

PUBLIC LAW BOARD NO. 1844

AWARD NO. 13

CASE NO. 1

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when outside forces were used to pick up and load rail and track scrap on the Illinois Division (System File 81-1-219).
- (2) The Agreement was further violated when the Carrier did not give the General Chairman prior notification of its plans to assign said work to outside forces.
- (3) Because of the aforesaid violations, Messrs. D. E. Harriss and K. L. Bushman each be allowed pay at their respective rates for an equal proportionate share of the total number of hours expended by outside forces beginning sixty (60) days retroactive from January 28, 1975."

OPINION OF BOARD:

In this case the Organization alleges a violation of the Scope Rule, Rule 1 of the Agreement. The background facts are not disputed. During the claim period Carrier was engaged in main line rail renewal, replacing old rail with new and heavier continuous welded (ribbon) rail. Several work stages of dismantling, removal of old material and construction of tracks were involved in the project. Specifically the old rail was taken out including tie plates, angle bars, and turnouts; the old rail and materials were picked up and transported

to a rail welding plant; and new ribbon rail together with tie plates, angle bars, turnouts, etc. were laid. M of W forces were used to perform all of this work but Carrier contracted part of the pickup and loading of the released rail and track scrap work to outside forces. Specifically, Carrier contracted with Stahl Construction Company for the use of two cranes and operators. This rented equipment was used to pick up the old rail and related material and machine operators supplied by the outside contractor ran the cranes in the performance of this work. The record shows that no prior notice or consultation was provided the General Chairman by the Carrier before entering into this disputed transaction. Nor is it contested that both of the Claimants herein, D. E. Harriss and K. L. Bushman, were working respectively as crane operator and foreman on the replacement phase of the rail renewal project at all times when the contractor's employees were operating the rental cranes on the rail removal phase of that project.

We do not find persuasive the Carrier's contention that the contracting out provisions of Rule 1 are inapplicable in this case. Carrier would have us find that its rental of equipment together with outside employees to run such equipment does not constitute a letting of work to contractors to be performed by contractor's forces. Such semantic distinctions however would permit parceling out of work protected by the Scope Rule piecemeal by such rental agreement in a fashion which would render Rule 1 meaningless. It is apparent to us that such was not the intent of the parties in drafting that Agreement language and we have no doubt that we deal here with a "contracting transaction" as that term is used in Rule 1 (b), Paragraph 3.

Apparently there is no real dispute that the work involved is work embraced within the scope of the applicable Agreement as described in the first paragraph of Section (b) of Rule 1. Therefore, even assuming arguendo that one or more of the criteria for subcontracting established by Paragraph 2 of Section (b) was applicable, it was incumbent upon Carrier to comply with the provisions of Paragraph 3 before contracting out the scope covered work to outside forces.

We are guided in construing and interpreting the notice and consultation provisions of Rule 1 (b) by antecedent Awards involving Article IV of the May 17, 1968 National Agreement upon which the instant contract language obviously is based. Carrier herein failed to give any notice before contracting out the work to Stahl Construction Company and beyond doubt it has violated Rule 1 by this failure. We concur with the reasoning of some of the earlier Article IV awards to the effect that failure to comply with the notice provisions makes irrelevant Carrier's further contentions regarding inadequate or unavailable equipment to handle the work. These are matters which the parties might have discussed under the procedures provided in Paragraph 3 of Rule 1 (b), but they have no bearing on whether the notice should have been given in the first place. See Awards 19399 and 19657.

The only remaining question is whether monetary damages should lie in this case for the proven violation of Rule 1. This Referee has stated on prior occasions in similar cases that he is most reluctant to treat a proven rule violation with a mere reprimand. (The notice and consultation requirements of Rule 1 are not precatory but mandatory and Carrier officials disregard them at their peril. But here, as in other cases, we do not write on a clean slate. A substantial body of precedent has developed regarding these Article IV type cases which we may not lightly disregard nor find palpably erroneous. A consistent principle flowing through all of those awards with respect to damages

is that monetary compensation is not awarded in the absence of a proven loss of earnings or work opportunity by Claimants. See Awards 19305, 19399, 19657, 20071, and 20275. Claimants in this case have not demonstrated such loss since the record shows that they were working and under pay at all times when the outside forces operated the rental cranes. Based upon the foregoing precedents we shall not award the monetary damages sought in the claim.

FINDINGS:

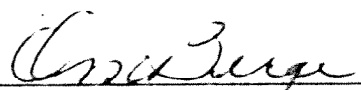
Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

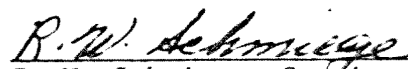
1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;
 2. that the Board has jurisdiction over the dispute involved herein;
- and
3. that the Agreement was violated.

AWARD

Claim sustained to the extent indicated in
the Opinion.


Dana E. Eischen, Chairman


O. M. Berge, Employee Member


R. W. Schmiede, Carrier Member

Dated: Aug. 18, 1977