Award No. 18792
Docket No. MW-18676

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Melvin L. Rosenbloom, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when, without prior notice to General Chairman M. R. Martin as required by Article IV of the May 17, 1968 National Agreement, it contracted out the work of framing and erecting a Car Department building Tacoma, Washington. (System File D-1638/19-39).

(2) B&B Foreman, G. R. Webber and B&B Carpenters W. C. Grissom, T. H. Skaar, J. O. Guiterrez, M. E. Dearing each be allowed three hundred eighty-four (384) hours' pay at their respective straight time rates because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The claimants hold seniority in their respective ranks within the Bridge and Building Sub-department on the Coast Division.

The Carrier decided to construct a new prefabricated sheet metal building (CD-18), with concrete foundation and floor, at the Car Department at Tacoma, Washington. To this end, the Carrier entered into a contract with an outside concern for the performance of all work involved in the construction of the building, which is work included within the scope of the Agreement and reserved to employes of the Bridge and Building Sub-department by Rule 46, which, insofar as it is pertinent hereto, reads:

"(a) An employe who, in addition to his other duties, directs the work of men and reports to officials of the Railroad will be designated as a foreman.

* * * * *

(d) An employe assigned to constructing, repairing, maintaining or dismantling bridges, buildings or other structures (except

Letters written by Mr. L. W. Harrington, Vice President-Labor Relations, to Mr. Max R. Martin, General Chairman, under date of February 27, 1969 ..... Carrier's Exhibit "C"
" " "D"

Letter written by Mr. L. W. Harrington to Mr. Max R. Martin under date of April 3, 1969 ..... Carrier's Exhibit "E"

Letter written by Mr. L. W. Harrington to Mr. Max R. Martin under date of June 18, 1969 ..... Carrier's Exhibit "F"

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier contracted the following work to an outside contractor:

(1) The demolition and removal of a Car Repair Shop Building located on the Carrier's property; and

(2) The construction of a new Freight Car Repair Building at the same location.

Claimants contend that the Carrier violated Article IV of the National Agreement between the parties when it failed to notify the Organization of its plans to contract out the above-described work. Article IV, in its entirety, provides:

"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.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by

an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement."

The sole issue herein is whether Carrier was obligated under Article IV to notify the Organization of its intention to contract out the work involved. Claimants contend that Carrier could not lawfully assign the work to an outside contractor without prior agreement of the Organization, but we view this issue to be beyond the scope of the claim herein. Accordingly, it is assumed for purposes of this case that Carrier was free to award the work to an outside contractor. As stated, the single question presented is whether Carrier should have notified the Organization that Carrier planned to contract the work at least fifteen days prior to consummating the commitment to the contractor. The Carrier maintains that it was under no obligation to give notice in this situation since the work involved is not reserved exclusively to employes covered by the Maintenance of Way Agreement. Claimants contend that exclusivity test is not relevant to the issue herein and that notice was required because the work is of the nature which could be and has been assigned to them on past occasions.

The first portion of the work — demolition and removal of the old building — was the subject of a prior proceeding before this Board which resulted in Award No. 18305. Referee Dugan found in that case that the Carrier had violated Article IV by not giving notice to the Organization of its intention to contract out the demolition and removal phase on the basis that the work generally falls within the scope of the Maintenance of Way Agreement. Referee Dugan also ruled in that case that since Claimants were assigned elsewhere during the time the contracted work was being performed, they suffered no pecuniary loss as a result of the violation and would therefore not be entitled to monetary damages.

The second portion of the work — the construction of the new building — is the subject of the instant proceeding. The Carrier takes the position that, without renouncing its view that no notice to the Organization was required in this case, Referee Dugan's decision in its entirety should be adopted herein in the interests of consistency of interpretation. Claimants urge the adoption of the Dugan Award as to the merits, but on the question of damages they assert that Referee Dugan erred in not finding and allowing monetary damages.

We adhere to the holding on the merits enunciated by Referee Dugan in Award 18305 and find that the notice requirements of Article IV are not restricted to situations involving work reserved exclusively to employes covered by the Maintenance of Way Agreement. We do not believe that Article IV was intended to be narrowly or restrictively construed. While it has the same binding force as other contract rules, its purpose and application are quite different. Virtually all other contract rules define the respective rights and prerogatives of the parties. These rules are a codification of the laws which are to govern the actions of the parties during the contract term. Article IV, however, does not purport to define or create rights or prescribe modes of action in particular circumstances. Article IV relates to the relationship between the parties and is designed to foster an atmosphere wherein existing rules regarding subcontracting can be made to work more smoothly. The right of the Carrier to utilize its personnel within the contractually established framework remains unaffected, as does the right of employes to claim work which has been reserved to them by the contract.

Article IV does not require or even suggest that either of the parties relinquish any of its existing substantive rights.

Article IV creates a new right, apart from any other, which guarantees employes a measure of participation in the formulating of decisions on subcontracting by providing a means for their views to be heard and considered before final decisions are reached. It was clearly intended to promote understanding and cooperation between the parties concerning a subject — subcontracting — which is traditionally a source of misunderstanding and hard feelings. The Article is grounded on the assumption that a free exchange of facts and ideas will tend to dissolve or diminish disagreements and may enhance efficiency by examining and approaching problems from more than one point of view. Perhaps most important, Article IV is designed to foster confidence and trust between the parties by affording the opportunity for each party to explain the reasons for its position and to listen to the reasoning and arguments of the other party. In short, Article IV encourages the parties to seek and discover areas of agreement. It focuses on the positive results which might be attained by greater understanding and goodwill between the parties. Its premise is that candor, knowledge and openness have a good chance of producing sensible, equitable and lasting results.

The subject of subcontracting is of vital importance to both parties. An unduly narrow interpretation of the requirements of Article IV would tend to undercut the means which the parties chose to attempt to reduce disputes on the subject. We hold that Carrier violated Article IV by failing to notify the Organization of its plans to contract out the construction of the new building.

The Carrier Member of this Board who presented the Company's case during reargument before the Referee advanced his view that the Referee was imposing on the parties his own ideas on the manner in which labor relations should be conducted. He stated that it was his assessment that the Referee's analysis of the meaning and purpose of Article IV amounted to an idealized, naive conception of what a labor-management relationship ought to be but did not reflect a realistic view of what it usually is. We submit that this characterization by the Carrier Member is both grossly inaccurate and unjustifiably cynical. It is inaccurate in that it fails to recognize that it is the parties and not the Referee who wrote and agreed to Article IV; it is the parties and not the Referee who arranged that Carrier should notify the Organization's General Chairman "as far in advance of the date of the contracting transaction as is practicable . . ."; it is the parties and not the Referee who agreed that a prompt meeting should be held if the General Chairman desired one; and, it is the parties and not the Referee who undertook to "make a good faith attempt to reach an understanding concerning said contracting". It is cynical in that it rejects the notion that labor and management representatives can or do engage in meaningful dialogue or that such dialogue should be encouraged. We do not find this same sense of cynicism in Article IV.

On the question of damages, Carrier asserts first that Claimants have lost nothing since in any event the Carrier was free to contract the work whether or not advance notice pursuant to Article IV was given to the Organization. This argument totally misses the point that the essence of Article IV is in the opportunity it affords to the employes to attempt to persuade the Carrier to assign to them work that the Carrier had tentatively

decided to farm out. It is that opportunity which Article IV guarantees and which Claimants were denied as a result of the violation herein. We must conclude that the opportunity to argue for the work has value since it is the essential quality and entire point of Article IV and it is logical to measure that value by the magnitude of the work which might have been done by Claimants had they been given the opportunity to discuss it with the Carrier.

Next, the Carrier asserts in effect that the amount of monetary damages due Claimants would be purely speculative even if the Board were disposed to award monetary damages since a portion of the work required the use of equipment which Claimants are not qualified to operate and, further, the Claimants have not made clear what portion of the work they actually sought to perform. We reject this argument for the reason that these subjects are precisely the type of things which Article IV contemplates should be discussed and disposed of at the meeting for which Article IV provides. Nothing in the record establishes that Claimants were incapable of performing any work necessary to the completion of the building, but the subject of their capabilities surely would have come up if the required meeting had been held and the Carrier felt that this was a factor in its decision to contract out. Similarly, if doubt exists at this juncture about how much of the work Claimants desired to perform, it exists only because no meeting was held which could have clarified that point.

Finally, Carrier contends that none of the Claimants suffered pecuniary loss as a result of the violation in this case since they were all fully employed on other work during the time the building was being constructed. Claimants argue that what they lost was the opportunity to do the work and that there is authority for the proposition that they are entitled to be paid for this loss. In essence, Claimants argue that the amount of time consumed in the construction of the new building should be viewed as a part of the totality of their work opportunities and by being denied that amount of time they have lost forever its monetary equivalent.

We agree with Claimants in principle. We believe that the loss of the opportunity to perform the work in question is a real loss which may potentially produce actual monetary damage. They have not as yet incurred a monetary loss, however, so far as the record indicates. The lost work opportunity would occasion monetary damage to Claimants when and if their total work opportunities were diminished to the point where they were no longer fully employed. Claimants cannot claim entitlement to more than full employment and the record indicates that they have been fully employed during and since the time that the work in question was accomplished. To order payment to them now for the lost work would put them in a better position than if no violation had occurred and this we have no authority or inclination to do. If Claimants should suffer a reduction of hours or be affected by a reduction in force in the future because of lack of work, however, it would be at that time that a monetary loss would be incurred as a result of the violation herein. At such time as the Carrier no longer has work enough to keep Claimants fully employed, the impact of denying them the work involved herein would be felt. If Claimants, or any of them, were to be furloughed for lack of work in the future it could properly be claimed that, but for the violation herein, their assignments would not have come to an end at that point since they would have had the opportunity to perform work equal to the number of hours it took to construct the new building.

Accordingly, we hold that Claimants will be entitled to monetary damages for the loss of the opportunity to perform the work of constructing the new building at any time in the future that any of them shall involuntarily be less than fully employed except, of course, if their loss of full employment is occasioned for disciplinary reasons or mandatory retirement. At such time Claimants shall be entitled to receive in a lump sum payment for the number of hours designated below at their regular rate of pay in effect at the time of payment.

There is a dispute as to the number of hours claimed during the processing of this case on the property. We find that each Claimant claimed and is entitled to 376 hours' pay in damages should they incur a monetary loss as described above.

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 Carrier violated the Agreement.

AWARD

Pay to Claimants 376 hours' pay when and if a monetary loss is incurred as described in the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of October 1971.

CARRIER MEMBERS' DISSENT TO AWARD 18792, DOCKET MW-18676
(Referee Rosenbloom)

This award contains a number of correct rulings, the most significant of which are:

1. "Carrier was free to award the work to an outside contractor."

2. "The sole issue herein is whether Carrier was obligated under Article IV to notify the Organization of its intention to contract out the work involved."

3. "Referee Dugan [in Award No. 18305] that the Carrier had violated Article IV by not giving notice to the Organization

of its intention to contract out the demolition and removal phase."

4. "The second portion of the work — the construction of the new building — is the subject of the instant proceeding."

5. "We adhere to the holding on the merits enunciated by Referee Dugan in Award 18305 and find that the notice requirements of Article IV are not restricted to situations involving work reserved exclusively to employees covered by the Maintenance of Way Agreement."

6. "The right of the Carrier to utilize its personnel within the contractually established framework remains unaffected, as does the right of employees to claim work which has been reserved to them by the contract. Article IV does not require or even suggest that either of the parties relinquish any of its existing substantive rights."

7. "They [Claimants] have not as yet incurred a monetary loss."

8. "Claimants cannot claim entitlement to more than full employment and the record indicates that they have been fully employed during and since the time that the work in question was accomplished. To order payment to them now for the lost work would put them in a better position than if no violation had occurred and this we have no authority or inclination to do."

In view of the obvious soundness of the foregoing rulings, we are completely mystified by some of the rulings and comments that appear elsewhere in the award.

In the paragraph which deals with Award 18305 (Dugan), it is said:

> ". . . Referee Dugan also ruled in that case that since Claimants were assigned elsewhere during the time the contracted work was being performed, they suffered no pecuniary loss as a result of the violation and would therefore not be entitled to monetary damages."

A careful review of Award 18305 will disclose that Referee Dugan made no such ruling. Although the Employes argued in that case that "Claimants were available" and suffered "a loss of work opportunity", and the Carrier argued that Claimants "did not lose any earnings", Referee Dugan made no ruling on those specific contentions. He ruled only on the Carrier's contention that the work was not reserved to the Employes by their agreement and Carrier had a perfect right to contract the same out. On that point Referee Dugan said:

> "While it is true that the scope rule of the Agreement is general in nature and that therefore work can be contracted out unless reserved exclusively by custom, tradition and practice to Maintenance of Way Employes, and finding that said work in dispute herein is not reserved 'exclusively' to Maintenance of Way Employes and

can be contracted out by Carrier as was done in this instance, nevertheless, we are here solely concerned with the application of Article IV of the May 17, 1968 Agreement."

From this it must be concluded that the foregoing finding, recognizing Carrier's right to contract the work out as it did (from which it necessarily follows that the claimant employes could not have sustained a loss), served as the sole basis for the conclusion in Award 18305 that:

". . . Since Claimants suffered no pecuniary loss in this instance, we will deny paragraph 2 of the Statement of Claim."

Turning now to the next fantasy in this award on the subject of damages, after correctly noting that the Claimants had "full employment" both "during and since the time that the work in question was accomplished", and that "they have not as yet incurred a monetary loss", the award goes on to state the impossible conclusion that:

". . . If Claimants, or any of them, were to be furloughed for lack of work in the future it could properly be claimed that, but for the violation herein, their assignments would not have come to an end at that point since they would have had the opportunity to perform work equal to the number of hours it took to construct the new building."

Manifestly, the buliding was needed when it was rebuilt, and there is no suggestion in the record that its reconstruction either should or could have been handled piecemeal at some unforseeable time in the future when some "or any" of the individual Claimants might be furloughed; or has it been suggested that the work in which Claimants were fully employed at the time of the reconstruction and since then could have been thus delayed.

Since it is conceded that Claimants were fully employed, and it is not denied that it was essential to rebuild the building at the time it was rebuilt, it is obvious that if Carrier had been required to do the work with its own employes, the answer would have been to hire additional employes who were qualified for the work. In other words, the real loser of work, if Carrier had been under a contractual obligation to use its own employes, would have been the individuals who would have been hired by Carrier. It is settled that the Employes cannot recover for work that would have gone to individuals who would have had to be hired, even where there has been a violation of the agreement. See **Bangor & Aroostook R. Co. v. Brotherhood of Locomotive Firemen and Enginemen,** U. S. Court of Appeals for the District of Columbia, No. 24,521, where the court said:

". . . The persons who suffered primary damage from the carriers' violations are the men who would have been hired on the blanked runs. Those who 'would have been' hired are a class that is essentially indeterminate and indeterminable. . ."

Obviously, on the admitted facts, these individual Claimants could not possibly have sustained any actual loss by the action taken by Carrier, and this brings us to another manifestly erroneous ruling in the award on the question of damages. The award states:

". . . We must conclude that the opportunity to argue for the work has value since it is the essential quality and entire point of Article IV and it is logical to measure that value by the magnitude of the work which might have been done by Claimants had they been given the opportunity to discuss it with the Carrier."

As we understand the authorities on the point, it is arbitrary, rather than logical, to say that a contract right to negotiate for an agreement that would create in one a new right to particular work has value in the field of damages which can be measured by the full value of an existing right to such work. Certainly it is not reasonable to say that the right to ask for particular work is the equivalent of a right to have that work. Article IV, as it plainly states on its face, is nothing more than an agreement that the parties will follow certain simple procedures in attempting to negotiate new agreements in the future with respect to the performance of certain work. The giving of the notice here involved is simply the step required of Carrier to open the door to negotiations and possible agreement. This is a classical example of an agreement to attempt to agree. The law is clear on the point that an agreement to agree and, **a fortiori,** an agreement to attempt to agree, cannot be made the basis of an action for damages. As the United States Court of Appeals for the Ninth Circuit recently put it:

> **"Advertising to first principles and Hornbook law,** we recall that a contract is a legally enforceable agreement between two or more parties. The essential elements necessary to transform an agreement into a legally enforceable contract include, among other things, . . . mutuality of agreement, and mutuality of obligation. . . . the minds of the parties must meet as to every essential term of the proposed contract, . . . **As long as any substantial or material matters are left open for further negotiation or consideration on an essential and necessary element of a proposed contract, . . . the agreement, if there has been such, is not enforceable. . .**
>
> **"Now, those are all Hornbook propositions that every one of us has heard since our first year of law school. . ."** (Emphasis added.) **[Joseph v. Donover Company,** 261 F.2d 812, 820]

The Supreme Court of Minnesota states:

> "But an agreement that they will in the future make such contract as they may then agree upon amounts to nothing. **An agreement to enter into negotiations, and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action . . ."** (Emphasis added.) **[Shepard v. Carpenter,** 54 Minn. 153, 55 N. W. 906]

The Supreme Court of California states:

> **"An agreement to agree in the future cannot be made the basis of a cause of action,** and neither law nor equity provides a remedy for breach of such an agreement." (Emphasis added.) **[Autry v. Republic Productions,** 180 P. 2d 888, 30 C.2d 144]

The United States Supreme Court states:

". . . **A lack of certainty** as to terms of contract obligations of either party, or measure of damages for breach, **is simply the misfortune of him who seeks to recover** in case of a breach thereof. . ." (Emphasis added.) [**Troy Laundry Mach. Co. v. Dolph**, 138 U. S. 617, 34 L.Ed. 1083, 11 S. Ct. 412]

In American Jurisprudence we find that:

". . . unless an agreement to make a future contract is definite and certain upon all the subjects to be embraced, it is nugatory. To be enforceable, a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations. . . . If any essential term is left open for future consideration, there is no binding contract, and **an agreement to reach an agreement imposes no obligation on the parties thereto.**" (Emphasis added.) 17 Am Jur 2d, Contracts §26

This Board has consistently refused to act where the agreement has required further agreement of the parties, as stated in Award 12724 (Coburn):

". . . This Board may not properly require the parties to agree on a bargainable issue. . ."

From the foregoing it is apparent to us that the Referee was not applying any agreement the parties made when he purported to find a basis for allowing damages to the individual Claimants herein; rather he was applying his own unique notions of industrial justice. In addition to his decision being in conflict with firmly established law on the question of damages, it is contrary to the prior decisions of this Board dealing with the same question. In six different awards the Board, sitting with four different referees, has denied all claims to monetary allowances even though the notice required by Article IV had not been given. See Awards 18306 (Dugan), 18687 (Rimer), 18714, 18716 (Devine), 18773 (Edgett).

Turning now to the portion of the award which comments on the "reargument".

The award states:

"The Carrier Members of this Board who presented the Company's case during reargument before the Referee advances his view that the Referee was imposing on the parties his own ideas on the manner in which labor relations should be conducted. . ."

It is quite true that the Carrier Member told the Referee that his novel ruling on the question of damages (which we have discussed above), apparently constituted an attempt on his part to inject his own views on industrial justice into the case, and Carrier Members are still of that opinion.

The award continues:

". . . He stated that it was his assessment that the Referee's analysis of the meaning and purpose of Article IV amounted to an idealized, naive conception of what a labor-management relation-

ship ought to be but did not reflect a realistic view of what it usually is. . ."

A review of the record, and particularly the comprehensive memoranda which the Carrier Members submitted to the Referee in handling of this case in panel, will disclose that this assertion is a figment of the Referee's imagination. Apparently it is injected into the decision as a basis for extolling the virtues of collective bargaining — virtues which the Carrier Members fully appreciate and readily accept.

We have no quarrel with the Referee's thinking on "good faith attempts to reach understanding"; but the Referee's comments on that subject are totally out of place in this record, because the Employes in this record have not questioned the good faith of Carrier in deciding that a notice was not required in this particular case.

Whether or not Carrier was obligated to give a notice in this case depended upon the meaning to be given the ambiguous phase, "within the scope of the applicable schedule agreement", as that phrase is used in Article IV; and the mere fact that the doubtful question as to the meaning of that phrase was ultimately resolved against Carrier's view in a subsequent decision by this Board has no tendency whatever to reflect on the Carrier's complete good faith in deciding that no notice was required.

As a practical matter, however, it should be noted that the right to negotiate which is recognized in Article IV is not a new right at all. This right to negotiate for new work rights has been guaranteed to the Employes by the Railway Labor Act for decades; and the parties to this dispute have been actively negotiating for decades, as is apparent from the records of this Board. The impact which Article IV has on this old right to negotiate for work is simply to eliminate some of the notice and time requirements established by Section 6 of the Railway Labor Act with respect to negotiations concerning specific work which a carrier desires to contract out. For a brief discussion of the history and effect of Article IV, see the Concurring Opinion of Carrier Members, Award 18773.

In conclusion, on the "reargument" aspect of the award, we believe it is worthy of note that the "reargument" was held at the request of the Labor Member who requested the Referee to omit the following finding which appeared as the first two sentences of the paragraph following the quotation of Article IV in the original proposed award:

> "There is no dispute concerning Carrier's right to contract out the work involved. The parties agree that Carrier was free to award the work to an outside contractor if it so desired."

The Referee obligingly revised that paragraph to read as it now reads, ruling that for purposes of this case it is "assumed" that "Carrier was free to award the work to an outside contractor."

We respectfully submit that this award is invalid to the extent that it purports to sustain any part of Paragraph 2 of the Statement of Claim.

G. L. Naylor
P. C. Carter
R. E. Black

Keenan Printing Co., Chicago, Ill. Printed in U. S. A.