NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24236
THIRD DIVISION Docket Number MW-23751

Carlton R. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(St. Louis-San Francisco Railway Company

OPINION OF BOARD: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned Bridge and Building Subdepartment work at Fort Scott, Kansas to outside forces during April, 1979 (System File B-760/D-9924).

(2) The Carrier also violated Article 12, Rule 99 when the above-mentioned work was assigned to outside forces without prior notice to or consultation and agreement with the General Chairman.

(3) As a consequence of the aforesaid violations, B&B Mechanics E. J. Adamson and G. P. Simmons each be allowed forty (40) hours of pay at their respective rates."

OPINION OF BOARD: The Claimant alleges a violation of Rule 99, "Contracting Out", which reads in part as follows:

> "(a) In the event the Carrier plans to contract out work within the scope of the applicable schedule agreement, the Carrier shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen days prior thereto."

The specific facts allege the failure to utilize two maintenance of way employes in the building and hanging of four bulletin boards and the construction of two wooden frames which were not hung.

The Carrier did not provide written notice to the General Chairman pursuant to the terms of Rule 99 prior to contracting out this work. The Carrier alleges that this was not necessary because the work in question was not within the scope of the agreement, particularly because the scope clause is general in nature and non-specific. It further points out that in order to determine exclusivity, it is necessary to prove that the work has been traditionally and historically performed by the particular employes.

With respect to this latter contention, we do not feel that it is applicable here because the Awards have held that it is not necessary that the work performed be established as the exclusive jurisdiction of the employes involved, but rather that work may be performed within the scope of an agreement even if not necessarily the exclusive work of the employes involved. For that reason, it is unnecessary in this instance to determine that the preparation

and hanging of bulletin boards is within the exclusive jurisdiction of the Organization. It is apparent that it is within the scope of the Agreement because the employes involved were, in fact, actually performing this function for the Carrier at the time that the work involved here was being performed by others.

For these reasons, it is the conclusion of this Board that the Carrier did, in fact, have the obligation to notify the General Chairman prior to the contracting out, which it did not do. Numerous Awards have been cited by the Carrier to indicate that this is an example of a wrong for which there is no remedy. We are aware that there have been different conclusions reached with respect to this issue within this Third Division. However, we are aware of Award 19899 which involved a dispute between the same parties and which considered the same subject matter. In that instance, the Award did provide for the payment of hours lost at the straight-time rate. We are prepared to do so here.

The question at issue then is the number of hours which are involved. The original claim was for eighty hours' pay for each of the two Claimants. In the early consideration of this matter on the property, a representative of the Carrier alleged that the actual work by two people was for two hours. In the subsequent proceedings on the property, the Carrier indicated that the number of hours would be substantially less than 160 hours, but did admit that it would involve more than two hours. Subsequently, the Claimants revised their claim to forty hours each rather than the original claim of eighty hours each since the Organization had been informed that the actual amount of time used in performing this work by the outside contracting forces was a total of eighty hours. This Board finds that there is sufficient evidence on the property that the number of hours involved is forty hours each for each of the Claimants because there was a total of eighty hours involved by the outside contracting force to complete the task, which fact was not sufficiently denied by the Carrier. For that reason, we will support the claim for forty hours for each Claimant.

The issue was raised that similar claims had been initially processed by the Organization but had been discontinued with the inference that this, therefore, indicates that the Organization accepted the principle that it was not required for the Carrier to follow the provisions of Rule 99. This Board does not find the lack of such action on the part of the Organization to further those referenced claims has any impact on the decisions rendered on this matter which are based upon the facts herein.

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 14th day of March 1983.

DISSENT OF CARRIER MEMBERS
TO
AWARD 24236, DOCKET MW-23751
(Referee Carlton Sickles)

It is self-evident that the Majority in this matter exceeded the parameters of the contract in concluding that the absence of a notice to the Employees required that a penalty must follow. Many Awards were submitted indicating that the weight of determinations in identical situations was that no penalty accrues. Third Division Awards 18305, 20275, 20071. Note also recent Third Division Awards 23560, 23578, 23354, 23402 on this point.

Further reliance upon Award 19899 is without contract support as was pointed out in the dissent filed in that case which is incorporated herein.

P. V. Varga

W. F. Euker

D. M. Lefkow

J. E. Mason

J. R. O'Connell