Award No. 4158
Docket No. MW-4125

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

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

(1) That the Carrier violated the agreement in effect by having certain work at Clinton, Iowa, viz. building of roadway approximately 450 feet in length and 8 feet in width and 8 inches deep, and putting cement floor in Shop A, performed by the Johnson Construction Company, said contractor devoting approximately 3036 man-hours in connection with this work;

(2) That the Foremen and twenty-two (22) Bridge and Building Employes, employed in the Bridge and Building crew, stationed at and with headquarters at Clinton, Iowa, shall each be paid for 132 hours pro rata rate at their respective rates of pay.

EMPLOYES' STATEMENT OF FACTS: During the period August 6, 1946, to September 26, 1946, the Carrier employed a contractor to remove a wood block floor at Shop "A" at Clinton, Iowa, and replace it with a concrete floor. It also had constructed a concrete roadway approximately 450 feet long, 8 feet wide, and 8 inches deep.

In order to remove the old flooring, it was necessary to move certain heavy machines, and the Carrier assigned its regular B&B forces to move these machines so that employes of the Johnson Construction Company could remove the wood block floor and replace with a concrete floor. In order that the rails would be flush with the new floor, it was necessary that the track in Shop "A" be raised approximately 3 inches. This work was performed by the B&B employes.

In replacing the floor in Shop "A" and constructing the above referred to roadway, the employes of the Johnson Construction Company consumed approximately 3,036 man-hours.

During the period involved in this claim, the Carrier had approximately twenty-two B&B mechanics employed at Clinton, Iowa. Also B&B Foreman Shields, located at Clinton, Iowa, had numerous opportunities to increase the number of men in his crew but was refused authority to do so by instructions of the Carrier's officer, Division Engineer Wells. Work of replacing floors in various buildings and the construction of roadways has heretofore and subsequently been performed by employes in the Bridge and Building Department.

Agreement in effect between the parties dated April 1, 1936, is by reference made a part of this Statement of Facts.

circumstances in the awards referred to above. We therefore ask that your Board sustain our claim in like manner.

CARRIER'S STATEMENT OF FACTS: The carrier removed approximately 15,200 square feet of wood block floor in Shop "A" at Clinton, Iowa, and replaced it with an 8" concrete floor. It also constructed approximately 3,600 square feet of 8" concrete roadway adjacent to Shop "A". In order to remove the old flooring in Shop "A", it was necessary to move a number of heavy machines and the track in Shop "A" was raised approximately three inches so that the rails would be flush with the new floor. The work of moving the machines and raising the track was performed by bridge and building employes of the carrier. The work of removing the old wood block floor, constructing the new concrete floor and constructing the new concrete roadway was handled under contract by the Johnson Construction Company. The work of constructing the new concrete roadway was performed by the contractor during the period June 27, 1946 to July 17, 1946 inclusive. The work in connection with the removal of the old floor and installing the new concrete floor was performed during the period August 13, 1946 and October 9, 1946 inclusive. The employes of the contractor worked 440 hours in constructing the new concrete roadway and 2043 hours in removing the wood block floor and installing the new concrete floor in Shop "A", or a total of 2483 hours on both projects. Employes are claiming compensation for 3036 hours not worked or 553 hours in excess of time worked by employes of the contractor.

POSITION OF CARRIER: It has been the general practice for many years, when the railway company forces cannot expeditiously handle the work, to let to an outside contractor construction work of the type and magnitude involved in this case, and such action has been taken in the past without objections by the employes or a contention on their part that by doing so the carrier was violating the provisions of maintenance of way schedule.

It was necessary to have the work in question taken care of as quickly as possible in order to eliminate the hazardous condition of the floor in Shop "A" at Clinton and to provide a roadway suitable for the operation of crane and crane truck that had been obtained to eliminate the use of hand trucks and wheelbarrows in handling materials for the Car Department. The carrier's bridge and building force assigned to service in the Clinton territory was engaged on other important work. There were not any laid off bridge and building employes who could have been used and, in consideration of the magnitude of the work as well as the necessity of having it taken care of without undue delay, it was decided to let such work to a contractor. During the entire period while the contractor was performing the work in question at Clinton, the members of the bridge and building crew lost no time or employment as a result of contracting the work. In fact, at the time the contract was let there was a sufficient amount of other work lined up at Clinton and vicinity to keep the entire bridge and building force fully engaged until the middle of the season of 1947 in handling such other work. It is not the practice of the carrier to contract work that can be adequately handled by its own forces and equipment without undue delay. It has been the practice to contract new construction of the magnitude and character of that involved in connection with the work that was performed by a contractor at Clinton. It has never been agreed that the carrier is required to unreasonably defer work essential and necessary to the conduct of its operation in an efficient and safe manner until such time as there may be bridge and building employes available to handle such work without detriment to regular necessary maintenance work.

It is the position of the railway company that in consideration of all factors involved, the claim as here presented is not justified and should be denied.

(Exhibits not Reproduced.)

OPINION OF BOARD: This case involves an alleged violation of the Scope and New Positions Rules of the Agreement between the Carrier and the Employes, effective April 1, 1936. There is no dispute as to the incident which gave rise to the filing of the claim and it is set forth in the notice of

claim with sufficient comprehensiveness and clarity as not to require repetition in this opinion.

The Scope Rule reads as follows:

"Employes (not including supervisory officers above the rank of foremen) engaged in or assigned to building, repairs, reconstructions, and operation in the Maintenance of Way Department.

Employes engaged in handling roadway machines, when used in maintenance of way work.

Coal chute foremen and laborers,

Pumpers,

Track, bridge, tunnel and highway crossing watchmen and flagmen at railway (non-interlocked) crossings.

Note: Employes governed by provisions of existing agreements between the Railway Company and other labor organizations, such as mechanical crafts, steam shovel, locomotive crane, and ditcher engineers, cranesmen, firemen, and watchmen, when performing work of their assigned craft in the Maintenance of Way Department are excepted from this agreement:"

The New Positions Rule reads as follows:

"19 (a) All new or vacant positions of a class coming within the scope of this agreement, except laborers, B&B mechanic helpers, or those coming within the provisions of Rule 21, known to be for thirty (30) days or more duration, will be bulletined for a period of seven (7) days and assigned to the senior qualified applicant within seven (7) days subsequent to termination of bulletin, such bulletin to be made in advance of the establishment of new position or creation of vacancy where possible, so that assignment may be made when new position is established or vacancy occurs. Where sufficient advance information is not available, new positions or vacancies must be bulletined not later than date new position is established or vacancy occurs. Temporary vacancies of less than thirty (30) days duration, if extended beyond thirty (30) days, will be bulletined at the expiration of thirty (30) days and assigned to the senior qualified applicant.

(b) Positions or vacancies of thirty (30) days or less duration will be considered temporary, and may be assigned without bulletin. Senior qualified employes making written request for such temporary assignment will be given preferred consideration.

When it is determined that a position bulletined as temporary will become permanent, it will be rebulletined as a permanent position."

From the broad language of the Scope Rule quoted above, it appears that there can be little question that some of the work described in the notice of claim comes within the scope of the Agreement. This seems to be practically admitted by the Carrier for its defense is more or less based upon (1) past practice, and (2) lack of sufficient men in the Bridge and Building forces to do the work.

The Carrier points up the real issues involved in this docket in its submission wherein it stated:

"The primary question here to be determined are—

(a) Whether when the railway company is furnishing all employes holding seniority status for employment under provisions of its contract with the Brotherhood of Maintenance

of Way Employes full-time employment under provisions thereof, and by such full-time employment is unable to perform all of its maintenance and construction work, it is denied the right to—

1. Hire additional employes, if available

or

2. Hire the work done by others.

(b) whether the provisions of that part of the scope rule as contained in agreement between the railway company and the brotherhood reading:

'Employes (not including supervisory officers above the rank of foremen) engaged in or assigned to building repairs, reconstructions, and operation in the Maintenance of Way Department.'

require that the railway company defer repairs, reconstruction and operations in the maintenance of way department until such time as it is able to perform said work by its employes and is precluded from performing such work by the employment of others."

We believe that in determining the answers to the questions posed by the Carrier, we can get a long way toward a solution to the very difficult problem confronting us in this case.

With respect to question (a)-1, the answer obviously is "No." The Carrier is not denied the right to hire additional employes, for the Employes in their submission indicated that that was what they wanted the Carrier to do and the provisions of Rule 19 (a) and (b) give them that privilege.

With respect to question (a)-2, in our opinion there can be no categorical answer. Looking to the Scope Rule of the Agreement, we find that its very broad language would indicate that all maintenance and construction work is covered thereby and that the Carrier could not hire such work to be done by other than Maintenance of Way employes. Obviously, such a conclusion is absurd. It would require the Carrier to use only Maintenance of Way employes to build a huge new bridge, an elaborate station or large buildings, and numerous other kinds of large capital improvements. No reasonable people would contract with such a result in mind for it is clear that for such large construction work the Carrier would not have the supply of men of different skills required nor the special equipment. Obviously, then, there must be some exceptions to the rule. What are those exceptions? Here again we run into a stone wall in attempting to settle upon a principle which would be a hard and fast guide. The difficulty is that it is not a matter of principle but a matter of degree which determines the exception. A clear exception would appear to be the building of a large structure from the ground up or the construction of any type of improvement requiring large capital outlay. On the other hand, the building of a small station, of tool houses and small annexes to existing structures may not be excepted. Ordinary maintenance work such as painting of existing structures, plumbing repairs, repairs to existing tracks, buildings and bridges necessary to the operation of the railroad are clearly not excepted from the Scope Rule.

Carrier states:

"The claimants here involved could not have been used to perform such work for the reason that the full measure of their availability for employment was otherwise utilized by the carrier, and there is no difference, in so far as these employes are concerned, whether the railway company hired additional men if available to perform the work at Clinton, Iowa or whether due to the inability to hire additional men, the railway company hired an outside contractor to perform the work for it, and there is in evidence no violation of schedule rules, provided the railway company compensated the em-

ployes of the contractor performing work for the railway at rates of pay comparable with rates established for similar class of work." (Underscoring supplied.)

We cannot totally subscribe to this statement. There is a difference, insofar as these employes are concerned, in at least two respects. The employes were deprived of a chance for promotion. If the Carrier had expanded its maintenance crews to perform this work, these employes obviously would have been in line for promotion under the seniority provisions of the Agreement. On the other hand, if the work on which they were engaged was being performed concurrently with the work upon which the contractor's forces were engaged and the two jobs completed simultaneously, some of the B&B employes might face the possibility of lay-off because of there being a lesser amount of work for them to carry on. Thus, even though they were fully employed during all the time that the contractor's employes were engaged, they could be hurt. One of the purposes of Scope Rules is to protect the employes from that result. In view of this analysis, we might reasonably conclude that the answer to question (a)-2 posed by the Carrier is "Yes" unless the work is of such a character as to warrant managerial judgment that there is need in the performance of the work for special equipment not normally used by the railroad, or special skills not normally to be found in the B&B forces, or facilities not possessed by the railroad.

With respect to question (b), there can be no doubt that under the Scope Rule the work of repairing, reconstruction and operations in the Maintenance of Way Department is within the Scope Rule of the Agreement. Therefore, the company may not with impunity contract it out. If the Maintenance of Way Department is adequately staffed, such work as above-mentioned, with the possible exception of a large scale reconstruction project, would be kept sufficiently current so that no deferment of the same would be necessary. The Board has frequently held that a party may not assert his own negligence or want of foresight as constituting an emergency. It follows that it cannot assert the same as constituting a basis for violating an agreement. The answer to question (b), therefore, would, generally speaking, appear to be that the Carrier should not permit a situation to arise where it is necessary to contract out such ordinary repair and maintenance work. Where it does arise, if sufficient manpower cannot be recruited to perform such as is non-deferable, negotiation with the Employes should be carried on to arrange for performance of the work by other means, as has been done before by this Carrier. Should the Employes take an unreasonable view of the situation, they would certainly be in an unfavorable position should they come before this Board with any claims.

It follows from the expression of views given above that in some respects, at least, the Carrier has violated the Agreement. Without indicating that we view all new construction as being outside the Scope of the Agreement, we do agree with the Carrier that some distinction can be made with respect to new construction and maintenance insofar as the Scope Rule of the Agreement is concerned. There may be some question as to whether or not the Carrier violated the Agreement in contracting the work of building the roadway. However, in this instance, in view of the surrounding circumstances, we believe the Carrier is entitled to the benefit of the doubt. We do not view the work of replacing the old flooring in the same manner. In our view, it was quite clearly maintenance work and hence in that respect, at least, this case is hardly distinguishable from that which confronted this Board in Awards Nos. 3251 and 3423. This Board has held that proof of wage loss is immaterial in such situations. Accordingly, we believe and hold that the claim must be sustained to the extent that B&B employes affected should be compensated at pro rata rate for the 2,043 hours which were indicated by the Carrier as having been spent by the contractor's employes in replacing the floor and which figure was not disputed by the Employes. It appears to us that all regular Bridge and Building employes in the seniority district of which Clinton, Iowa, was a part at the time of letting the work by contract, were affected and accordingly the compensation should be so distributed and not confined to the Foreman and the twenty-two (22) Bridge and Building em-

ployes, employed in the Bridge and Building Crew at Clinton, Iowa, unless, of course, that constituted a seniority district.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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.

AWARD

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 8th day of November, 1948.