

Award No. 5152

Docket No. MW-4900

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA

(Texas and New Orleans Railroad Company)

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

(1) That the Carrier violated the agreement on or about December 28, 1948 by assigning to the American Bridge Company the work of replacing steel spans in the Carrier's bridge Devil's River, Texas:

(2) That the members of the steel erecting gangs, bridge and building gangs, and the welders and helpers on the San Antonio Division be paid at their respective pro rata rates for a number of hours equal to the number of hours consumed by the contractor's forces in the performing of the work referred to in part (1) of this claim; such number of hours to be divided proportionately among those employees involved.

EMPLOYES' STATEMENT OF FACTS: On or about December 28, 1948, the Carrier assigned or permitted employees of the American Bridge Company, general contractors, to perform work necessary in connection with the replacing of steel spans in the Carrier's bridge at Devil's River, Texas.

During the period involved, the Carrier had in its employment three steel erecting crews working on the San Antonio Division, which is the Division where the work in this instant case was performed. The personnel of these three steel erecting crews consisted of 3 foremen, 3 assistant foremen, 15 mechanics, and 13 helpers. In addition, the Carrier was employing 10 Bridge and Building crews on this Division. The personnel of these Bridge and Building gangs consisted of 10 foremen, 9 assistant foremen, 50 mechanics, and 21 helpers.

The Carrier was also employing on this Division, 9 welders and 7 welder helpers. Work of the nature and type which was performed by the employees of the American Bridge Company has heretofore been performed by the Carrier's Maintenance of Way forces.

The agreement in effect between the two parties to this dispute, dated December 1, 1937, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Under date of October 25, 1948, Mr. H. H. Raddick, General Chairman of the Maintenance of Way Employees on the

B&B supervisor who was the employing officer for bridgemen on the San Antonio Division. If we accept the Organization's own contention that the limit was nine men on such gangs, our Exhibit 3 sets out the force employed on each of the gangs. We never were able to get 9 mechanics on any gang in any month except one, and if the helpers are included that number was exceeded. Exhibit 3 is proof that the contention made by Mr. Reddick is not correct.

The third contention made, that we reduced our bridge forces after the washout, is absolutely incorrect. No qualified steel bridgeman has ever been laid off to this day, nor have any other bridgemen who might be changed to steel bridgemen. There is no basis at all for this contention and it is met by proof in our Exhibit 6.

Finally, the Carrier respectfully calls the attention of the Board to the fact that we actually paid our bridgemen a very large sum as wages for putting up the two temporary bridges at this location, since the first one was partially destroyed by the second flood. We also used our concrete gang and bridgemen to increase the height of the piers and raise the bridge and its approaches. The temporary work and the raising of the bridge after it was constructed created a large amount of work for our men, much of it on overtime or punitive rate due to the emergency nature of the work.

No employe among the claimants lost as much as an hour's work by reason of the contract for construction of the bridge. All were fully employed, and the maintenance of our railroad as a going concern was so closely connected to the immediate restoration of the bridge, that the general employment of employes represented by the BofMofWE was sustained at a high level. It was to the best interest of employer and employe alike to restore the bridge promptly. The only means open to the Carrier was to contract for its construction.

The attention of the Board is directed to a quotation in the report of Award 2819. The petitioner in that case, who was the same as in this case, in connection with a case under a comparable scope rule, made the following comment:

"On this subject, the Petitioner says:

'We agree and recognize that generally speaking the performance of a large construction job comparable to the erection of a bridge across the Missouri River which would require the use of equipment that the Carrier may not have and where quite commonly the contract for such job embraces not only the erection of the bridge but the furnishing of the material as well, may not be in violation of our Maintenance of Way Agreement.'

If the Organization held to the position they did in that case now the case would not have been submitted to the Board. We urge that the view expressed in 1945 is much more reasonable than the attitude assumed in the case here before the Board.

The Carrier prays that the claim of the Organization be, in all respects, denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This case grows out of the same set of circumstances that existed in the case decided by our Award No. 5151. The Carrier in reconstructing the Devil's River Bridge contracted with the American Bridge Company for the material, the fabrication of the bridge and its erection on location in a single contract. The Organization contends that this work of erecting the bridge belonged to B&B employes under the Maintenance of Way Agreement and claims compensation for employes under the Agreement who were entitled to perform it.

The record shows that on June 24, 1948, an extraordinary flood on the Devil's River destroyed the large steel bridge then existing at the location here involved. The bridge was immediately replaced by B&B forces with a temporary wood structure. On July 4, 1948, a part of the temporary wood trestle was again washed out and again replaced by B&B forces. The order for the steel bridge was placed with the American Bridge Company in July 1948. On October 23, 1948, the contract for the erection of the steel portion of the bridge was let to the American Bridge Company. The bridge was completed on March 4, 1949, the work having been commenced on December 28, 1948 and completed in 56 working days.

The bridge here involved is located on the main line of the Southern Pacific Lines extending from New Orleans, Louisiana to Portland, Oregon. It is a part of the Carrier's transcontinental main line. Carrier points out that an interruption of traffic on this line results in a diversion of traffic to other railroads and a corresponding loss of income to the Carrier and work for its employees. Short detours around the bridge are not possible in this territory. It was absolutely necessary for the good of all concerned to keep traffic moving over this bridge and to displace the temporary structure with the permanent one at the earliest possible time.

Bridge work on this Carrier is usually performed by division bridge gangs. These gangs are not steel bridge gangs. They generally do carpentering and painting on wood bridges and other ordinary bridge maintenance. They are not ordinarily qualified to erect steel bridge structures such as we have here. In addition to these bridge gangs, the Carrier maintains three steel bridge gangs that are qualified to do steel bridge work. It is the contention of the Carrier that these three steel bridge gangs were engaged in urgent work on other steel bridges at the time the Devil's River bridge was replaced.

The Carrier points out that during the period in question, from December 28, 1948 to March 4, 1949, one steel bridge gang was working on the Hondo River and Frio River bridges on work that could not be deferred. A second steel bridge gang was engaged in making repairs to the steel bridge over the Guadalupe River. The third steel bridge gang worked on the repairs and replacement of bridges over the Sabinal and Frio Rivers. The evidence indicates that the work performed by these steel bridge gangs was necessary and urgent. The record shows that these gangs have worked continuously since the period in question and there is no direct evidence of any intent on the part of the Carrier to consolidate work during this particular period to justify the contracting of the work on the Devil's River bridge.

There is evidence in the record that the Carrier did not have the equipment necessary to construct the bridge as expeditiously as the time element required. The Carrier asserts that it was necessary to get the new structure completed before spring floods did further damage. In order for the contractor to complete the bridge in 56 working days, it made use of a locomotive crane of greater capacity than the Carrier possessed. The method employed by the contractor of putting in place two complete panels the length of the steel spans and the removal of a corresponding amount of temporary trestle between train movements over the bridge could not have been accomplished by the employees and equipment which was available to the Carrier.

The Carrier asserts that it attempted to employ additional qualified steel erectors without success. The record shows that in October and November, 1948, the Carrier ran advertisements for steel erectors for their steel bridge gangs in four Chicago, two Dallas, three Houston, one Kansas City, two New Orleans and three St. Louis daily newspapers without success. The system was bulletined for employees with experience as steel erectors and only six or eight employees responded. The Organization was asked to assist in procuring qualified men for this work without result.

The Carrier conferred with the General Chairman of the Organization and familiarized him with the foregoing facts. An agreement was not reached

and the Carrier thereafter contracted the work to the American Bridge Company. The claim before us was thereupon made.

It is the contention of the Organization that B&B forces could have reconstructed this bridge. In this respect the Organization points out that the bridge at this location was built by B&B forces in 1932. The building of the temporary trestle in June 1948 and the rebuilding of a part of it after it was partially destroyed by a flood on the following July 4, is pointed to as evidence that B&B forces could have performed the steel work. The evidence of the foremen of the three steel construction gangs that they could have obtained adequate forces to build the bridge if the Carrier had not restricted the employment of steel workers appears in the record. On this point the Organization cites an order of the Carrier under date of September 7, 1948 to the effect that no additional men were to be employed in the B&B Department without personal approval for the reason that a drastic force reduction was in the offing. The Organization also points out that all of the newspaper advertising carried on by the Carrier was done after the contract was let to the American Bridge Company. It is urged also that the fact that the American Bridge Company could get all the steel workers needed is evidence that the Carrier could have done likewise if it had attempted to do so in good faith.

We say, at the outset, that the bridge in question could have been built by B&B forces of this Carrier if adequate steel erectors could have been found and if the time limit asserted by the Carrier did not have to be met. The fact that B&B forces built the steel structure of the bridge in 1932 is some evidence that B&B forces could have built the bridge in 1949 under similar conditions, but it is by no means controlling. Nor is the fact that B&B employes constructed the temporary wood trestles in June and July under adverse conditions proof that they had the equipment and skilled workmen to construct the steel portion of the bridge. The order of September 7, 1948, applies to all B&B employes and necessarily includes steel erectors and other steel workers within the Maintenance of Way Agreement. The Carrier explains, however, that as to the steel erectors that the Carrier was at all times short on this class of employes and it was hiring every qualified steel erector that it could find. The record sustains the contention of the Organization that the advertising campaign to secure this type of employe was carried on after the contract was let. Irrespective of this fact, the result indicated a scarcity of steel erectors during October and November, 1948, and supports to some extent the contention of the Carrier that sufficient steel erectors were not available during that period. The record shows also that the situation was thoroughly discussed with the General Chairman in an attempt to work out a solution agreeable to both parties. Nothing was accomplished in this respect.

We make the following findings of fact upon which the result must hinge:

The bridge was destroyed by an extraordinary flood on June 24, 1948. The B&B forces of the Carrier constructed the temporary wood trestle to keep trains moving. They had constructed the steel portion of the bridge in 1932 and they could have done it again if time permitted and sufficient skilled B&B forces were available. We think the record sustains a finding that it was necessary to construct the permanent steel portion of this bridge before spring floods were to be expected. The controlling question is whether B&B forces could have constructed the bridge within the period allotted.

The Carrier asserts that the steel for this bridge was ordered in July 1948. We cannot say that this was an unreasonable length of time to determine the amount and type of steel required for this bridge, and to place the order for it. On October 23, 1948, the Carrier entered into a contract with the American Bridge Company for the steel, its fabrication, and the erection of the bridge. The written correspondence with the General Chairman with reference to the contracting of this work bears a date subsequent to the date the contract was entered into. It indicates clearly, however, that conferences had been held with reference to the matter previous to the time the contract was

entered into. The dates of these conferences are not shown by the record. Carrier asserts that the situation was explained fully to the General Chairman. It is evident that the General Chairman refused to agree to the contracting of the work for the reasons set forth in the subsequent correspondence.

The Carrier's chief reason for contracting the work was that it did not have the skilled steel workers to do the work within the time it felt that the work must be performed. The time required to obtain the steel, have it fabricated and delivered on the property is not shown by this record. We are in no position to say, under such circumstances, that the time taken was unreasonable. To do so would require us to enter the field of speculation and conjecture. The Organization asserts, however, that if the Carrier had taken ordinary steps to build up its B&B forces that they could have performed the work.

The Organization points out that the Carrier directed on September 7, 1948, that new employees were not to be employed for B&B forces because of an imminent force reduction. The Carrier answers this by saying that even though this be true, it was employing every skilled steel erector that could be found and that they have continued to do so up to the time this docket was closed. It is shown also that Carrier advertised in many large newspapers during October and November for employees of this class with little or no result. While this advertising was done after the contract was let, it is rather conclusive evidence that skilled labor in this particular field was not available in October and November 1948. There appears in the record the affidavits of three bridge foremen who say that they could have employed the necessary men if they had not been restricted by the Carrier. While these affidavits are competent as evidence, we must say that the subsequent facts developed by the record indicate that they were largely speculative. If they were not, these foremen should have produced the steel erectors when the Carrier advertised by newspaper and by bulletin for men skilled in this type of work. With respect to the three steel bridge gangs, the record shows that they were engaged in similar work on other bridges which had to be done at that time. This is not disputed by the Organization. Under the record before us, we must conclude that the Carrier did not have the forces available to do this work. Nor does the evidence preponderate in favor of the Organization on their claim that the skilled forces could have been obtained to perform the work under the terms of the collective Agreement.

We must point out also that the management of the Carrier has a certain leeway in determining certain questions involving the best interests of the Carrier which is generally referred to as managerial prerogative. Within the scope of its managerial prerogatives, the Carrier could properly determine when it was necessary to have this bridge completed, although it could not whimsically or arbitrarily fix such time. The determination of the Carrier that this bridge must be built before the time that spring floods could be expected, was clearly a proper exercise of managerial judgment. The record does not establish by a preponderance of the evidence that the Carrier had the skilled forces available to build this bridge within the prescribed time nor does it show by a preponderance of the evidence that such skilled forces could have been obtained so that the work could have been performed within the purview of the collective Agreement. The claim of the Organization therefore fails for want of adequate proof and a denial award is required.

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 Employees involved in this dispute are respectively Carrier and Employees 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 18th day of December, 1950.