Award No. 4441

Docket No. 4400

2-L&N-EW-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Harvey Daly when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Electrical Workers)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement the Carrier improperly contracted the repairing of a 102 horsepower electric motor to an outside contractor to be repaired by employes not subject to the current agreement thereby damaging the employes of the electrical workers' craft.

2. That accordingly, the Carrier be ordered to additionally compensate electricians whose names appear on the Armature Gang Overtime Board, namely, K. E. Karr, J. W. Kenealy, J. W. Harless, C. A. Toole, T. E. Scriven and R. J. Kissling an equal number of hours at time and one-half rate as was charged the Carrier by the contractor who performed the work.

EMPLOYES' STATEMENT OF FACTS: The Louisville and Nashville Railroad Co., hereinafter referred to as the carrier, maintains at Louisville, Kentucky a modern up to date maintenance and repair shop, including an armature shop for the repair, rebuilding and overhauling of electric motors and generators. Carrier's armature shop is equipped with the following:

Test Equipment—growlers, analyzers, milivolt meters, wheatstone bridge, megger, A.C. hipots, and high potential D. C. test equipment.

Cleaning Equipment—Degreasers, 1 small, 1 medium size and 1 large enough to accommodate traction motors and main generators used on diesels.

Machines Used in Winding Motors or Armatures—Band saw for cutting sticks for slots, paper cutter, crimper-taper for cutting and forming slot insulators, coil former and spreader for winding field coils and preshaped armature coils—1 armature winding machine for fractional horsepower armatures.

When the motor failed and the inspection revealed that extensive repairs were required, certainly it was of paramount importance that the repairs be made with the least possible delay. Since the 200-ton crane is so vital to the successful operation of the heavy diesel repair operation concentrated in South Louisville shops, every possible way to return it to service as soon as possible was considered; and since carrier was not equipped to perform such work, it had no alternative but to send the armature to an outside firm.

In the light of the whole record, carrier has shown that the claim presented to your Honorable Board is wholly without merit. It should, in all respects, be denied, and carrier respectfully requests that you so hold.

(Exhibits not reproduced.)

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Around September 1, 1961, the Carrier contracted out to General Electric Company the repair and overhauling of a 102 horsepower electric motor from a 200 ton overhead crane located in the Carrier's Shop at South Louisville, Kentucky.

The Organization charged that the Carrier's action violated Rule 132(a) of the controlling Agreement, and, accordingly, the Organization filed a claim on behalf of Electricians K. E. Karr, J. W. Kenealy, J. W. Harless, C. A. Toole, T. E. Scriven and R. J. Kissling.

The first contention of the Carrier, supra, is untenable, because the record indicates that the "upgraded" motor "failed in less than two months after being repaired by General Electric".

The Carrier's second contention, supra, finds scant support because the weight of the evidence offered reveals the Claimants had the skill and experience, the Carrier's facilities were adequate, and the materials used by the General Electric Company were available on the open market.

The final contention of the Carrier, supra, is also not supported by the record, because the Carrier's desire for speed was nullified by the necessity for having the job redone after the motor's failure. In fact, the record casts serious doubts on the ability of the General Electric Company employes to do the work better and faster than the Claimants.

Briefly stated, the reasons for the Board's determination in this case are as follows:

1) Rule 132 (a) gave the work to the Claimants;

2) the Claimants had the skill and experience to do the work;

3) the materials used by the General Electric Company were available to the Carrier on the open market;

4) the Carrier had the equipment and facilities to do the work.

Accordingly, the Board must sustain this claim but at the pro rata rate of pay.

An impressive number of previous Awards were thoroughly studied and evaluated. We found those Awards readily distinguishable from the instant case. A large number of the Awards dealt with motor repairs on a repair and exchange basis, while the remainder were premised on situations where past practice controlled or where the Carrier lacked the facilities, equipment, or skill to do the job.

AWARD

Claim sustained at the pro rata rate of pay.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February, 1964.

DISSENT OF CARRIER MEMBERS TO AWARD 4441

Since the majority has elected to depart from firmly established principles governing the right of a Carrier to contract out work which it has not performed previously and has shown it cannot do, we must then review the reasons for the failure of the majority to reach the same conclusion in Award 4441 as decided in Award 2188, July 18, 1956, between the same parties involving the same principle, and in more than thirty subsequent denial awards involving the same principle as found in Award 4441. We believe an award is no stronger than the reasoning behind it.

In the Employes' submission a listing of available machinery is shown giving the impression that with such equipment the work could have been given to the employes, yet the Employes admitted that the Carrier had only "1 armature winding machine for fractional horsepower armatures." The motor involved was a 102 horsepower motor and not a fractional horsepower motor. The Employes made no showing that the Carrier had the proper equipment for epoxy encapsulation of the armature and motor; however, reference was made to available varnishing equipment.

A review of the work experiences of the claimants shows that much of their experience was received somewhere besides their present employment; however, in not a single employe's experience is it shown that any work such as involved with this size of motor was ever performed on this Carrier's property. In claimant Kissling's work experience it is shown—"He has used every type of varnish and insulation known to the industry for approximately 49 years and has even encapsulated windings with the materials used for this purpose **prior to Epoxy.**" (Emphasis ours.) It is shown in letter of Mr. C. A. Love, Chief Mechanical Officer of Carrier, dated February 8, 1962, to Mr. Webb, General Chairman, I.B.E.W.—(Employes' submission, Exhibit H)—"A

new G. E. special epoxy varnish formulation with which **the entire motor** was encapsulated" was used. (Emphasis ours.) The work to which the Employes constantly refer involved armature repairs, yet the Employes admitted on page 1 of their rebuttal submission "the complete motor assembly, i.e., the armature and frame (fields) were sent to General Electric for repair."

The evidence on which the Employes apparently built their case is found mostly in self-supporting statements of the local chairman, for on pages 6-7 of their submission under "Position of Employes" we read:

> "Employes' Exhibits C and F attached hereto reflect beyond doubt that the work of repairing, rebuilding and overhauling of motors of the size here involved and larger motors have been performed by Carrier's electricians in its shops for years."

At the hearing, Mr. O. S. Reynolds, Manager, Employe Relations, Chief Mechanical Officer Staff, and former Superintendent of the South Louisville Shops—the location of this dispute—denied the truth of the Employes' contentions and advised the Board that Carrier's electricians have never been used to do the work here involved on any motor except fractional horsepower motor and that Carrier has, since acquiring their first diesel, returned diesel traction motors, main generators, and their armatures to the manufacturers for heavy repairs. Both parties have stated the size of the motor involved is comparable to the diesel motors named.

The Employes skillfully show in their Exhibits L and M the products of National Electric Coil Company and Minnesota Mining & Manufacturing Company, which are not involved and which may or may not be comparable to "A new G. E. Epoxy" material. Even so, these exhibits support Carrier's position that it does not have the necessary equipment to do the work. In Exhibit L we read that two methods of applying epoxy resins are used. One method is by baking, and the second method requires the cold storage method. We read that the best quality is obtained with the 100% solids resin, and this method requires the cold storage method and not baking. The Employes did not show that Carrier possessed the necessary cold storage facilities to perform this work.

The naked truth is, Carrier did not possess the equipment then, and does not now possess the equipment to do this work, and regardless of this award, the Carrier cannot possibly do this work with its present equipment.

On page 2 of Carrier's submission, it advises—"Carrier did not have in its employ employes experienced in such work, and neither did it possess the necessary materials or equipment and thus it was necessary that the work be contracted." On page 3 of Carrier's submission, we read that Carrier's electricians have never rewound any large comparable motor. Carrier's former shop superintendent's statement that this Carrier's electricians have never done any of this work was completely disregarded by the majority in arriving at the decision that:

> "2) the Claimants had the skill and experience to do the work;
>
> 3) the materials used by the General Electric Company were available to the Carrier on the open market;
>
> 4) the Carrier had the equipment and facilities to do the work."

These determinations were made after the Carrier had shown such work had never been performed, and the Employes did not cite a single motor of

comparable size which they had rebuilt—they claimed only fractional horsepower motor had been overhauled. These determinations were made without any showing anywhere or any time by the Employes that the special G. E. Epoxy was available on the open market, and nowhere was it shown that Carrier possessed cold storage facilities which would be required to give top quality job, or other special equipment for motors of this size.

To reach this determination, the majority had to disregard a similar dispute (Award 2188), wherein this Board interpreted the same rule of the same agreement and the identical issue as here involved. Our Award 2188 is a binding interpretation of the agreement and rules and should be followed by us, unless it is shown to be in error. No such showing has been made.

From the date of Award 2188 the Carrier has shown that large motor work of much lesser magnitude has been contracted out without prior complaints.

The employes made no showing that they have customarily and traditionally or by practice performed the work in question. The Employes contended that all maintenance and service work on this and other large motors was performed by them. The fact that the Employes do maintain and service large electric motors does not militate Carrier's position, for there is little comparison between routine service and minor repairs and re-manufacturing to up-date an obsolete motor.

Would it be reasonable to believe that Carrier had all the necessary equipment and materials to re-manufacture the complete large electric motors, yet in the past eight years none of such work had been performed, although a considerable number of large electric motors required heavy repairs during this period?

The work involved in this dispute was not the normal standard work such as the Employes contended. Certainly where a Carrier has ordinarily contracted out work it may continue to do so. See Awards 3839, 5487, 5747, 6251, 6299, 6706, 7600, 7765, and 7806 of the Third Division.

In our Award 3630, we held in part:

> "It is a fundamental principle of the employer-employe relation that the determination of the manner of conducting the business is vested in the employer except as its power of decision has been surrendered by Agreement or is limited by law."
>
> "The fact that the Carrier may possess adequate facilities for making some items in its own shops does not justify an implied prohibition in the classification of work rule against the purchase of similar items in the open market."

In our Award 3767, we held in part:

> "The Carrier is not in the manufacturing industry, but in the transportation business; the Agreement relates to the Carrier's business, and in the absence of express provisions or other compelling reasons cannot properly be construed as committing it to engage in any manufacturing operation or activity which it can reasonably or economically avoid. For it is under statutory obligation as well as competitive necessity to operate its business with all possible economy and efficiency."

In making the determination that:

"1) Rule 132 (a) gave the work to the Claimants." the majority found that the Employes did have the exclusive right to perform the work in dispute. Rule 132(a) does not grant exclusive rights to do work which the Carrier cannot perform on its property.

On April 18, 1938, Third Division held in part in its Award 615:

> " * * * it is a mistaken concept that the source of the right to exclusive performance of the work covered by the agreement is to be found in either the scope or seniority rules; they may be searched in vain for a line implying **that they purport to accord to the employes represented the exclusive right to the performance of the work covered by the agreement.** The scope rules describe the class of work; they do not undertake to specify directly the inclusion of all such classes that is available under the agreement." (Emphasis ours.)

Also see Awards 4353, 6422, 6644, 7199, 7712, 7806, 7833, 7841, 7842, 7843, 7844, 7861, 7965, 8083, 8149, 8184, 11832, and 11298 of the Third Division, as well as more than 100 denial awards of this Division ranging from Award 1110 to Award 4347, for in all of these awards the same basic principle was involved, considered, and decided adversely to the Employes.

In conclusion, the Findings in Award 4441 state:

> "An impressive number of previous Awards were thoroughly studied and evaluated. We found those Awards readily distinguishable from the instant case. ***where the Carrier lacked the facilities, equipment, or skill to do the job."

In the 45 denial awards of this Division involving the same craft and the same basic principle offered in support of Carrier's position, 29 of these awards involved electric motor repairs. For the majority to reach the decision it did, to set aside everything offered by the Carrier as meaningless and to accept all the assumptions, contentions, and conjectures of the Employes, which were so skillfully presented as to mislead the Board, is difficult to understand.

In this award the Carrier is compelled to pay the claimants, who lost no time, for work which the Carrier could not offer its employes because of the lack of necessary equipment to do the work.

The majority has committed a serious and grievous error in this award.

For the reasons hereinabove presented, the Carrier Members dissent.

/s/ **P. R. Humphreys**
/s/ **H. K. Hagerman**
/s/ **F. P. Butler**
/s/ **W. B. Jones**
/s/ **C. H. Manoogian**