

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26182

Docket Number MW-26300

Charlotte Gold, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation

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

1. The Carrier violated the Agreement when it assigned outside forces to load bridge spans at the South Altoona, Pennsylvania Material Yard between August 24 and September 2, 1983 (System Dockets CR-584 and CR-585).
2. The Carrier also violated the 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 violations, Vehicle Operator R. W. Wilson and Class I Machine Operator J. A. McMahon shall each be allowed thirty-two (32) hours of pay at their respective straight time rates."

OPINION OF BOARD: Between August 24 and September 2, 1983, bridge spans were loaded at the South Altoona Material Yard by an outside Contractor using a thirty-ton Hydraulic Crane and trucks. The Organization maintains that Carrier violated the Agreement by assigning this work to outside forces and by failing to give the General Chairman advance written notice of its intent to contract out. The Organization alleged that Claimants were fully qualified and available to perform the work.

In support of its position, the Organization argues that the Scope Rule refers to construction, maintenance, and repair of road beds as Maintenance of Way work. Rule 1 (Seniority Classes) stipulates that Machine Operators Classes 2 and 3 will perform the work of operating machines, including cranes, while vehicle operators will operate highway or rail-highway vehicles. Further, the Organization disputes Carrier's allegation that it supplied a written Notice and claims that Carrier failed to inform the General Chairman of its intent in writing fifteen days prior to the contracting transaction. Carrier believes that the work was performed in accordance with the March 16, 1977 Agreement concerning the use of Contractors and equipment, but the Organization insists that that Agreement was no longer in effect. Were that Agreement in effect, Carrier would have had to make every reasonable effort to rent construction equipment, which it did not. Finally, in arguing that the South Altoona Material Distribution Center is part of Altoona Shops and thereby exempt from the provisions of the Scope Rule, Carrier has failed to provide any evidence to support that contention.

In its Submission, Carrier argues that the work in question did not accrue to BMWWE represented employees by past practice, custom, tradition, or Agreement provision and that therefore Carrier was under no contractual obligation to notify the BMWWE General Chairman of its intent to contract out. Carrier points specifically to the Scope Rule of the parties' Agreement that states that "These rules shall be the agreement between the Consolidated Rail Corporation (excluding Altoona Shops) and its employees of the classification herein set forth represented by the Brotherhood of Maintenance of Way Employees" It contends that the work performed within the confines of the Altoona Shops seniority district belongs to M of E Shop Craft employees. Carrier further maintains that were the Board to find merit in the Organization's Claim, Claimants would not be entitled to compensation, since they were on duty and under pay.

In reviewing this case, the Board notes that in the course of discussions and correspondence on the property, Carrier alleged that it had properly notified the General Chairman of its intent to contract out the work of loading bridge spans. A copy of that notice, which the Organization maintains it never received, was included in the record. This Board has no basis for disputing the validity of that document, despite the fact that the Organization was unable to locate it in its file. We view that document as a tacit acknowledgment by Carrier that the loading work did accrue to employees represented by the BMWWE.

At the same time, however, we find that the notice was dated August 22, 1983, two days prior to the time that the subcontracting was to take place. The Scope Rule of the parties' Agreement states that:

"In the event the Company plans to contract out work within the Scope of this Agreement, except in emergencies, the Company shall notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. 'Emergencies' applies to fires, floods, heavy snow and like circumstances."

No mention was made in the record of the existence of an emergency in this situation that would cause Carrier to be unable to meet the time requirement for notification to the General Chairman outlined in this Rule. As a consequence, we must conclude that while Carrier did comply with Agreement in providing notice to the Organization, it did not do so in a timely manner (that is more than fifteen days prior to the intended subcontracting).

Carrier has pointed out that Claimants were on duty and under pay and therefore not entitled to compensation. This Board must agree. It is a well accepted principle in the industry that compensation must be denied where all affected employees are fully employed and suffer no loss. As we noted in Third Division Award No. 26174, involving the Organization and a different

Carrier, however, there is merit "to the Organization's contention that flagrant and continued disregard of a Carrier's responsibility to provide proper notification should result in the sustaining of a monetary Claim. It is an argument that warrants attention and we will continue to consider it in the future."

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:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of November 1986.