

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19337
Docket Number MW-19270

William M. Edgett, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Illinois Terminal Railroad Company

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

(1) The Carrier violated the Agreement when it assigned the work of rehabilitating its tracks between A&S Crossing at McKinley and Mont, Illinois to outside forces.

(2) The claimants* be allowed pay at their respective rates of pay 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. (This claim contemplates that pay for the time expended by outside forces during the claimants' regularly assigned work period will be allowed at the claimants' respective straight time rates and that pay for all time expended by outside forces outside of the claimants' regularly assigned hours will be allowed at the claimants' respective overtime rates.)

(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.

* Foremen

C. L. Johnson
Charles Logsdon
R. E. Stephens
T. L. Hitchcock
J. C. Desper
K. M. Oberkfell
R. B. Carrizales
M. Gryant
C. B. White

Asst. Foremen

James Samelton
W. M. Tyler

Speed Swing Operators

W. Palm
J. F. Marion

Tractor Backhoe Operator

R. D. Frey

Track Machine Operators

D. Lawrence
A. Wigfall
G. Daniels
G. Scholernd
R. Kress
P. Cruthird

Laborers

E. D. Dancy
Willie Robinson
V. T. Frazier
Robert Williams
Spencer Wilson
Herbert McCray
F. T. Boyer
David Ingle
Hulett Borders
Ivory Wilson

D. Patton
R. L. Keel
R. A. Kilduff
L. D. Harnetiaux
Jack Stewart

W. Thompson
Leroy Trappey
Richard L. Coy
C. Whaley
J. Carter
J. Whaley
D. Laurie

Truck Drivers

H. Johnson
O. Wall
C. Patton
C. Adams

Crane Operator

L. G. Ott

OPINION OF BOARD: Carrier found it necessary to reconstruct fifteen and one half miles of its road. (The record also states the figure at thirteen and one half miles.) It decided to use outside forces for this work and advances the following reasons for the decision; insufficient engineering and management staff, lack of equipment for the job, insufficient forces in its Maintenance of Way Department.

The claim is based upon an alleged violation of Rule 1 - Scope, Rule 2 - Department Limits and Rule 3 - Classification. Carrier resists the claim on the grounds that the Scope Rule is general and the required proof of exclusive right to perform the work has not been made, that Rule 3 - Classification is not applicable and that since it lacked staff and equipment it could contract out within a recognized exception to the Scope Rule.

The Board has examined the applicable Rules and Carrier's defenses and concludes that the claim must be sustained, as later set forth. Here we are not dealing with a general Scope or Classification Rule:

"RULE 1 - SCOPE

The rules contained herein shall govern the hours of service, working conditions, and rates of pay of all employees in any and all Sub-Departments of the Maintenance of Way and Structures Department, represented by the Brotherhood of Maintenance of Way Employees, except the following:

- A. Roadmaster, Assistant Roadmaster, Supervisor, or those of higher rank.

Note: All work coming under the jurisdiction of the Maintenance of Way Department will be performed by men covered by this Agreement."

"RULE 3 - CLASSIFICATION

(e) All work in connection with construction, maintenance or dismantling of roadway and track, such as rail laying, tie renewals, ballasting, lining and surfacing track, ditching, sloping and widening cuts and banks, mowing and cleaning, loading, unloading and handling all kinds of track material and all other material incident thereto, snow fences, shall be track work and shall be performed by employes of the Track Sub-Department."

These Rules make it clear that the work performed by outside forces was reserved to Claimants. Unless Carrier can rely on exceptions to the rule, it was a violation of the Agreement to sub-contract the work. The Board has in Award No. 9335, held that Carrier may call in outside forces where "special skills, equipment or materials are required, or when work is unusual or novel in character or involves a considerable undertaking." The Board has also held that Carrier has the burden of proving the facts supporting its reliance on this affirmative defense. (Award No. 12961 and Awards cited therein.) This burden is not met by simply alleging its inability. Carrier must show that it has the alleged insufficiency in staff, equipment skills or manpower and that it has made a reasonable attempt to overcome it. This may mean an attempt to procure equipment on a reasonable rental basis. The record shows no such attempt. It may mean an attempt to augment staff by the use of consultants in engineering or management. No effort in this direction was made. It may mean an attempt to employ additional personnel. This was not tried. The record shows that Carrier relied on its claimed inability, and on the exception to the Rule, but did not consider the need to make a good faith effort to accomplish the work with its employes. Therefore its reliance on the Rule exception, referred to above, is not well founded. The fact that Carrier has contracted out other work is of no avail.

Damages for violation of a collective bargaining agreement should adhere to a "make whole" principle. As is the case with other general rules this one is subject to exception. In the instant case refusal by the Board to award damages would effectively rewrite the Agreement, for in practice it would then say that Carrier is at liberty to contract out work reserved by the Agreement to its employes at anytime all employes are fully employed. The Agreement does not so state, and the Board should not interpret it in a manner which makes it do so. There was unquestionably lost work opportunity to Claimants in the decision to use outside forces to perform work which is reserved to them by the Agreement. It is the Boards' obligation, and right, to provide a remedy for the loss. After a careful review of the record the Board has determined that the loss of work opportunity for each of the named claimants amounts to twelve hours at the applicable straight time rate for each week the outside forces were engaged in the work in question.

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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

Part (1) of the claim is sustained. Part (2) of the claim is sustained to the extent stated in the Opinion. Part (3) of the claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. A. Killen
Executive Secretary

Dated at Chicago, Illinois, this 14th day of July 1972.