NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23928

THIRD DIVISION Docket Number MW-23862

Carlton R. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Terminal Railroad Association or st. Louis

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

(1) The Carrier violated the Agreement when it assigned the work of completing construction and/or erection of a pole barn at Madison, Illinois to outside forces beginning April 26, 1979 (system File TRRA 1979-33/013-293-16).

(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 or its intention to contract said work.

(3) As a consequence of the aforesaid violation, B&B Gang Leaders 0. Guion and L. V. Gann and B&B Mechanics D. M. Morton, E. R. Harper, F. Lloyd, D. F. Ullrich, T. Holmes, J. Roberds, R. J. Harris, W. E. Jackson, A. Themes and R. Scott each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside forces."

OPINION OF BOARD: There is no disagreement between the parties that the Carrier contracted out work in connection with the constructionofa pole-barnwithout flrst notifying the Organization in writing of its intention to do so not less than 15 days prior to the contracting transaction as is required in Article IV (contracting out).

The specific provision provides as follows:

> "In the event acarrier 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 practical and in any event not less than 15 days prior thereto."

In the instant matter, the erection of the pole-barn was started on March 15, 1979 by the carrier with its own employees. On April 10, 1979 part of the structure collapsed and three of the employees were injured.

The Carrier alleges that the General Chairman was notified in a telephone conversation on April 11, 1979 of its intent to contract out the work. The Organization denies that the phone conversation did

any more than notify the Organization of the accident with a further discussion of what might happen. The Carrier also indicatesa meeting was held to discuss the matter eight days prior to the contractors beginning work.

It is noted that the requirement is that notice be made in writing no less than 15 days prior to the contracting transaction. The Carrier indicated that the reason it did not give the written notice is because it did not want to delay its actions. One must, therefore, assume that the contracting transaction, namely the execution ofacontract with the outside construction firm, occurred prior to the date of the alleged meeting. There is uoreferenceto the alleged meeting by the Organization on the record nor is it alleged that it was a conference as is contemplated in Article IV which could have been requested by the Organization.

The awards cited to this Board support the proposition that Article IV does require notice to the Organization or Article IV has been violated. In this matter the Carrier is making the distinction between an oral notification and a written notification. This Board need not cite the long line of awards which have upheld that the requirement in au agreement that a notice be in writing will be strictly adhered to. We find, therefore, that the Carrier violated Article IV by not notifying the Organization in writing of its Intention to contract out the work involved.

From here on the awards differ. Many support the proposition that even with such a violation or Article IV a claimant will not succeed unless there is a showing of actual loss of pay on the claimant's part. The opposing line or cases allege that to limit damages only in such actual losses situations would in effect give aCarrier license to ignore the sub-contracting out provisions of an agreement because of the absence of actual loss and payment in a matter such as this.

In attempt to reconcile these two opposing views, Award21646 resulted' in the conclusion that each case must be considered on its merits taking into consideration such factors as intent or motive on the part of the Carrier.

We have gone through the exercise of attempting to determine motivation or intent on the part of theCarrier. It is a tortuous subjective consideration. While it my indeed have its application in other aspects of this Board's activity, to apply it in the instant matter only adds a new element of uncertainty in the relationship or the parties. We are of the opinion that it would serve a better purpose in the long run to make a decision which clearly provides a guideline for the parties in the future and with that in mind, we have reviewed the awards on both sides of the issue of the requirement of actual losses prior to the awarding or damages. We have concluded that there is no prohibition from awarding damages when there were not actual losses of pay. We also find, that in order to provide for enforcement of the agreement and in particular this provisionthatthe only way it can be effectively enforced is if a claimant or claimants be awarded damages even though there are no actual losses in an Instant matter. To do otherwise would authorize the ignoring of this provision by the Carrier. We are aware that the application of this principle may cause a harsh result in some Instances. The Carrier may feel that this is so in this instance, however, bad cases can produce bad law. If we were to attempt to inject the principle of the intention of the parties in this type of matter in order to relieve the Carrier, we would only encourage

the ignoring of this provision and encourage the establishment of lengthy records showing the motivation that led to the violation of the provision of the agreement. We will, therefore, find for the claimants, to the extent that they shall each receive compensation for an equal proportionate share of the number of hours contracted out by the Carrier.

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 sustained.

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 30th day of June 1982.