Award No. 4367
Docket No. MW-4325

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN RAILWAY SYSTEM

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

(1) That the Carrier violated the agreement in effect between the Carrier and the Maintenance of Way Employes by contracting to the Hahn Roofing and Heating Company the work of making repairs to the Freight House at Birmingham, Alabama;

(2) That all B&B Employes affected by this violation of the agreement be compensated at their proper rate of pay for an amount of time equivalent to that required by the Contractor's employes to perform this work.

EMPLOYES' STATEMENT OF FACTS: On or about October 19, 1946, the Southern Railway Company entered into a contract with outside parties for the renewal of the roof of the freight house and butterfly shed at Birmingham, Alabama. This work was actually started by employes of the Hahn Roofing and Heating Company on or about March 1, 1947.

The Contractor's employes performing the above referred to work varied in number from 6 to 12 men per day for a period of about 90 days. The consist of the contractor's crew was 3 white men, who performed whatever tinning work was necessary, and also supervised and assisted the balance of the contractor's crew who were inexperienced Negro laborers, used to lay the felt roofing.

The roof installed by the Hahn Roofing Company was a built-up type of gravel roof. The method of applying such a roof is to install a layer of felt, then coating same with hot tar, then another layer of felt and another coat of hot tar, until the desired thickness and number of layers is obtained. Finally, the entire roof is coated with hot tar and gravel.

Work of this nature, or the type of roof referred to, has heretofore been applied by B&B Gangs. Such work has been customarily performed by B&B employes in the past. In fact, this same freight depot was reroofed about twenty years ago by the Foreman and some of the men who now make up the Terminal B&B Gang at Birmingham.

During the period that this referred to work was being performed by the contractor's employes, the claimants, members of B&B Terminal Gang at Birmingham, were available and working on other B&B maintenance work in the close vicinity of the location of the work performed by the contractors.

justified in maintaining because of the rare occasions on which they would be used. (Awards 2812, 2819 and 3839.)

(19) Carrier's action in contracting the specialized roofing job was justified. (Awards 2812, 2819 and 3839.)

(20) The claimants suffered no loss as a result of the work having been performed under contract. In fact, three of them went on vacation during the period the work was being performed.

(21) Claim is one for compensation for work not performed and is therefore clearly not valid under Rule 46 quoted herein.

(22) The Board has recognized that a claimant assumes the burden of presenting some consistent theory which, when supported by the facts, will entitle him to prevail. Claimants have not presented any consistent theory supported by facts which would entitle them to prevail in this case.

For all of the reasons given, the claim should be in all things denied and the carrier respectfully requests that the Board so decide.

(Exhibits not reproduced.)

OPINION OF BOARD: The question for decision in this case is whether or not the Carrier violated its agreement with the Brotherhood of Maintenance of Way Employes in contracting to an independent roofing company the work of applying a built-up roof to the freight house at Birmingham, Alabama. Rule 1, Scope rule, of the Agreement of August 1, 1940, provides:

> "These rules govern the hours of service and working conditions of the following employes as represented by Brotherhood of Maintenance of Way employes: * * *"

This rule does not undertake to specify the work covered thereby. In Award 2812 this Board ruled that the coverage of a similar rule to be as follows:

> " * * * We go further and hold that we regard it as covering all work in the Maintenance of Way Department except such, there being no exceptions contained in the scope rule or elsewhere in the Agreement, as in view of the exigencies confronting the Carrier can under our decisions be properly excepted under what in judicial parlance is known, for want of a better term, as 'operation of law.' Perhaps better for our purposes would be to describe it as that which from the very nature of the work involved the Carrier does not possess sufficient equipment and skill to perform under the exigencies of the situation prevailing and with which it is required to deal. That conclusion brings us to the question of whether a cituation of such character existed when the Carrier entered into the agreement with the general contractors and permitted them to do the work on its shops at Macomb."

On the general question involved here the basic principles recognized by this Board to be governing are found in a much quoted statement of the Board in Award 757; in that Award the Board said:

> "It is well settled by many decisions of this and the First Division of this Board and predecessor Boards, that as an abstract principle a carrier may not let out to others the performance of work of a type embraced within one of its collective agreements with its employes. See awards of this Division, 180, 323, 521 and 615; of the First Division, 351 and 1237. This conclusion is reached not because of anything stated in the schedule but as a basic legal principle that the contract with the employes covers all the work of the kind involved, except such as may be specifically excepted; ordinarily such exception appears in the Scope Rule, but the decisions likewise recognize that there may be other exceptions, very definite proof of

which, however, is necessary. **Mere practice alone is not sufficient, for as often held, repeated violations of a contract do not modify it."**

(Emphasis added.)

One of the recognized exceptions is had where the Carrier can show that it did not have the needed equipment or trained employes to perform a specialized type of job; see Award 2338. In the instant case the Carrier contends that the contract called for a special built-up roof and that the Carrier did not have the equipment and employes needed for such a specialized project. Petitioners contend that the Carrier's employes could have performed the work and that no special equipment was needed. The Board finds that the Carrier has failed to establish that the exception upon which it relies should apply to the facts of this case.

The Carrier stated that the special tools and equipment essential for the roofing work consisted of special ladders, mops and brushes, asphalt or tar, and special equipment for heating the pitch, asphalt or tar and keeping it at the proper temperatures. But the record indicates that such equipment is readily available, and that most of it is ordinarily carried in stock by the Carrier. B&B Foreman H. D. Shelton stated in a letter of October 28, 1948, that the Carrier had all of the necessary equipment needed to put on a built-up roof, including a vat for heating tar. Even if the Carrier did not possess the needed vat, the record indicates that in recent years this Carrier has had many built-up roofs applied, so it cannot be said that there is not sufficient work to justify the purchase of such equipment.

The Carrier admitted that its B&B employes had from time to time patched and made minor repairs to built-up roofs, and often had put on other types of roofs, but it contends that they had never been assigned to apply a new built-up roof and were not qualified to do so, although the B&B forces are made up of mechanics and helpers experienced and trained in all types of maintenance and repair work. The employes themselves contended that they were fully qualified to perform such work, and the record shows that they had applied a built-up roof to the Passenger Station at Birmingham, Alabama; this indicates that these employes could apply such a roof, and the fact that it was not this Carrier that paid them for that particular job has nothing to do with their qualifications for the type of work in quesion. The Carrier has included in its presentation the instructions for the application of 4-ply roofing (Asphalt) and 5-play roofing (Pitch); a study of these instructions fails to show that this work is as highly specialized as is contended by the Carrier. The Petitioners contend that the labor employed by the contractor was inexperienced, and in this regard the record does indicate that the turnover on this job was great. It should be noted also that work of the contractor was subject to the inspection, supervision and approval of the Chief Engineer, UW&S. The Carrier contends that this work has in the past been contracted out, but as was seen above mere practice alone is not sufficient, for repeated violations of a contract do not modify it.

Petitioners agree that there are no sheet metal workers under the Maintenance of Way Agreement in that such workers are covered by the Shop Crafts' agreement, so they have no claim to the 714½ hours of sheet metal work that was performed by the contractor.

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 extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of March, 1949.

DISSENT TO AWARD 4367, DOCKET MW-4325

This award errs because it gives insufficient weight to Carrier's unrefuted statements of its practice to contract the application of the built-up type of roofing here involved, which statements are supported by the substantive evidence of some 120 itemized structures with specialized built-up roofing applied by contractors during the years following negotiation of the governing Agreement of August 1, 1940, and which continuing practice reinforces Rule 58, "Purposes of Agreement," thereof providing:

> "It is understood and agreed that this agreement cancels all previous agreements, rules relating to working conditions and interpretations which are not attached hereto, but does not, except where rules are altered, amended or changed, alter past, accepted and agreed to practices not in conflict herewith."

The application of the specialized types of built-up roofing to the 120 structures of record is completely distinguishable from the application of roofs of the types applied by Carrier's bridge and building forces during these years which embraced only the ordinary commercial types of rolled roofing, composition shingle roofing and similar prepared roofings applied by nailing and included only minor repairs to built-up roofs.

The Opinion of this award having taken governing cognizance of the differentiating principles of the quoted preceding awards, we believe sound conclusion should likewise have recognized the foregoing unrefuted evidence, both by practice and rule, as constituting specific exception of work of this specialized character from the scope of the Agreement.

(s) C. P. Dugan
(s) A. H. Jones
(s) R. H. Allison
(s) C C. Cook
(s) R. F Ray

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 4367

DOCKET MW-4325

NAME OF ORGANIZATION: Brotherhood of Ma;ntenance of Way Employes.

NAME OF CARRIER: Southern Railway System.

Upon application of the representatives of the Employes involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The statement "Claim sustained to extent indicated in Opinion and Findings" applied to both part 1 and part 2 of the Claim. The Opinion was written in reference to all parts of the Claim, and it sustained the claim, both parts, to the extent of 3,684¼ hours; this called for the payment of money (which, of course, was a penalty) for the 3,684¼ hours.

It has been the impression of the Referee in this case that referees frequently speak of the "Claim" in the Award in the singular, although the Claim may be made up of several parts. It was with this practice in mind that the term "Claim" instead of the term "Claims" was used. However, it is felt that a reading of the entire Opinion makes clear the extent to which the Claim was intended to be sustained.

No merit is found in the contention of the Carrier that part 2 of the Claim was indefinite and that no Claimants were named. The Claimants were named on three separate pages of the record. The total hours of work contracted out were, of course, known to the Carrier.

All of the named Claimants were covered by agreement provisions which were made a part of the record. See the following parts of the record in the Carrier's submission: Top of page 9, beginning "(17) There are two agreements * * *"; top of page 10 speaks of "the agreements here in evidence"; the last half of page 15 includes the introduction to the scope rule of the agreement with laborers—that introduction is:

> "These rules govern the hours of service and working conditions of the following employes as represented by Brotherhood of Maintenance of Way Employes:"

It will be noted that these words are the very same as those used at page 5 of the printed Agreement, effective August 1, 1940, containing the provisions applying to the specified employes represented by the Brotherhood of Maintenance of Way Employes, and they are the very same as the words quoted in the first paragraph of the Opinion of the Board. Both the provision at said page 5 and that at page 82 of that Agreement were made effective August 1, 1940.

Finally, one of the basic reasons for concluding the Opinion of the Board with the statement that "Petitioners agree that there are no sheet metal workers under the Maintenance of Way Agreement, (etc.)" was to

make it clear that the monetary payment was to be for 3,684¼ hours only. This was thought to be necessary since the Claim was for "the work of making repairs to the Freight House"; part of "the work of making repairs" was sheet metal work, to which, of course, Petitioners could have no valid claim for the performance of. It was only to this extent that the Claim was not sustained in total.

Referee Frank Elkouri, who sat with the Division as a Member when Award No. 4367 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 5th day of October, 1949.