Award No. 4671
Docket No. MW-4600

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Mortimer Stone, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY

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

(1) That the Carrier violated the provisions of the current agreement by assigning to the International Rail Welding Corporation of Chicago, an outside contractor, the work of welding rail ends on the Carrier's property between the period October to December 1947;

(2) That Laren Cooper, Raymond Gilson, and Sidney Spear, Welders, who, as a result of force reduction had been reduced to Welder Helpers, shall be paid the difference between what they earned as Welder Helpers and the rate of pay applicable to Welders from the time that the contractor was assigned to perform track welding and for each day that the contractor's forces were working;

(3) That Roy Brewer, Welder, laid off in force reduction shall be paid the rate applicable to Welder from the time that the contractor began track welding and for each day that the contractor's forces were assigned in the performance of track welding;

(4) That Eugene Brewer, Clyde Delany, Donald Brady, Thomas Apple, Barney Riley, Melvin Smith, and Harry Gilson, Welder Helpers, laid off in force reduction, shall be paid at the rate applicable to Welder Helpers from the time the contractor began track welding and for each day that the contractor's forces were engaged in track welding.

EMPLOYES' STATEMENT OF FACTS: Laren Cooper, Raymond Gilson, Sidney Spear and Roy Brewer are Welders in the Track Department and hold seniority as such.

Eugene Brewer, Clyde Delany, Donald Brady, Thomas Apple, Barney Riley, Melvin Smith and Harry Gilson are Welder Helpers in the Track Department and hold seniority as such.

On or about October 23, 1947, the Chicago, Indianapolis and Louisville Railway engaged the International Rail Welding Corporation of Chicago, a contractor, to perform certain track welding work near Bloomington, Indiana. And on or about November 3, 1947 the same Carrier engaged the same contractor to perform certain track welding work near Rensselaer, Indiana.

"Another point on which the record is obscure is this; the claim is for 19 members of Bridge and Building forces, all of whom were laid off beginning December 24th. Apparently there was no relation between their lay-off and the contracts which had been let more than a month previous, but the record is in the dark as to whether the contractor performed any of the work which would ordinarily be performed by the laid-off men or merely continued the performance of their contract. Further, it does not appear whether the men laid off would have performed work the contractor was doing had it not been let. The facts are necessary to a determination of the reparation claim if it is found the contracting itself was an invasion of the Maintenance of Way contract. In this aspect of the matter rule 3(a) may be determinative."

As heretofore stated, there was no relation between the law-off of the employes covered by Section 4 of the claim and the performance of the building of rail ends by the International Rail Weld Corporation. The men laid off would not have performed work the contractor was doing had it not been let. Early in June, 1947, conferences were held with the contractor concerning the work to be performed and arrangements were subsequently completed for the performance of the work.

As stated in opinion of Board in Award No. 3206, it would not have been possible and would have been difficult to divide the project into small component parts and turn some of the work over to the employes as specified in Section 4; the contract as a whole being outside the scope of the agreement, 'it would neither be expedient nor wise to place small obstacles in the path of management and thus limit its discretion and judgment and cause friction and discord and perhaps the failure of the entire project." (See Award 3206.)

In conclusion, carrier respectfully submits it has shown that:

(1) Carrier had the right to contract the work involved in this claim.

(2) The agreement was not violated.

(3) The Board has recognized in prior decisions that certain work is excluded from the scope of the agreements, even though the exception is not expressed therein. (See Awards No. 757, 2812, 2338, 2465, etc., of the Third Division.)

(4) The work of building up rail ends by the electric weld process was not heretofore performed by carrier's employes.

(5) The carrier would have been required to purchase expensive equipment and tools to perform the work, and after work was completed there would have been no further use for such equipment and tools. Reference is made to rulings of Board that carriers are not required to purchase such equipment.

(6) Carrier's employes were not qualified to perform the work.

(7) The work performed was necessary at the time it was performed in order that expedited train service might be instituted quickly.

(8) The men laid off would not have performed work the contractor was doing had it not been let. There was no connection between lay-off of the men and the performance of the work by contractor.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier, on termination of bankruptcy on May 1, 1946, attempted rapid rehabilitation of its plant. Much of the rail had been in service many years and part of it was replaced, while on two sections, totaling 27.05 miles of track, Carrier provided for the electric welding of the old rail ends by contract under which the contractor furnished all equipment

and workmen. Two gangs were employed. One worker from Oct. 23 to Nov. 13, 1947 and the other from Nov. 5 to 24, 1947. The Organization claims that contracting out this work violated the Scope Rule.

Generally, it hardly needs to be said, the Carrier may not contract out work embraced within its collective agreements. However those agreements deal with realities and are given a practicable construction, and it is recognized that wherever, without neglect of the Carrier in proper maintenance of its equipment and forces, it is required to perform a task of such magnitude or specialization or essential danger or time requirements, that it is not feasible for the Organization to furnish or procure the labor and skill or not feasible for the Carrier to furnish or procure the equipment for the adequate peformance of the task, then the wok may be contracted out.

The burden of justifying such a contract is on the Carrier and he must establish facts showing the impracticability of performance by the employes by very definite proof. Awards Nos. 757, 2338. But when facts are so established sufficient to warrant the exercise of managerial judgment as to performance of work, the Board should not substitute its judgment for that of the Carrier.

In application of these rules we find that in the situation before us there was involved no question of magnitude of the task beyond the capacity of the employes. The work was performed by two gangs of 10 men each, one working over a period of 22 days and the other 20 days. There was no question of emergency. Carrier said that it was desired to have the work done before inclement weather set in, but no reason is apparent for not making earlier start. There was no special danger involved in the work. The Carrier rests its action on two factors only: (1) lack of necessary skill by its employes and (2) lack of equipment.

As to skilled employes; on each of its 2 gangs the contractor employed 1 foreman, 2 electric welders, 2 grinders, 2 cross grinders and 4 helpers. The time of the two gangs overlapped 9 days so that it would appear that one gang might well have done all the work. Carrier says that electric welding of rail ends had never been done on the property, that its employes were not experienced or qualified for that type of welding, and that its welders were busy at other work. It also says that rail end welding is now standard practice on practically all railroads of the United States and of foreign countries, and it does not dispute Employes' statement that many railroads have crews for performance of that work. If we admit that Carrier had the right, as it insists, to specify required qualifications and determine if employes could do the work, when not acting arbitrarily, and that it determined that its employes then working could not do this work, that alone did not establish the right to have it done by contract. Carrier should have sought to recruit help by bulletin, and have conferred with the employes. Not having done so its claim on that ground must fail. These requirements have been declared many times. We note in particular Awards Nos. 3251 and 3687.

(As to lack of equipment, the burden was on Carrier to establish by definite proof that the equipment was not only not possessed but that its expense and the rare occasions of its use would not justify its procurement.) On this issue Carrier lists the equipment used by the contractor and says only "that it would have added heavily to the expense." This is certainly far from definite proof. It further expresses the opinion that the equipment, if purchased, "would have been stored for a number of years." In contradiction of this statement, is not only the undisputed statement of the employes that rail end welding will be a continuing maintenance operation in future years on all roads, but Carrier's own statement above quoted that it is now standard practice. Carrier's vague and disputed statements do not constitute the definite proof required to justify the work contract, and we must therefore sustain the claim.

It appears that the Organization was not correctly informed as to the employment of the several claimants during the period of contract performance. Accordingly the claims should be allowed only for the difference, if any, between their several actual earnings and what they would have earned at their regular positions, while employed, during that period.

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

That both parties to this dispute waived oral hearing thereon;

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

Claims allowed to the extent indicated in the concluding paragraph of the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 22nd day of December, 1949.