Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 26762
THIRD DIVISION Docket No. Ml-26340
88-3-85-3-60

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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 it assigned track alignment and grading work at Colton, Utah to outside forces on Augsut (sic) 19, 24, and 25, 1983 (System File D-46-83).

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 violations, Machine Operator F. Ward shall be compensated for the straight time and overtime man-hours expended by outside forces at his appropriate rate beginning August 19, 1983 and continuing until the violation is discontinued."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On August 19, 24 and 25, 1983, Carrier used outside forces to prepare the subgrade for a second main track at Colton, Utah. Claimant was available, qualified, and willing to perform the work involved. The Organization thereafter filed a Claim on Claimant's behalf, challenging Carrier's use of outside forces to perform the disputed work.

The Organization contends that the disputed work is included within the scope of the Agreement; the work belongs to the employees for whose benefit the contract was made. The Organization argues that it is fundamental that delegating such work to others who are not covered by the Agreement is a violation of the Agreement. The Agreement provides that each class of work coming within its scope shall be performed by employees holding seniority rights for that class; the Agreement encompasses the road equipment operator's class. The Organization points out that Carrier owns roadway machines, and these machines are regularly operated by its equipment operators to perform work similar to the disputed work.

The Organization also asserts that Article IV of the May 17, 1968, National Agreement clearly and unambiguously states that Carrier must give advance written notice to the General Chairman of any plans to contract out work that is within the scope of the Agreement; Carrier is estopped from contracting out work until it complies the requirements of this Rule. The Organization argues that Carrier's unilateral and arbitrary action in contracting out the disputed work, without first giving notice to and meeting with the General Chairman, violated Article IV. Carrier's failure to comply with Article IV requires payment of the instant Claim.

Carrier initially asserts that it did not violate any agreement Rules by contracting out the disputed work. Carrier argues that the cited Agreement Rules are general in nature; this Board has held that in a Claim under these Rules, the Organization must show system-wide practice establishing that the work has been exclusively performed by the employees. The Organization has not produced evidence that the disputed work is within the scope of the Agreement and has not proven that the work exclusively belongs to it on a system-wide basis.

Carrier further argues that the record establishes that it did give proper notice of its subcontracting plan; Carrier therefore did not violate Article IV. Moreover, Article IV is inapplicable to this dispute because there has been no showing that the disputed work is within the scope of the Agreement.

In rebuttal, the Organization contends that during the handling of this Claim on the property, Carrier never contended that it gave advance notice to the General Chairman in accordance with Article IV. The General Chairman, in fact, never received such notice as to the disputed work; Carrier did not dispute this during handltng on the property, but took the position that no notice was given because notice was not required. Moreover, the documents that Carrier cites to support this Claim were never made a part of the record, so these documents are not properly before this Board. The Organization also points out that this Board previously has reviewed the alleged letter of notice and found that it did not meet Article IV's requirements.

This Board has reviewed the record in this case, and we find that the Carrier never raised on the property the issue of having given advance notice to the Organization. The Carrier always took the position until the matter reached this Board that no notice was required and, therefore, no notice was given. Now, the Carrier has shifted its position by stating that it did give proper notice of its subcontracting plan. However, this Board must find that notice was insufficient.

This case is very similar to Third Division Award 25677 in which we found that the notice requirements are somewhat explicit and that no general blanket notice may be given in order to comply with the requirements of Article IV of the Agreement. In this case, it is evident that no specific notice was given. Moreover, the Carrier failed to raise the issue that notice was properly given when the matter was still on the property. Consequently, the Claim must be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 15th day of January 1988.