Award No. 4760
Docket No. MW-4557

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles S. Connell, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

GALVESTON WHARVES

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

(1) That the Carrier violated the agreement by assigning to contractors the performance of work covered by the Carrier's Agreement with the Brotherhood of Maintenance of Way Employes, during the period from 1943 and continuing through to the present time;

(2) That all employes adversely affected by this violation of the agreement be compensated at pro rata rates for an amount of time equivalent to that performed by the employes of the contractors during the specific period from April 7, 1947 and continuing up through the present time.

EMPLOYES' STATEMENT OF FACTS: There is in effect an agreement dated May 1, 1940 between the parties to this dispute. This referred to agreement contains Article XVI, Hours Paid For, Rule 1, which we quote below:

> "Rule 1. Except by mutual agreement between the management and employes representatives; hours of work of employes shall not be reduced in order to permit company to employ those not members of organization represented or to let by contract work of maintenance, construction or demolishing."

However, subsequent to the effective date of this agreement the Carrier reduced forces and curtailed its employment of its regular forces to such an extent that this organization was put to bring this matter to the Adjustment Board for adjudication.

As a result, the Board in its Award No. 2124, dated April 5, 1943, remanded this case to the property recommending that an interpretation of the memorandum of agreement dated August 14, 1940 be entered into. An interpretation of the memorandum of agreement dated April 22, 1943, effective April 26, 1943 was entered into. A copy of this April 26, 1943 memorandum of agreement is attached as Employes' Exhibit "A."

However, the Carrier failed to properly apply this referred to memorandum of agreement of April 26, 1943, and as a result has steadily increased the contracting of work covered by the Scope of its agreement with this Brotherhood, and has been assigning such work to outside parties. The increase in the number of employes of the contractor has grown from 17 or 18 men in 1943 to a point where at the present time the contractor employs from 70 to 100 men daily.

SUMMARY: The Galveston Wharves has shown that it did not negotiate the Agreement under which this claim was presented by the Brotherhood of Maintenance of Way Employes. It has shown that it is an agency of the City of Galveston and that its operations are controlled by the laws of Texas, that these laws forbid us to enter into a collective bargaining agreement with a labor organization. The Galveston Wharves has shown that the vague and indefinite claim for "all employes adversely affected" is not a proper claim and has not been handled in a proper manner under the provisions of the Railway Labor Act. It has shown that at best the claim purports to be a claim for one day and no more. It has shown that the work was of an urgent nature, required special equipment and an organization capable of carrying on a full re-lay of track under traffic, and that the Galveston Wharves did not then or does not now possess the equipment or personnel to do such a job. It has shown that a critical situation existed which demanded immediate action. It has shown that no employe of the Galveston Wharves was injured or suffered any loss by reason of contracting the work that was contracted. It has shown that there were no employes available who could have been promoted to foreman or assistant foreman in connection with this work. It prays that the claim be dismissed because it is not properly before the Third Division of the National Railroad Adjustment Board. It further prays that if the Board does consider the claim on its merits, that it be denied because it is wholly without merit.

The Galveston Wharves respectfully requests an opportunity to appear before the Board in oral hearing and make such answer to the Organization's submission in this case as may be deemed proper.

Whereas, in consideration of the facts, applicable laws of the State of Texas, and decisions of your Honorable Board in similar disputes, the Galveston Wharves urges that the claim presented in behalf of certain unnamed employes of the Galveston Wharves be, in all things, denied.

(Exhibits not reproduced).

OPINION OF BOARD: The Carrier makes the same challenge to the validity of the Agreement in question and the jurisdiction of the Board as it did in Award 4756. Our findings as to jurisdiction in that award will apply here. However, there is one important difference in the facts in this claim, and that is that the claim here deals with alleged violations of the Agreement which happened subsequent to the passage of the Texas Statute which the Carrier contends rendered the Agreement invalid. Nevertheless, we state again that this Board has jurisdiction to pass upon questions of proper interpretation or application of Agreements, and it is beyond its jurisdiction to pass upon the validity of Agreements, and it follows that the Board cannot rule as to whether the Texas Statute quoted by Carrier did or did not render the Agreement invalid.

The claim is that the Carrier violated the Agreement by assigning to outside contractors work covered by the Scope of the Employes' Agreement during the period from 1943 and continuing through to the present. The Employes have not offered any proof covering the period from 1943 to April 7, 1947, nor for the period from June 7, 1947 to the present time. Employes have made a day-to-day check of the performance of work on the property by outside contractors during the period April 7, 1947 to June 7, 1947, and have attached as an exhibit a summary of the dates, number of men, and man-hours worked by said contractors. They have also placed on file as an exhibit, four days during the period checked as indicative of the whole period, a detailed report illustrating the type of work, class and number of employes used, place where work performed and number of man-hours worked on the various jobs, and state that a like check of each day from April 7 to June 7, 1947 is available but not submitted to avoid burdening the file. It is our opinion that the claim must be denied for all periods of the claim except that period when the contractors covered by the survey from April 7 to June 7, 1947, worked on the property, by failure of any evidence upon which to base an award for any other period.

The record indicated without denial that there were two construction companies working on Carrier's property, Texas Gulf Construction Company and W. A. Smith Construction Company. The record shows that the Texas Gulf Company performed work in many and varied locations, and the Employes have not furnished sufficient evidence to establish that the assignment of the work performed by that Company, to employes outside the Agreement, violated the Scope of Claimants' Agreement. On the other hand, the work performed by the W. A. Smith Company was definitely related to work on the railroad right-of-way such as removing old rails, raising tracks, and replacing ties, and in our opinion such work was definitely within the Scope of the Agreement.

This Board has consistently held that a Carrier may not contract out work embraced within its collective Agreements. There are exceptions, however, to that general statement and if the Carrier is required to do work of great magnitude or specialization, or of such danger or requirement for speed in completion, that it is not practical or feasible for the Carrier to furnish equipment, or the employes lack the necessary skills, then the work may be contracted to an outside employer. However, the burden of justifying such contracting of work is definitely on the Carrier. Awards Nos. 757, 2338 and 4671.

In the instant case, we are dealing with a Carrier that has a total of 43.75 miles of track, and the Carrier found it necessary to completely overhaul these tracks due to long deferred maintenance. This is not a job of great magnitude, or specialization. The Carrier states that the work was urgently needed and could not have been accomplished quickly enough by the Claimant employes. The Board stated in Award No. 4158, "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 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." See also Award No. 3251.

The Carrier states it could not employ enough men to do the work. The Employes deny that statement, and we are of the opinion that the Carrier has failed to prove its contention, for if the contractor did procure laborers, it seems reasonable to believe the Carrier could also. The Carrier has not established by definite proof that the work in question was of sufficient magnitude or specialization to allow it to contract out this work embraced in the Scope of the Agreement. It is the opinion of the Board that the Carrier violated the Agreement when it contracted with W. A. Smith Construction Company to overhaul its tracks during the period April 7 to August 31, 1947, and claim (1) will be allowed for that period of time.

Claim (2) requests that all employes adversely affected be compensated at pro rata rates for an amount of time equivalent to that performed by the employes of the contractors from April 7, 1947 through the present time. That claim will be sustained in part, and all employes adversely affected by reason of the Carrier contracting with W. A. Smith Construction Company, between April 7, 1947 and August 31, 1947, will be compensated at pro rata rate for an amount equivalent to that performed on the Carrier's property in overhauling its tracks by employes of said operator. In computing this time spent on the job by employes of contractor, time paid said employes while being transported to and from the job will not be used, but only the time actually spent in performing the work on Carrier's property.

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 as indicated in the Opinion.

AWARD

Claims (1) and (2) sustained in part, as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
BY Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 14th day of March, 1950.