

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20275
Docket Number MW-20082

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Board of Trustees of the Galveston Wharves

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

(1) The Carrier violated the Agreement when it used outside forces to repair the roof on Pier 12 (System Files 700-5, 700-19, 700-23, 700-57, 700-66).

(2) The Carrier also violated Article IV of the National Agreement of May 17, 1968 when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) C&M Foreman C. Moore, Assistant Foreman C. Mlcak, Mechanics T. E. Curtis, J. Meyer, Jr. and P. Fontono each be allowed fifty-six (56) hours of pay at their respective time and one-half rates for October 17, 18, 24, November 7, 8, 21 and 22, 1970 because of the aforesaid violation.

OPINION OF BOARD: This claim is grounded in part upon Petitioner's assertion that Carrier violated the Scope, and Hours Paid For, provisions of the Agreement between the parties when it used employes of an outside contractor to repair the roof on Pier 12 located at its facilities in Galveston, Texas. It is undisputed that employes of the outside contractor performed repair of the roof from mid-October to mid-November, 1970. The pertinent provisions of the Agreement read as follows:

"ARTICLE 1., SCOPE

Rule 1. The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employes in any and all sub-departments of the Construction and Maintenance Department represented by the Brotherhood of Maintenance of Way Employes. This agreement shall not apply to the following:

1. Construction and Maintenance Supervisors or other comparable supervisory officers and those of higher rank.
2. Clerical, office and civil engineering forces.

"3. Electrical Department employes as now constituted."

Article 14 of the above-mentioned Agreement reads as follows:

"ARTICLE 14., HOURS PAID FOR

Rule 1. Except by mutual agreement between the management and employes' representative; hours of work of employes shall not be reduced in order to permit company to employ those not members of organization represented or to let by contract work of maintenance, construction or demolishing."

In order to sustain its position on the merits of its claim, Petitioner must demonstrate that the Agreement clearly reserves unto it an exclusive right to the work complained of; or in the absence of such Agreement reservation, probative evidence that custom, practice and tradition have reserved such work to it exclusively. (Awards 18471, 19032, 19421, 19516, 19576, et al.) In this context, the provision of the Agreement primarily relied upon by Petitioner is a general Scope rule. No exclusive reservation of work is found in this rule. Accordingly, Petitioner must demonstrate such reservation by force of custom and past practice. In this connection, Petitioner has shown that similar work was being performed by Carrier's M of W employes on Pier 11 at the time that the contractor was repairing Pier 12. This evidence is probative but not determinative of the issue of exclusive practice. On this point the record is more compellingly persuasive that roof repairs in the past have been systematically and regularly subcontracted to outside roofing contractors by Carrier. Accordingly, we must conclude that Petitioner has not met the burden of proof requisite to claim the work is exclusively reserved to it.

In asserting Agreement violations, Petitioner also relies on the prohibition against unilateral reduction in hours of work for reasons listed in Rule 1 of Article 14. On the record before us we are not persuaded that employes' hours of work were reduced as a result of the roof repair subcontracting. Moreover, to whatever extent this Article 14 agreement is premised upon the claim of exclusivity dealt with supra, it similarly must fail.

Petitioner also alleges an independent violation of the procedural requirements of Article IV of the National Agreement of May 17, 1968. The record shows and Carrier admits that no advance written notice of its intention to contract the roof repair work was provided the General Chairman. A clear violation of Article IV is thereby shown.

Finally, Petitioner requests monetary damages for the alleged breaches of agreement. On this point we must advert to our recent Award 20071 (Eischen) involving the same parties and essentially the same issue:

"We are aware of the divergence of awards on this difficult and often enigmatic problem as it relates to Article IV. As we have stated on prior occasions, we are loathe to treat contractual violations by simple reprimand. Nonetheless, this Board is not empowered to add to, subtract from or alter existing agreements. In regard to damages, the record herein shows no provision of the Agreement which specifies monetary relief for breach of Article IV; and, no proven loss of earnings or work opportunity. In these circumstances we are constrained to deny the compensation requested in Claim (3). (See, e.g., Awards 19657, 19574, 19399, 19254, 19056, 18687, 18305)."

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 Employee involved in this dispute are respectively Carrier and Employee 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 denied.

Part (2) of the claim is sustained.

Part (3) of the claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1974.