Award No. 5090
Docket No. MW-4985

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO AND NORTHWESTERN RAILWAY COMPANY

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

(1) That the Carrier on or about October 12, 1947, violated the effective Agreement by the contracting of certain concrete work at Chadron, Nebraska, to be used in connection with making repairs to Bridges in the vicinity of Chadron.

(2) That the following B&B Department employes be compensated at pro rata rates for an amount of time equivalent to that required by the employes of the Contractor, to perform the work referred to in part 1 of this claim:

O. L. Pickering	Edward J. Brice	Newton A. Craig
Clyde L. Wilkes	Jack A. Nielsen	A. N. Biltoft
Morton Bartlett		

(3) That each employe named in part (2) of this claim be paid his proportionate share of the total time worked by the employes of the contractor in performing the work referred to in part (1) of this claim; this in addition to the compensation already received by these B&B employes during the period the contractor's employes were working.

EMPLOYES' STATEMENT OF FACTS: On or about October 12, 1947, the Carrier employed a contractor at Chadron, Nebraska, to build forms and make concrete blocks to be used on 12 bridges west of Chadron. Approximately 500 man hours were consumed by the contractor's employes in performing this work.

The use of the blocks was necessitated by the raising of the grade at these 12 locations.

The blocks manufactured by the contractor were approximately 3'x2'x1½'.

The contractor utilized railroad company equipment in the manufacture of the blocks. The equipment, which was owned by the Carrier and which was used by the contractor in performing this disputed work, consisted of a concrete mixer, wheelbarrels, shovels and shop and power saws.

The Carrier's regular Bridge and Building forces assisted the contractor when certain functions necessary in the manufacture and installation of the

arrears. The work outlined in items (b) and (c) was of such a nature and magnitude that it could not be handled by the carrier's employes. It was necessary that all of the work covered by items (b) and (c) be carried out as promptly as possible in order that the strip of main track be restored to proper operating condition without undue delay, and in consideration of the fact that the carrier's bridge and building force was inadequate to do so and the inability of the carrier to employ additional men it had no alternative but to let such work to a contractor.

In support of the employes' contention in this case, the General Chairman, when handling the matter on the property, stressed the fact that the contractor had used equipment of the carrier in manufacturing the concrete blocks. It is true that due to his own equipment not being available at Chadron to manufacture the concrete blocks, account such equipment being in use out on the line in connection with other work which he was performing for the carrier, the carrier loaned its concrete mixer and power saw to the contractor. The loan of such equipment to the contractor cannot be considered as a relevant factor in determining the justification for the claim of the employes. Regardless of the equipment used by the contractor, the manufacture of the concrete blocks was in connection with the construction work he was performing for the railway company. The manufacture of the concrete blocks at Chadron by the contractor with equipment loaned from the railway company instead of with his own equipment out on the line would not justify the claim presented in favor of the seven B&B employes.

POSITION OF CARRIER: It is the position of the carrier that for the following reasons the claim is not justified and should be denied:

1. The work involved and handled by employes of the contractor was in connection with and a part of new construction work the contractor was performing for the carrier and such new construction was not work that had been recognized as belonging exclusively to employes of the railway company, but was construction work of a nature that had been previously let to contract without a contention that such action was in violation of the provisions of maintenance of way schedule rules agreement. In that regard the attention of the Board is called to the fact that the employes do not contend the contracting of the bridge work performed out on the line was in violation of the rules agreement, but the claim is based solely on the manufacture of the concrete blocks at Chadron by employes of the contractor regardless of the fact that such work was a part of and in connection with the bridge work.

2. The work was let to a contract due to the nature and magnitude of the work involved, and due to the fact that the bridge and building force of the carrier could not handle such work and also adequately keep up with the necessary regular maintenance work requirements.

3. All of the bridge and building employes involved were worked full time during the period the work was performed by the contractor, and they were not deprived of employment due to the work having been let to the contractor. Neither were they available for use in the performance of the work here involved.

OPINION OF BOARD: On or about October 7, 1947, the Carrier awarded to an independent contractor work involving, (a) construction of reinforced concrete three stall drop pit in enginehouse at Chadron, Nebraska, (b) construction of concrete piers and abutment wing walls at Bridges 732 and 738 in the vicinity of Glen, Nebraska, and (c) construction of 112 pre-cast reinforced concrete blocks to be placed on bridge seats of 12 bridges between Ft. Robinson and Glen, Nebraska.

A special agreement was reached between the Carrier and Organization for letting the outside contractor perform the work covered under (a), subject

to the express understanding that the Organization's consent would not establish a precedent, and that such work is covered in the scope rule of the agreement. Neither (b) nor (c) appears to have been covered by the special agreement. The single and only item of work subject to the claim before the Board is that under item (c) above.

The many contentions urged by the Carrier in its statement of position first above set out just about cover every known claim of right which the Carrier has to contract out work under its agreement with the Organization, and cannot be summarily dismissed. Also, there is perhaps no greater area for dispute than that concerning scope of work under a labor agreement. The great number of disputes of this character which the Board has been called on to settle testifies to that fact. These two factors taken together make a complicated dispute of a simple case.

Out of the many Board experiences has developed the abstract principle that a Carrier may not let out to others the performance of work of a type embraced within one of its agreements. That such has been the rule from the beginning of the Board, and even before, is evidenced by Award 757. Likewise that award has continued throughout the years as basic authority for recognizing exceptions to the scope of the agreement, other than those expressly mentioned, provided the limitation upon the agreement is established by definite proof.

Our attention is first claimed by the Carrier's representation that the work here in question is excepted from the scope rule of the subject agreement by Board precedent and this necessitates a review of the cases in which the Board has sustained like contentions.

Where the work is specialized in character and hazardous by nature, and the hazards being increased because the Carrier is lacking in equipment and the employes in skill, work of a maintenance and construction character has been excepted. See Award 2338. To the same effect is Award 3206. Where the Carrier had need for a small specialized installation, uncommon to the industry, and in order to do the work itself, it would be required to put forth an effort disproportionate to the size of the project in order to qualify its staff and workers to do specialized work of very rare utility in its overall operations, constitutes another exception. See Award 2465. A case involving purchase of pre-cast concrete crossing planks from either manufacturers or contractors was decided adversely to the Organization's claim in Award 4879. In that case the Carrier contended that the concrete crossing planks were needed to meet peculiar crossing arrangements which could not be eliminated by production of standard concrete crossing plank. Another point of distinction was that when the Carrier manufactured ties the work was covered by the Clerks' Agreement.

Clearly the work of constructing 112 pre-cast reinforced concrete blocks of the kind here in question does not come within the foregoing exceptions.

In Award 4158, under the same agreement and between the same parties to the confronting dispute, the Board undertakes a distinction between new construction and maintenance. That award is authority for the proposition that it is not a matter of principle but a matter of degree which determines the exception. The Board held that a clear exception would appear to be the building of a large structure from the ground up or the construction of any type improvement requiring large capital outlay. On the other hand, the Board says that the building of a small station, of tool houses and small annexes to existing structures may not be excepted. Further, that 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. In a companion case, Award 4159, the Board concluded that the construction of the extension of a platform at a passenger station was excepted, but qualified the rule as not intended to be an indication that all new construction work is outside the scope of the agreement.

Standing alone the work of constructing the reinforced concrete blocks can hardly be said to constitute "the building of a large structure from the ground up or the construction of any type improvement requiring large capital outlay". But the Carrier says that the manufacture of the concrete blocks was only a part of the whole contract job of a rebuilding project which of itself was not work exclusively covered by the scope of the agreement. If the questioned work is an integral part of a whole project which is the proper subject of outside contract, it has been held to be excepted from the agreement under the facts and circumstances existing in Awards 3206, 4753, and 5044. The fact, though, that the work of manufacturing the concrete blocks was let under the construction contract and that the concrete blocks became a part of the completed structure does not necessarily make the manufacture of the concrete blocks an integral part of the construction project, so as to except it from the agreement.

As said in Award 3206:

> "This Board has held that ordinarily the scope of the contract includes all work unless excepted specifically. All the cases heretofore decided, including Award 615, 757 and later ones, recognize that there is a line of demarcation between those that are within the scope and those that are without; that each case presents a factual situation which upon examination causes it to be cast to the one side or the other. That line has never been completely described, and perhaps because of the varying nature of undertakings, it never can be ascertained in a set and certain way. The general principles can be determined, but the particular facts of each controversy must be weighed and tested in the light of the scope of the contract and from that basis a decision can be reached as to whether it is within the scope of the contract or forms an exception thereto."

Another point, related to the argument that the work in question was an integral part to the whole project, concerns the question of whether the Carrier should be required to break down the project into its component parts. Thus, we are confronted with another abstract principle. If, clearly, the contract as a whole is outside the scope of the agreement, the Board said in Award 3206, "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".

In this case there is nothing before us to indicate that the contract was in any manner contingent upon the contractor being permitted or required to manufacture the pre-cast reinforced concrete blocks, so we fail to see how it could have caused friction, discord and perhaps the failure of the entire project, for the Carrier to have reserved this portion of the work for its employes. The only known obstacle, in the path of management, precluding the reservation of the work, involved a manpower shortage. In connection therewith it has been noted that the special agreement for letting a part of the work to an outside contractor did not include the project in question. Therefore, in the absence of negotiations with the Organization, the work may not be farmed out with impunity even where unusual conditions intervene, such as a labor shortage. Compare Awards 3251, 4158, 4833 and 4888.

We detect some inconsistency in the Carrier's position when it argues, on the one hand, that the manufacture of the blocks was an essential part of and inherent in the construction contract, and on the other hand contends that it was privileged to buy the blocks from an outside supplier. We are aware of the line of cases holding that the Carrier may purchase equipment, wholly or partially assembled, by item or in quantity, or by having it built to order. Our attention has not been called, however, to any instances when the letting of a contract for work to be performed on the property with the Carrier's equipment, and the aid of some of its employes, has been held to constitute the purchase of equipment. Further, we do not grasp the validity of the argument in a case where the manufacture of the blocks was let under a construction contract and the same were not obtained from an outside supplier in their finished form.

Neither are we impressed with the Carrier's argument that work of the character here in question has been contracted as a general practice for a number of years without protest by the Organization. We do not see how the work in question can be brought under any exception, express or implied, to the scope rule. Clearly, it is of a character which is customarily and traditionally performed by maintenance of way employes and the regular B&B forces at Chadron, Nebraska, have previously done the work. In addition, we are satisfied with the Organization's explanation that when it felt the facts warranted action it has protested the Carrier's invasion of the scope rule. Furthermore, we see in the Organization's action consenting to contracting of the work involving the construction of the reinforced concrete drop pit in the enginehouse at Chadron, Nebraska, a commendable attitude and disposition to cooperate with the Carrier. We are not disposed to encourage the Organization to pursue another course by here holding that unless it makes a grievance of every deviation from its agreement, it will be prejudiced thereby. Anyhow we think the answer to this contention is properly set forth in Award 4701 wherein the Board held:

> "The burden of establishing an exception to the rule is on the Carrier and we do not believe that it has met that burden. With respect to the asserted practice, no supporting facts are given by either side. In any event, in Award 757 this Board held that mere practice alone is not enough to establish exceptions to work clearly embraced in the scope rules."

See also Award 4158, same agreement, same parties.

The Carrier's contention that claimants are not entitled to additional compensation for a period of time during which they were regularly employed in performance of other pursuits under the agreement has been overruled at least once under this same agreement in a case involving the same parties. See Award 4158.

Even though we have gone to great lengths to dispose of all pertinent contentions of the Carrier, there was no real difficulty from the start in reaching a decision which we are confident speaks the truth. This Carrier recognizes the rights of the maintenance of way employes to have performed this work in preference to the letting of contract. The proof of such a statement is in the fact they have done it before and the further fact that the Carrier requested permission to let this same contractor install the drop pits at the enginehouse stalls. The general chairman put the Carrier on notice in his answering letter that the Organization claimed the work of such character properly was embraced in the scope rule. The Carrier did not take issue, but accepted the Organization's conditions for contracting out that work, and then went on to include other work in the contract without notice to the Organization. It is interesting to note that in its correspondence with the general chairman relative to the work in the enginehouse, the Carrier stated that this work was "a special type of job requiring very accurate form work". This was one of the reasons that the Carrier requested dispensation to let the work by contract. Yet, in the work involved in the subject dispute, the Carrier concedes the fact that its own forces had the ability to do the work. Further, it appears from the record that except for a labor shortage, the Carrier was as well if not better equipped to manufacture blocks than was the contractor. It had the equipment and a part of the labor force. In actuality the contractor's principle contribution was to furnish labor outside the Carrier's agreement with the Organization. This is in violation of the agreement.

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 contended by the petitioner.

AWARD

Claim sustained in its entirety.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

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