Award No. 19056
Docket No. MW-19101

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert A. Franden, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO & EASTERN ILLINOIS 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 the General Chairman as required by Article IV of the National Agreement dated May 17, 1968, it assigned earth moving work at Yard Center to outside force. (System File MW-6901.)

(2) Messrs. J. Copher, H. J. McConnell, W. E. Gross, E. J. Sterchi, C. J. Hall, P. F. Rumble, C. W. West, R. L. Johnson and E. White each be allowed pay at the Bulldozer-Euclid operator's rate for an equal proportionate share of the total number of man hours expended by outside forces in the performance of the work referred to within Part (1) of this claim.

(3) The Carrier shall also pay the claimants six percent (6%) interest per annum on the monetary allowances accruing from the initial claim date until paid.

EMPLOYES' STATEMENT OF FACTS: The claimants hold seniority within various classes comprising the Carrier's Track Sub-department, including the System Roadway Machine operator's class. They are listed on the appropriate seniority roster as Euclid operators. Employes holding such seniority have historically and traditionally been assigned to perform all earth moving work required in connection with building, maintaining and repairing the Carrier's tracks.

A short time prior to June 19, 1969, the Carrier decided to extend No. 8 Yard at Yard Center. To this end, the Carrier assigned the required earth moving work to Faso Fuel and Excavating Company. The employes of said company hold no seniority whatsoever within the Carrier's Maintenance of Way and Structures Department. Two (2) Euclid earth moving machines and operators were used to perform this work.

The Carrier did not advise the General Chairman of its desire to assign this work to outside forces as it is required to do under the provisions of Article IV of the May 17, 1968 National Agreement which reads:

clined in letter dated November 4, 1969, copy attached hereto as Carrier Exhibit "D."

There is in effect between the parties hereto an agreement, identified as Schedule No. 3, effective May 15, 1953.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim is based on an alleged violation of Article IV of the May 17, 1968 National Agreement which reads 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 act less than 15 days prior thereto."

As part of the modernization of its freight yard and terminal at Dolton, Illinois the Carrier contracted with Faso Fuel & Excavating Company to do earth moving. The Carrier had been using Faso Fuel & Excavating Company at this location since November of 1967. The Organization claims that there was earth moving work assigned to Faso in June of 1969 which was not a part of the earlier contract.

The issue of whether the work which is the subject of this dispute was a continuation of an earlier contract has been properly joined on the property. Both parties have attempted to support their position.

After a careful review of the record we come to the conclusion that while the work under discussion was connected with earlier work it was a further expansion of the yard not contemplated when earlier work was assigned to Faso.

The matter of past practice is not applicable in that we are here concerned with a violation of the May 17, 1968 Agreement. Likewise, the question of exclusivity is not properly an issue. We are concerned here with work "within the scope of the applicable schedule agreement." This is not a definition of exclusivity. See Award 18305 (Dugan).

> "The first paragraph of said Article IV deals with the contracting out of work 'within the scope of the applicable schedule agreement.' It does not say the contracting out of work reserved exclusively to a craft by history, custom and tradition. This Board is not empowered to add to, subtract from, or alter an existing agreement. We therefore conclude that inasmuch as Maintenance of Way Employes have in the past performed such work as is in dispute here, then said work being within the scope of the applicable Agreement before us, Carrier violated the terms thereof by failing to notify the General Chairman within 15 days prior to the contracting out of said work. In reaching this conclusion, we are not asserting that the work here in question cannot be contracted out later after the giving of the required notice. We are only saying that since the work in question came within the scope of the Maintenance of Way Agreement, Carrier was obligated to give said advance notice. Failing to do so,

Carrier violated the terms of Article IV of the May 17, 1968 National Agreement governing the parties to this dispute."

The above quotation is applicable here and we find that the Carrier violated the Agreement when it failed to notify the General Chairman.

The question of damages is difficult. The Carrier's violation deprived the Organization of the right to bargain. Whether the bargaining would have had the result of obtaining the work for the Claimants is pure speculation. Awards 18305 (Dugan), 18306 (Dugan), 18687 (Rimer), 18773 (Edgett), 18714 (Devine) and 18716 (Devine), found violations identical to that found herein but awarded no damages in the absence of a finding of pecuniary loss. Award 18792 (Rosenbloom) damages should be but deferred them until some future time when actual earnings loss could be shown.

In the absence of any proof as to damages we are inclined to follow Award 18305 and will dismiss parts 2 and 3 of the claim.

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.

AWARD

Claim sustained as to part (1) and declined as to parts (2) and (3).

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 10th day of March 1972.

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