Award No. 4954
Docket No. MW-4870

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ILLINOIS CENTRAL RAILROAD COMPANY

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

(1) That the Carrier violated the Agreement when they assigned individuals having no seniority under the agreement to paint the Carrier's division offices at 301 West Capitol Street, Jackson, Mississippi;

(2) That Painters C. J. Weeks, W. H. Wallace, W. E. Jordan, J. H. Ward, James W. Smith, J. W. Barlow, W. L. Furr, Leland M. Saxon, F. D. Hales, G. W. Watson, and J. W. Harper be paid for 138 hours each at their straight time rate of pay account of being deprived of the right to perform the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: In the Fall of 1948, the Carrier assigned employes of an outside contractor to paint the Carrier's division offices at 301 West Capitol Street, Jackson, Mississippi.

Approximately 1,518 hours were consumed by the employes of the Contractor in performing the painting work in the Carrier's division offices. The employes of the contractor who performed the above referred to painting work, held no seniority rights in the Maintenance of Way Department.

The Agreement in effect between the Carrier and the Brotherhood dated September 1, 1934, reprinted June 1, 1945, is by reference made a part of of this Statement of Facts.

POSITION OF EMPLOYES: The Scope Rule of the effective Agreement between the Carrier and the Brotherhood of Maintenance of Way Employes reads as follows:

"This schedule governs hours of service and working conditions of all employes in the Maintenance of Way and Structures Department, except:

(a) Signal Department employes.
(b) Clerical forces.
(c) Engineering forces.
(d) Scale Department employes.
(e) Water Works Foremen, repair men and helpers.

In conclusion, Carrier avers:

1. That the claimants were not, by contract or agreement, entitled to the work here in dispute.

2. The Carrier did not have the skilled forces and equipment necessary to perform the work in question.

3. The Carrier was prohibited by The Jackson Building and Construction Trades Council in utilizing its own forces in this work.

4. Claim is not based on any rule of the agreement, hence it is in effect a request for a new rule—this the Board does not have authority to grant.

5. The Carrier has the right to contract work of a nature here involved.

6. The Carrier is required, by law, to operate efficient and economically.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a claim by certain specified employes for work lost when the Carrier contracted out the work of painting its division offices at 301 West Capitol Street, Jackson, Mississippi.

The record shows that effective August 1, 1948, Carrier's division offices were moved from McComb, Mississippi, to 301 West Capitol Street, Jackson, Mississippi. Prior to the return of division headquarters to McComb, the building at 301 West Capitol Street was leased to a furniture company. Before reentering the building it was necessary to make external and internal alterations, including plumbing, heating and electrical work and the painting and decorating work in connection therewith in accordance with specifications provided by the Carrier. The Carrier contracted with the M. T. Reed Construction Company for the performance of this work at an estimated cost of $79,000.00 of which $1,084.00 was the estimated cost of painting.

It cannot be successfully disputed that the painting of buildings of the Carrier is ordinarily work within the Maintenance of Way Agreement. It is a general rule also that the Carrier may not let to others the performance of work which is within the scope of an agreement with its employes. It is urged that the altering and remodeling of this two story building involved the use of employes with special skills whom the Carrier could not supply. It is urged also that the Carrier did not have the tools and equipment to perform the work and that this justifies letting the work out to others. We do not think the record will sustain these contentions for the reason that it does not establish that the work was such that it could not be performed by Carrier's employes or that it required the use of tools and equipment which the Carrier could not reasonably provide. If the work on this building was such as to bring it within the exception to the general rule, we think the Carrier could properly contract the whole job. In other words, the painting here involved could properly be included in the contract to avoid the trouble and expense involved in doing the work piecemeal. The job should be treated as a single unit in determining whether the Carrier could properly let the work to an independent contractor.

It is asserted by the Carrier that the work to be done on this building was required to be performed by persons associated with the Jackson Building and Construction Trades Council. Carrier employes at Jackson are not affiliated with that Council and it contends that its employes could not properly perform the work. It is not disputed that the contractor, the M. T. Reed Construction Company, secured its labor, skilled and otherwise, through the Jackson Building and Construction Trades Council.

It appears that on May 21, 1943, the Brotherhood of Maintenance of Way Employes and the Building and Construction Trades Department entered into an agreement among themselves to the effect that the alterations, repairs and additions to dwellings, office buildings and other structures acquired by the Carrier not located on the line of the railroad, shall be considered as coming under the jurisdiction of the Building and Construction Trades Council. It was also agreed that all work of any nature or duration on the right-of-way of a railroad, its roadbed, its supports to traffic and trackage and all other trackage appurtenant thereto, shall be considered as coming under the jurisdiction of the Brotherhood of Maintenance of Way Employes. The Agreement provided also that in the event of any dispute between the parties as to the meaning of the Agreement, the General President of the Brotherhood of Maintenance of Way Employes and the General President of the craft union involved should make the adjustment. We cannot foretell what the result would be if the claims of the parties to the work on this building were submitted for such a determination.

Without deciding the correctness of the Carrier's conclusion, the Carrier was justified in assuming, under a literal interpretation of the Agreement, that property adjoining the railroad right-of-way was on the line of the railroad and not on the right-of-way even though the parties as between themselves intended a different construction of the language used. The Organization argues, however, that the Agreement between the Brotherhood of Maintenance of Way Employes and the Building Construction Trades Council is of no concern to this Carrier and that Carrier's responsibility is to be measured by the Agreement it made with the Maintenance of Way Employes. This argument might be valid if Carrier had contracted with the Organization that this specific work should be performed by employes under the Maintenance of Way Agreement. But this was not done. The Organization relies upon its general scope rule to support its claim to the work. There are questions of fact to be determined before a decision can be made as to whether it is or is not maintenance of way work that could properly be farmed out. Certainly any Agreement made by the Brotherhood of Maintenance of Way Employes with the Building and Construction Trades Council is a fact which the Carrier may consider in arriving at a conclusion.

No better exemplification of the correctness of this conclusion can be made than a statement of an incident which occurred in this case. The Carrier sought to use its own electricians in the performance of the electrical work in this building. The Building and Construction Trades Council immediately served notice that it was work belonging to members of their organization and that an immediate work stoppage would be imposed unless Carrier complied with their demands. The Carrier's interest was in getting the work done. In attempting to do so, it certainly had the right to examine, determine, and act upon the facts, including the Agreements that these two groups had made among themselves. The Carrier had a right to assume from the Agreement which the Carrier's employes themselves made, that the Building and Construction Trades Council had an interest in the performance of this work. By their own conduct they have estopped themselves from asserting a violation and demanding reparations. Their contract with the Carrier remains unimpaired but they have voluntarily placed themselves in such a position that the Carrier had a right to act upon it. In other words, the circumstances induced by the Organization's voluntary conduct placed the Carrier in a position where it could act with safety upon the ostensible authority that the Organization had given. A party will not be permitted to recover reparations for a violation of an agreement which he himself induced. No basis for an affirmative award exists.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of July, 1950.