NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26301
THIRD DIVISION Docket Number MW-26064

Gil Vernon, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(The Atchison, Topeka and Santa Fe Railway Company

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

(1) The Carrier violated the Agreement when it assigned outside forces to construct fence at Continental Divide, Gallup Hill, Sanders, Adamanda and Joseph City on the Albuquerque Division (System File 170-A8-833).

(2) The Carrier also violated Appendix No. 8 (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 violations furloughed B&B employes W. P. Roanhorse, N. C. Colberg, L. E. Kennedy, D. R. Nelson, E. Rubio, E. A. Yazzie, T. Baisden, C. E. Gilliam, L. E. Hutchins, G. L. Rogers, T. L. Allen, R. E. Sartor, Jr., M. Beeson, T. Billy, N. Yazzie, P. Beeson, D. D. Davis, W. R. Cockerham, R. E. Welch, G. T. Rickard, A. D. Foster, C. J. Franklin shall each be allowed pay at their respective rates for an equal proportionate share of the two hundred forty (240) man-hours expended by outside forces in performing the work referred to in Part (1) hereof."

OPINION OF BOARD: The basic facts of this case are not disputed. The Carrier contracted for the construction of security fencing (chain link fence) around the perimeter of microwave buildings located at Gallup Hill, New Mexico, Sanders, Adamanda and Joseph City, Arizona, without giving the Organization advance notice pursuant to Article IV (Contracting Out) of the May 17, 1968, National Agreement. The Agreement reads as follows:

"APPENDIX NO. 8

ARTICLE IV - CONTRACTING OUT -
NATIONAL AGREEMENT 5/17/68

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

Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement."

There are two essential independent elements of the dispute. First, a question is presented whether advance notice was required under Article IV and second, it is disputed whether the subcontracting violated the Agreement.

On the notice issue, the Carrier argues that the Organization must show that they have performed the work in question exclusively before notice is required.

The Board disagrees. It has been held previously that exclusivity need not be established to show that the disputed work is within the Scope Rule for purposes of notification. In this case, there are wage classifications covering fence work and on occasion fencing around a microwave tower has been performed by Maintenance of Way forces. This is sufficient for notice purposes to establish the work was covered by the Scope Rule. There is good reason not to interpret the notice provisions too strictly since conferences pursuant to Article IV may help eliminate disputes.

While the Board believes that the work in question is covered by the Scope Rule for the purposes of advance notice, it is equally convinced that a sustaining award on this basis alone would, under these unique circumstances, be inappropriate. This is because the Organization has slept on their right to a notice for microwave tower fencing. The record bears out that between 1967 and 1983 the Carrier contracted out the installation of fences around 131

microwave installations without protest. The Organization asserts it was not aware of this subcontracting. However, this is difficult to accept. A microwave installation is difficult to miss, especially when there are so many of them. It is the opinion of the Board the Organization cannot rightfully claim a violation of Article IV without first putting the Carrier on notice that it believed advance notification was required. Thus, the Board is limited to directing the Carrier to provide notice in the future.

The second consideration under Article IV is the propriety or merits of the subcontracting. A relevant consideration in this respect is the historical practices of the parties. Again, the Board cannot ignore the fact the Carrier has contracted out these installations to the almost total exclusion of the Organization, without protest. It is significant as well that this predates the May 17, 1968, Agreement, in that the Agreement states "nothing in this Article IV shall affect the existing rights of either party in connection with contracting out." Accordingly, we cannot find that this contracting out violated the Agreement.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of April 1987.