NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20020
THIRD DIVISION Docket Number MW-19593

Benjamin Rubenstein, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Kansas City Terminal Railway Company

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

(1) The Carrier violated the Agreement when, without prior notice to or discussion and agreement with General Chairman Carpenter, it used other than maintenance of way department employes to pave the road on the south side of the depot in front of the mail docks (System File 4/MW-8.70,180).

(2) Paving Foreman Wayne Brewer, Truck Driver A. C. Davila, Paving Mechanics M. Aguirre, M. Solomons, and B. Davis each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours expended by outside forces in performing the aforementioned paving work.

OPINION OF BOARD: The issue, here, involves interpretation of Article IV of the May 17, 1968, National Agreement and Rules 1 and 2 of the Scope Agreement.

Article IV of the National Agreement reads:

> "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 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."

Rule 1 - Scope, covers employees of Maintenance of Way and Structures, represented by the Brotherhood of Maintenance of Way Employees. It includes Paving Foremen, Truck Drivers and Paving Mechanics. (Group 7).

Rule 2 - Classification of Work, Group 7, provides, that "installation, renewing, resurfacing and patching of asphalt highway crossings, roadways, parking areas, and driveways, shall be classified as paving work."

On, and between, August 17, 1970 and August 21, 1970 the Carrier used an outside contractor to do paving. It did not give prior notice, as provided for in Article IV of the National Agreement.

The Organization contends that the Carrier violated the provisions of Article IV of the National Agreement as well as Rules 1 and 2 of the Scope Agreement.

The Carrier denies the claim on the grounds: 1) that the Organization has not proved exclusivity of the work; 2) that the Carrier always contracted large jobs; and 3) that it had no machinery or man power of its own to do the job.

The first paragraph of Article IV of the National Agreement is clear and unambiguous. It provides for notice to be given, at least 15 days in advance of contracting to outside contractors. Surely, this does not impose a tremendous obligation or hardship on the Carrier. It could have sent such notice and avoided the instant dispute.

BACKGROUND OF ARTICLE IV

This issue has been agitating the Board and the Referees for some time. Numerous awards of this Board have been strongly dissented with by the carrier members, who presented some very serious arguments.

Besides the dissenting opinions within the Board, there are divergencies in the opinions of various Referees who had to deal with this issue, especially on the question of damages. Some held, that where the union proved no damages / loss of work, no monetary damages should be awarded, although the agreement was violated. Others awarded half-damages and, still others, felt, that regardless of whether there was a violation of the Scope Rule or actual loss of work, the employees were entitled to full damages claimed under the "loss of work opportunity" theory. To say the least, the issue is in a "mess".

We shall, therefore, try to analyze the history and background of Article IV, the carrier arguments, in general, and those presented in the instant claim.

As is, very ably, pointed out by the Carrier, in its Memorandum, the adoption of Article IV, was the result of impasses that existed for decades between the rail carriers and the maintenance of way employees with respect to contracting out construction work. The Article seeks to eliminate a point of friction between management and labor, which persisted as a result of management's subcontracting work, despite Scope provisions of the various agreements. It seeks to reduce, if possible, the numerous grievances and claims for violations of the Scope agreements, clogging the dockets of the Adjustment Boards, by discussing with the carriers their decisions to contract, prior to the event, instead of filing claims thereafter. It does not affect the Carrier's right to contract out, nor does it restrain the employer in any way, except for the obligation to give notice, and meet with the Organization, if it requests a meeting. The Article is, somewhat, comparable to the provisions of the National Labor Relations Act, requiring good faith collective bargaining. It does not prescribe any provisions for agreements nor force any agreement upon the parties. Yet, a refusal of either party to negotiate, is deemed a violation of the Act.

We are aware of the fact that numerous Board decisions, while finding a violation of the contract, refused to assess damages, unless the claimants proved loss of earnings. Several of our decisions do provide for money damages (Award No. 16, Public Law Board No. 249, 19578, 19552, etc.).

ARGUMENTS OF CARRIER

1. That Article IV of the Agreement is merely an "agreement to negotiate" and is, therefore, unenforcible. At best, the aggrieved party may apply for injunctive relief.

The Court, in Brotherhood of Railroad Signalmen v. Southern Railroad Company, 330 F. 2nd 59; May 1, 1967, reversing the District Court's decision, said:

> "We cannot disregard the Supreme Court's animadversion expressed in Gunther against paying strict attention only to the bare words of the contract and involving old common-law rules for the interpretation of private employment contracts.... 382 U.S. at 261. Were we to approve the District Court's resort to common-law principles governing breach of contract damages, we would be derelict in our unquestionable duty fully to enforce the Board's determination on the merits. The Supreme Court, in another context, has only recently strongly reiterated that a collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it to be governed by the same old common law concepts which control such private contracts". (emphasis supplied).

The above, unless reversed by the Supreme Court of the United States is the law of the land for interpreting Labor Relations Agreements. Article IV is not just an agreement to agree. It is a binding obligation on the Carrier to do something: give notice. A failure to give notice, as provided for, is, in and by itself, a violation of the agreement and remediable under the provisions of the Railroad Adjustment Board's Rules and Regulations.

Article IV provides in part:

> "Nothing in this Article IV shall effect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice...." (emphasis supplied).

Having failed to give such notice the carrier violated the agreement.

Had the carrier given the notice provided for, and failed to reach an understanding with the union, and then proceeded to contract out its work, the issue then would be one of exclusivity under the Scope provision.

Having failed to give notice, the issue must be determined under Article IV provisions.

2. That under Article IV, the employer is not required to give notice, unless the work is within "the Scope of the applicable schedule agreement".

This issue has been dealt with in numerous awards affecting Article IV, invariably holding, that failure to give notice is in, and by itself, a violation of the agreement, regardless of the Scope rules or exclusivity of work right, and need not be discussed herein.

In Award 18305 (Dugan) the Board, discussing the arguments of carrier, in a case involving the same article, 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 employees, and finding that said work in dispute herein is not reserved 'exclusively' to Maintenance of Way Employees 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." (underscoring supplied).
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> "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 Employees 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... 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. Failing to do so, Carrier violated the terms of Article IV of the May 17, 1968 National Agreement governing the parties to this dispute". (emphasis added)

It is evident from the above extract, that the award in the above case was not based on the question of exclusivity, and that the phrase "within the scope of the applicable schedule agreement", does not require proof of exclusivity.

The above was followed in all awards cited by both parties in their arguments. In Award 18687 (Rimer), we said:

"The Carrier did not provide such notice, having made the judgment that the work involved was not within the Scope of the agreement. For the limited purposes of providing notice to the General Chairman we find that the Carrier erred in its first judgment and concur with Award 18305 (Dugan) in this regard.

See also 18714 (Devine), 18716, 18860; 18968 (Cull); 19056 (Franden); 19153 (Dugan); 19154, 19155; 19191 (O'Brien)."

The above cited awards and numerous others followed the ruling in Award 18305, although denying monetary damages.

The same holding was applied in those awards that did grant monetary compensation.

The conclusion thus is, that the Board, invariably, held that a violation of Article IV is not dependent upon the issue of exclusivity, although that issue may be raised in a claim, arising out of the failure of the parties to agree, after notice is given pursuant to the provisions of Article IV.

3. That even though a claim of violation of Article IV was proven, no damages may be awarded because; a) the Article does not provide for damages, and b) damages may be assessed only upon proof of violation of the Scope Rule and exclusivity.

The above is the only issue on which there has been no unanimity in the Board decisions. Some, and by far, the majority of awards, while finding a violation of the agreement, denied damages where the employees involved were fully employed. Others, albeit, a minority, awarded monetary damages on the ground that as a result of the breach of agreement the employees, whose jobs were contracted or given to other employees suffered a loss of "work opportunity" and are entitled to recovery. Some cases labeled such awards as "penalties", but the result is the same: When a finding was made that the carrier violated the terms of an agreement of employment, he was ordered to pay damages to the employee or employees involved.

In Award No. 12785 (Ives), we said:

"The sole issue to be determined is whether or not the claimants should be compensated at their respective rates of pay for an equal proportionate share of the total man-hours consumed by employees in performing the work in question. Carrier contends that such payments were not warranted even though the scope rule of the agreement was violated because claimants were fully employed on the specific dates involved in the dispute. Carrier asserts that the agreement contains no provisions for penalties arising out of contractual violation".

The claim for damages was sustained in its entirety.

In Railroad Signalmen of America v. Southern Railway Company, supra, the Court reversing the decision of the District Court, that the Board may allow only nominal damages for breach of contract said:

> "....if whenever no direct layoff of a union's members is involved the employer can unilaterally contract out work that has been allocated by agreement to the union, under no greater threat then liability for merely nominal damages, the collective agreement would soon become a worthless scrap of paper. It requires but slight insight into the realities of human behaviour to realize that neither party would feel bound to abide by an agreement that would not be effectively enforced by the courts".

In Award No. 15689 (Dorsey) we held, after discussing the above and other court decisions, "that when the Railroad Adjustment Board finds a violation of an agreement, it has jurisdiction to award compensation to claimants during a period they were on duty and under pay".

The Carrier members in dissent to Award No. 15689 cited a previous award by the same referee in which he discussed "contract law" and held that in violations of a contract, the claimant seeking damages must prove the amount thereof. The dissent, seemingly, disregarded the fact, that the second award was written after the decision in Railroad Signalmen, cited above. See also Award Nos. 15888 (Heskett), 16009 (Ives),16430 (Friedman), 19552 (Edgett).

Discussing the reasoning of the District Court, the Court of Appeals, in Railroad Signalmen, supra, said:

> "This approach, /disallowing damages unless loss of employment was proved/ however, completely ignores the loss of opportunities for earnings resulting from the contracting out of work....." (emphasis supplied).

The Circuit Court, thus sustained the theory of "work opportunity", adopted and followed by the Board in the numerous cases involving violation of the Scope Rule.

In Award No. 19899 (Sickles), adopted recently by the Board, we said:

> "We are not cognizant of any basic reason why the rationale of the Fourth Circuit should be adopted and adhered to by referees in one line of cases, but ignored in cases dealing with demonstrated violations of Article IV of the National Agreement, nor have the Article IV cases suggested any cogent reason for such a distinction".

The case of Bangor and Aroostook Railroad Company v. Brotherhood of Locomotive Firemen and Enginemen, 442 F. 2nd 812, cited by the Carrier in its dissent on Award No. 19899, and in the instant matter, has no application to the issues before us. That case involved a class action for violations of the 1950 National Diesel agreement. The Circuit Court remanded the case back to the district, for assessment of damages incurred by the breach of the agreement, to the identifiable claimants and beneficiaries. The court said:

> "This is not a case where the court can say with reasonable confidence that the class of injured persons coincides in substantial part with the membership of the Brotherhood, or firemen as a whole. If such an assumption could be made BLFE's request could be supported as providing an effective means of compensating those who, by hypothesis, were the victims of the carriers illegal acts. In the present case, however, there is not a sufficient showing of identity between the victims and the intended beneficiaries to justify an Award on that basis". (p. 98) (emphasis supplied)
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> "Those who 'would have been hired' are a class that is essentially indeterminate and indeterminable. By the Brotherhood's own admission, the additional positions would have been filled 'from the streets'. We have no way of knowing who was harmed by the violations....."

In the case before us, the claimants are clearly identified.

In fact, the Bangor case justified the claim and award of damages where claimants could be identified. Thus, the Court said:

> "We reverse in part. We hold that BLFE is entitled to recover the amount of dues, assessments, initiation fees and other payments which it would have received were it not for the carrier's illegal blankings...." (p. 96)

The Board, invariably, adhered to the theory, that where a violation of agreement resulted in a "loss of work opportunity", the claimant was entitled to recover such loss, regardless of whether he did or did not lose actual work. The cases denying a monetary recovery, if there was no actual loss of earnings, even though there was a breach of the agreement seem to run contrary to the "loss of work opportunity" line of cases.

Although our policy is to adhere to previously established decisions, we feel that better valor and prudence lies in those cases, that assess some damages for violation of this type of agreement. Contracts are not entered into for the purpose of practice in semantics. They seek to establish certain rights of the parties. A violation of a contract, especially, if persisted, causes some damages to the injured party. Unless the violator is restrained in some way from breaching the contract by punishment it will continue to do so, thus turning the "sanctity" of contracts into a mockery.

Furthermore, had there not been a violation of the contract, the claimants might have worked overtime and earned additional money. The violation "resulted in a clear loss of work opportunity" (19552).

In Award 19574, we said:

> "We are reluctant to treat blatant violations of contractual rights by simple reprimand. Obviously calculated violations of the contract, such as in this case, cannot lead to a constructive relationship between the parties as contemplated by the Act."

And in Award 19635, we held:

> "In the light of all of the circumstances, we sustain the claim to the extent of one-half the amount of compensation paid to outside forces for the work....."

In view of the numerous violations by Carriers of Article IV of the National Agreement, which violations bring us back to the "decades of impasse between Carriers and Maintenance of Way Employees", which were sought to be solved by the adoption of Article IV, the Board must, in order to prevent continuous violations thereof, impose some damages.

Rendition of the full amount of the claim, is sustained by sound logic.

However, in view of our previous awards granting only one-half of the amount claimed, and the acceptance by the Board of such awards, we shall follow those awards and allow one half of the monetary damages claimed.

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.

A W A R D

Claim sustained in line with the above opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: G. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1973.

CARRIER MEMBERS' DISSENT TO AWARD 20020, DOCKET MW-19593

(Referee Rubenstein)

Instead of following a strong line of sound precedent on the question of damages for violation of the notice provisions in Article IV of the May 17, 1968 National Agreement, the Referee herein has followed the arbitrary and void awards of Referees Sickles and Blackwell (19899-Sickles; 19948-Blackwell).

Those two awards proceed on the categorically erroneous theory that there can be a legally recognizable "loss of work opportunity" in a case where there is no legal right to the work. Like his two predecessors in error, the Referee herein blindly quotes from prior awards of this Board and Federal court decisions which are expressly based on a finding that the work therein had been reserved to the claimants therein by their existing agreement and on that premise found a loss of work opportunity had occurred. To the extent those awards and court decisions are relevant, they necessarily imply there can be no legally recognizable loss of work opportunity in a case where the claimants have no right to the work under their existing agreement.

We dissent, and our Dissents to Awards 19899 (Sickles) and 19948 (Blackwell) are incorporated herein by reference.

J L Naylor

W. B. Jones

R J M Braidwood

P C Carter

D M Yoder