Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28475
THIRD DIVISION Docket No. MW-28296
90-3-87-3-845

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(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 outside forces to operate the rail welding plant in the Minneque Yard at Pueblo, Colorado beginning March 10, 1986 (System File D-86-13/MW-21-86).

(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 violations referred to in Parts (1) and/or (2) above, Welding Foreman J. J. Rivera, Work Equipment Operator Meitzler and Trackmen S. D. Maldonado, L. L. Archuleta, J. Roybal, M. Gutierrez, J. G. Allen, P. Maisel, D. M. Dremel, D. Guillen, R. A. Workman, W. K. Fleshman, K. D. Nelson, E. D. Tellin, T. B. Diaz, J. R. Garcia, D. M. Arguello, E. Baca, J. T. Roller, Jr., G. G. Carbajal, A. C. Fogani, F. R. Garcia, S. B. Espinoza, M. J. Walker, C. L. Orndorff, Jr., D. T. Proud and T. L. Workman shall each be compensated eight (8) hours at their respective straight time rates of pay Monday through Friday and they shall be compensated at the time and one-half rate of pay for all hours worked outside of regular assigned hours by the outside contractor beginning March 10, 1986 and continuing until the violation is corrected."

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 employes 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.

Prior to February 28, 1986, the Carrier operated a rail welding facility at Pueblo, Colorado, located in the Carrier's Minneque Yard. This facility was operated jointly with the Holland Company, a welded rail supplier, for the purpose of providing welded rail to the Carrier. The Carrier assigned four employees (one Foreman-Inspector, one Crane Operator and two Trackmen) to this work.

According to the Carrier, the Holland Company sought to expand the operation to provide welded rail to other Carriers. The Carrier asserts that if the Holland Company were able to expand the facility and assume the full operation, this would result in a substantial reduction of the Carrier's cost of welded rail, based on the Holland Company's ability to purchase rail in quantity and thus reduce the price.

In March 1986, when the production of welded rail was scheduled to resume after a period of inactivity, the Carrier assigned Claimant Meitzler to the crane and bulletined two Trackman's positions. When the Holland Company determined to use its own forces, rather than Carrier employees for the expanded operation, the bulletined assignments were cancelled and the Crane Operator was transferred to other equipment.

The Claim herein faults the Carrier in its assignment of other than Maintenance of Way employees to the work taken over by the Holland Company and for failure to notify the General Chairman on the change in operations as required by Article IV of the May 17, 1968 Agreement, which states in part as follows:

> "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."

The Carrier's defense is that there is no contracting out of work, but rather the Carrier contends that a lease exists between the Carrier and the Holland Company which, in effect, turns the full operation over to Holland and out of the control of the Carrier.

Previous Awards have dealt with the establishment of lease arrangements for a Carrier's property and/or operations, and in some instances the Carrier's position has been sustained as to failure to notify the General Chairman and to utilize Carrier forces.

In this instance, however, the Organization argues that the Carrier failed to meet its request to examine the reputed lease. The Carrier asserts that "In conference, the Carrier showed the Organization a copy of the lease agreement." Such lease was not shown or given to the Organization at an earlier and more appropriate time, and the Board is not given a copy of the lease or a summary of its terms.

Without knowing all the terms of the lease, the Organization understandably presses the issue of the Carrier's failure to advise the General Chairman under the cited portion of Article IV and the insistence on use of Carrier forces to continue the assignments which were previously theirs.

A similar situation arose in Third Division Award 20895, concerning an industrial customer which had allegedly leased trackage from the Carrier and then assigned track construction work to an outside contractor. This Award stated:

> "The Organization stated throughout the handling of this Claim, without denial, that the type of work involved in this dispute was embraced within its Agreement and had historically been performed by Track Department forces. Since Carrier's defense was based largely on the assertion that the right-of-way was leased to the Elevator Company, Petitioner requested that Carrier submit a copy of the lease to clarify the issue in dispute. The Organization argues that Carrier did not furnish a copy of the lease and by letter dated November 15, 1973 told the Organization that the lease had not been consummated as of the date of the conference. In addition, Carrier informed the Petitioner that it would not be agreeable to furnishing a copy of the contract. Petitioner argues that Carrier's omission of the lease was fatal to its defense, and since a prima facie case had been established, the Claim must be sustained.

> It is noted that Carrier with its rebuttal argument before this Board submitted a copy of a lease agreement with the Elevator Company dated April 13, 1973. Such evidence cannot be considered since it is well established doctrine that new evidence which was not presented during the handling of the dispute on the property may not be considered by this Board.
>
> ...we must find that the work of extending the trackage was work which should have been assigned to track forces since it occurred on Carrier's right-of-way and was work within the Agreement. Furthermore, Carrier did not give the notice required under the National Agreement. The question of damages was not raised by Carrier."

To similar effect is sustaining Third Division Award 19623, concerning the work of cleaning a drainage ditch. That Award stated:

> "While the Carrier asserted on the property that the work performed by the sub-contractor was performed on land granted to the State of Oregon, no probative evidence to sustain that allegation was introduced. A copy of the actual easement to the State of Oregon would have sufficed. Absent such proof this Board must find that the passing track is on operating property and the shoulder of the track and the drainage ditch is an integral part of the track and therefore the cleaning of spill material was in fact a necessary operation to the completion of the passing track, which is work within the scope of the Agreement. The Carrier's desire to contract out must conform to Rule 40."

As to the circumstances here under review, the Carrier's undertaking to follow the advance notice requirement of Article IV might well have avoided the consequences of this Claim. The Board must necessarily provide a sustaining award. However, based on the Carrier's previous work assignments, the remedy is limited to Claimants Rivera, Meitzler, Maldonado, and Archuleta.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of August 1990.