NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24137
THIRD DIVISION Docket Number MW-23870

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Denver and Rio Grande Western Railroad Company

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

(1) The Carrier violated the Agreement when it assigned snow removal work between Floy and Cedar, Utah to outside forces beginning February 5, 1979 (System File D-13-79/MW-26-79).

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

(3) As a consequence of the aforesaid violation, furloughed Road Equipment Subdepartment employees N. N.McDonald, D. R. Daniels, E. Nez, F. L. Duboue, J. D. Horan, W. M. Hays and M. R. Cordova each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside forces."

OPINION OF BOARD: The Organization claimed that the Carrier violated Article IV of the May 17, 1968 Agreement - among other Rules - when it contracted out the plowing of snow off of access roads along the right-of-way and the Claimant sought equal proportionate shares of the compensation concerning the time worked by employes of the contract firms.

In addition to an assertion that the work in question had customarily been performed by the road equipment sub-department, the Organization asserts that the Carrier did not notify the Organization of its intention to contract out the work.

The Carrier conceded that commencing on February 5 it began contracting out the grading of snow from the roads along the railroad right-of-way and that it used a contractor because all of the Carrier's snow removal equipment was working in snow removal. Although there were several operators on a layoff status at the time there were no machines available for said employes to operate. In the initial denial the Carrier concluded that the snow "had to be removed at this time and, therefore, see no justification for this claim as it was an emergency".

In response to the initial denial the Organization asserted that there was available equipment and in any event it is not uncommon for the Carrier to lease machinery and have its own employes operate same.

The question of exclusivity of performance was raised by the Carrier on the property and the Carrier urges that there is no obligation to give notice of intent in such a case.

After a number of items of correspondence had been exchanged, the Carrier raised the question that the Organization had not identified the Claimants; but promptly thereafter, the Organization complied by specifying the identity of the individuals involved.

We find it unnecessary to explore the question of exclusivity because it has been long established that when a violation of Article IV of the May 17, 1968 National Agreement is at issue it is only necessary to establish that the work in question is within the scope of the applicable Agreement - whether or not it is performed exclusively by the bargaining unit employes. See Award 19899, and consistent Awards cited therein. Awards to the contrary are not persuasive.

Whether or not the existence of a heavy snow circumstance in the geographic area in question can be considered as emergency may very well be open to debate in another case. Suffice it to say in this instance that we feel that the Carrier had an obligation under Article IV to bring the matter of contracting out to the attention of the General Chairman. To be sure, in a given case, a Carrier might be excused for failing to afford a full fifteen (15) day notice (a matter not decided in this case) but here we feel that a failure to make any effort to give any notification is a clear violation of Article IV and we will sustain the claim.

The identity of the Claimants was established while the matter was still under consideration on the property and the assertion that the Claimants were not properly identified is, in our view, not properly before us nor is the question of "full employment" due to the assertion that the Employes in question were working at the time. See Award 19899.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of January 1983.

DISSENT OF CARRIER MEMBERS
TO
AWARD 24137, DOCKET MW-23870
(Referee J. Sickles)

For the same reasons expressed in our Dissent to Award 19899, dissent to this Award is required.

P. V. Varga

W. F. Euker

D. M. Lefkow

J. E. Mason

J. R. O'Connell