NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21646
Docket Number MW-21411

Robert J. Ables, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Louisville and Nashville 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 and/or discussion with General Chairman J. D. Sowders, it contracted the work of constructing a building (No. 6732) at Pascagoula, Mississippi to outside forces /System File 1-17(24)/E-201-14 E-201/.

(2) B&B Foreman L. E. Harville, Carpenters H. W. Wright, E. Stinson, E. A. Ward, Carpenter Helpers I. W. Owen and J. W. Pruett each be allowed pay at their respective straight time rates for eight hours straight time each for April 9 through 12, April 15 through 19, April 22 through 26, April 29 through May 3, May 6 through 10, May 13 through 17, May 20 through 24, May 28 through 31 and June 3 through 6, 1974, and continue to be paid as long as contractor Broadmoor Corporation of Gulfport, Mississippi is allowed to perform work on Building 6732 being contracted at Pascagoula, Mississippi.

OPINION OF BOARD: Carrier concedes it did not give the required notice that it would sub-contract work out for the construction of a building; therefore there is no question that there was a violation of the agreement.

The question is what to do about the violation.

The Carrier argues that the sub-contracting provisions of the agreement permit the Carrier under Section 2(e) to sub-contract out work if there are not sufficient laid off employes to draw upon to do the work, or if there is not enough equipment not otherwise in use to perform the work; and that, in fact, with respect to the work in issue there were not sufficient laid off employes to do the work.

Thus, the Carrier has a very strong case on the merits supporting its decision to contract out the work on the new building.

But a National Agreement was violated. Article IV requires the Carrier to give notice not less than 15 days before it sub-contracts out work. Thereafter, if the Organization feels it is necessary, it can

ask for a meeting which shall be granted by the Carrier to discuss the contemplated sub-contracting work. The agreement further provides that in the event the parties do not agree whether or not the company is authorized to contract out the work, each party reserves the rights it had and the Carrier can go forward with the sub-contracted work. In other words, in the event of an impasse, the Carrier is free to proceed with the work and the Organization is free to file a grievance.

In view of the Carrier's failure to give the required notice, the dispute here is whether or not to grant the claim as the Organization requests, which is for consequential damages to the extent of the specific days missed, as identified in the claim, and for all subsequent time missed; or whether as the company argues there is no basis for a penalty or money award because there was not in fact a loss of work opportunity for the employes involved.

The Organization relies on recent Awards 19899 (Sickles), in which full damages were authorized, and 20020 in which damages were paid on a half claim basis. The Organization concedes that the award in 20020 in which half the claim was authorized to be paid did not include any criterion as to how that judgment was reached.

The Carrier argues strongly to the contrary that in the event there is no showing of loss of work opportunity - even though there is showing of violation of the agreement - no damages, compensation, penalty, etc. may be awarded.

Award 18305 (Dugan) was the first in a long line of decisions supporting this position. Some 28 awards subsequent to the Dugan award likewise denied damages for violation of Article IV where no pecuniary loss was shown. These awards involve different referees and it cannot be said they were inexperienced thereby establishing firm precedent against damages where there is no loss of work opportunity.

The case however cannot be disposed of so matter-of-factly.

It is true that to award a penalty there must be either a showing of damage, or it must be shown that the violation was of the kind that was intended, and did, result in some prejudice to the employes involved and therefore some injunctive or punitive action should be taken to prevent the Carrier from doing the same thing in the future with impunity.

In considering this question it is pertinent to know that Article IV of the National Agreement of May 17, 1968 was intended to allay the fears of the Organization about sub-contracting out work and

that the requirement to give notice - at least implicitly - was intended to give the Organization an opportunity to educate the Carrier why the intended sub-contracting work should not be assigned off the property. Also, it can be inferred that the Organization by asking for and getting a meeting in accordance with the notice requirements under Article IV was educating itself to develop a grievance in the event that the Carrier ultimately decided to go ahead with the sub-contracting out work. For these reasons it cannot be said that the notice requirement was a technical or meaningless requirement even in the event the Carrier - as here - had reason to be confident that it was authorized to sub-contract. In defense of the Carrier in this case, however, it may be said that there does not seem to have been any intent or motive to shortchange the Organization. Prior and subsequent to this dispute, the Carrier did give notice about intended sub-contracting work.

The Organization is well aware of the decisions issued under Article IV, in which compensation was denied where the employes were employed in their regular jobs and suffered no loss of wages. This precedent was set in Award 18305 (Dugan) where the "full employment" concept was established in which damages were denied even upon finding a violation of the agreement. But the Organization states that for over 40 years the question of damages has swung back and forth like a pendulum in a grandfather's clock. "The pendulum is now on the side of payment because of lost earning opportunities." Recent Award 19899 (Sickles) and early awards before the National Agreement in Article IV give comfort to the Organization. In these cases compensation was awarded for failure to notify or discuss in accordance with the agreement. The Organization also relies on the decision of the Fourth Circuit Court of Appeals in Brotherhood of Railroad Signalmen v. Southern Railroad Company, 330 F.2d 59, decided May 1, 1967, and the decision in Award 20020 which referred to that decision, in which the court sustained the principle that loss of work opportunity is a compensable offense.

In Award 19899, Referee Sickles makes the point that in the line of cases starting with Award 18305 various referees did adopt Dugan's conclusion of denying damages if full employment was demonstrated, but such denials were made without significant comment and, quite importantly, no referee stated or suggested that the Board lacked authority to award damages.

The Fourth Circuit decision supports the thought that there is no reason for the division to continue between arbitrators on the question whether or not damages may be awarded in the event of a violation of Article IV. Sickles' observation makes sense that the Board should award damages in each individual case in direct relationship to the loss of job opportunity and tangible loss of pay, notwithstanding a "full employment" situation.

The question remains, what happens to the Organization's concern about sub-contracting out work if the Carrier can effectively disregard the Organization such as by failing to give notice it has agreed to give under the contract?

A list of successful awards finding such violations of the sub-contracting agreement would give ammunition to the Organization to open up the contract, in accordance with Section 6 of the Railway Labor Act to require some new provisions with respect to sub-contracting out; but this is major surgery and is not easy to do. Short of this remedy, each case under the jurisdiction of this Board must be considered on its merits.

On this test and in recognition of Carrier's failure to give notice, it may be found that the Carrier did violate the Agreement but that it did not do so with bad intent or motive. There is therefore no need to impose a penalty (which could have been imposed if warranted), particularly as the evidence is clear that the Carrier would have been authorized under the Agreement to sub-contract out construction of the building in issue, even if it had given the required notice.

If there were actual damages in this case, the Organization has the burden to prove them in this or other appropriate forum. It has not proved such damages in this case.

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 Carrier violated the Agreement.

A W A R D

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 18th day of August 1977.