NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19619
Docket Number MW-19607

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Chicago and Western Indiana Railroad Company

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

(1) The Carrier violated the Agreement when, without prior notification to or discussion and agreement with General Chairman M. Caputo, it used outside forces to pave (black top) the Burnham Avenue Crossing on May 8 and 18, 1970 (System File 410-MofW).

(2) The Carrier violated provisions of the Railway Labor Act when it failed and refused to specify a time, date and place for conference as requested by General Chairman Caputo within a letter dated November 12, 1970.

(3) B&B Foreman B. Grulhke, Carpenters E. Peters, J. Tatinger, H. Buwalda, J. Quinn, J. Moskal, F. Gaydich, D. Basile, V. Evans and Carpenter Leader P. Vagielski each be allowed sixteen (16) hours' pay at their respective straight-time rates and four (4) hours' pay at their respective time and one-half rates because of the aforesaid violations.

OPINION OF BOARD: This dispute arises under Agreement between the parties effective April 15, 1940.

On the two claim dates Carrier used outside forces to pave or blacktop the Burnham Avenue Crossing. The outside forces consisted of ten (10) men who worked eight (8) hours on May 8, 1970 and twelve (12) hours on May 18, 1970. Claim is made that ten (10) Bridge and Building employes should be paid sixteen (16) hours straight time and four (4) hours overtime account the work being improperly performed by persons outside the Agreement.

The basis of the claim is that Carrier allegedly violated the mandatory notice requirements of Article IV of the May 17, 1968 National Agreement which, in pertinent part, reads as follows:

> "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 representatives to discuss and if possible reach an understanding in connection therewith.

The record contains no denial or other mention by Carrier of the Organization's claim that Carrier failed to give notice as required by Article IV. Accordingly, we find that Carrier did in fact commit the alleged violation of Article IV.

Carrier's defenses on the claim is that the disputed work is not exclusively reserved to Maintenance of Way employees, and that the paving project involved specialized work for which it lacked the requisite materials, skill, and equipment.

We find no merit in Carrier's contentions. The proposition that exclusivity of work is not involved in an Article IV dispute is well settled by prior awards, and warrants no further discussion. (See Awards 18305 (Dugan) and 19399 (O'Brien). As to the specialized nature of the work, and the Carrier's lack of requisite materials, skills, and equipment, these matters, on the record before us, must be regarded as mere assertions by Carrier which are not supported by probative evidence. We also note that these matters are more appropriately considered under Article IV before rather than after the work is performed by outside forces.

We turn now to Carrier's contentions that claimants were on duty and under pay on the claim dates. Numerous prior Awards hold that compensation for an Article IV violation shall be on the basis of actual losses only. (Awards 18305 and 19399). On the principle of stare decisis we shall apply herein the rulings of these prior Awards and, thus, we shall deny the claims for pro rata pay for the time claimants were on duty and under pay.

The claim for four (4) hours overtime stands on a different footing, however. In Award 19155 (Dugan) this Board ruled that compensation is appropriate where "the claimant was off duty and not working on the date of the work in dispute" and we believe the principle of this Award also applies to claimants

who were off duty and not working while disputed overtime work was performed by outside forces. In this case the outside forces performed four (4) hours overtime on May 18, 1972, while claimants performed no overtime on that date; thus the issue is raised of whether the overtime performed by outside forces represents lost earnings opportunities for claimants. The Carrier's statement is that claimants were offered overtime on the date in question, but the majority of claimants refused it. This statement by Carrier is too generalized to dispose of the overtime claim, especially since the Carrier possessed the knowledge and/or records with which to provide some particulars on this issue. We shall therefore sustain the overtime claim to the extent of awarding the claimant four (4) hours overtime for the overtime performed by outside forces on May 18, 1970.

In paragraph (2) of the claim Petitioner also alleges a violation of the Railway Labor Act in that Carrier did not comply with the Organization's request for a conference within the time limits prescribed by Section 2, Sixth, of the Act. Conceivably there could be a case where an alleged violation of the Act might be so connected with the merits of the case as to warrant its being considered by the Board along with other factors in the case. In and of itself, though, and in the case at hand, such an alleged violation is not subject to the power of this Board and the remedy therefor, if any, lies in a different forum. Consequently, we shall not determine whether such a violation occurred or otherwise decide the issues raised in paragraph (2) 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

The Agreement was violated.

A W A R D

The claim is sustained to the extent of four (4) hours overtime as indicated in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1973.