been worked by the contractor's forces. See Awards 18305, 19155, 19399 and 19948. Given these prior Awards, Claimants are entitled to **no compensation here**.

Finally, we have examined in detail the procedural **arguments** presented by Carrier. We **find** that those assertions are without merit.

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;

Award Number 23402
Docket Number MW-23242

Page 4

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 G-pinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **Third** Division

ATTEST: *A. W. Paulsen*
Executive Secretary

Dated at Chicago, **Illinois**, this 6th day of October 1981.

