Award No. 5457

Docket No. MW-5397

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

(1) The Carrier violated the agreement when they assigned a General Contractor the work of renewing floors at Freight Houses Nos. 2 and 3, Union Street, Chicago, Illinois, during the period July 21, 1949 to October 14, 1949.

(2) The B&B forces in the Chicago Terminal be paid at their respective straight time rate of pay for their proportionate share of the 8,974½ hours that were consumed by the Contractor's forces in performing the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: During the period July 21, 1949 to October 14, 1949, a General Contractor was assigned to remove the existing floors in Freight Houses 2 and 3, Union Street, Chicago, Illinois, and to replace the removed floors with reinforced concrete.

Approximately 8,974½ man-hours were consumed by the contractor's forces in the performance of this work.

The Employes of the Contractor are not covered by the scope of the Maintenance of Way Agreement.

The forces employed by the contractor varied from 3 to 32 men during the period of time the work was being performed.

During the same period of time, the Carrier's Bridge and Building forces in the Chicago Terminal area averaged 32 men.

Claim in behalf of the regular Bridge and Building forces was filed with the Carrier and claim was declined.

The agreement in effect between the two parties to this dispute, dated November 1, 1940, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

OPINION OF BOARD: This is a joint submission with the facts set forth at great length by the parties in their respective statements. For that reason our summarization of the factual picture will be as brief as the state of the record permits.

On July 15, 1949, without conference or negotiation with the Employes, the Carrier employed the services of a contractor to replace the wood floor system in its Freight Houses Nos. 2 and 3 in Chicago. The project consisted of replacing all wood floors with reinforced concrete floors and it was necessary to practically gut the buildings in order to convert to a concrete type of construction. It involved miscellaneous iron and steel installation, also changes in lighting, plumbing and sewerage and was of such character it was necessary to obtain a building permit from the City of Chicago.

Work on the project was commenced on July 21 and completed October 14, 1949, the contractor working as many as 32 men during a portion of that time. These men worked a total of 8,974½ hours in all classifications. The concrete paving alone involved 865 cubic yards and was done in sections of 3,000 to 3,500 square feet per pour with eight cement finishers being used to finish this area.

Under date of August 30, 1949, the Employes' General Chairman advised the Carrier the current Agreement between the parties was violated when it assigned a general contractor to perform the work and that the employes were claiming pay at the pro rata rate for the number of hours worked by the contractor in completing the project. This claim was denied by the Superintendent of Terminals and the work continued. Thereafter the Employes appealed the claim to the Assistant to the Vice President and it was denied by that official in a letter dated January 23, 1950. This letter is important in that it sets out the Carrier's grounds for the denial of the claim, hence it should be quoted in toto. It reads as follows:

> "Referring to your communication of the 12th inst., in regard to the renewing of floors in Freight Houses Nos. 2 and 3, Union Street, Chicago.
>
> This project was started July 21, 1949 and completed on October 14, 1949. In order to complete the work in that time, it was necessary for the contractor to work as many as 32 men. During this period the B. & B. forces in our four B. & B. crews in Chicago Terminals averaged 32 men. The Railroad could not undertake a special job of this size and at the same time handle the regular work due to not possessing the equipment to do the work, also the fact that the B. and B. forces were preoccupied during this period with regular maintenance work.
>
> None of the B. & B. forces in the Chicago Terminal lost any time during this period as a result of this project having been done by contract, and further I might add that this was not a case of farming out work for economical reasons to the detriment of carrier forces.
>
> There is no rule in the Maintenance of Way Agreement which provides that work must be deferred or that the men who are regularly employed are entitled to additional compensation for work which they do not perform because at the time they are regularly employed.
>
> It was not intended to deprive employes under the Agreement of work by letting the job in question under the contract; because it was done in good faith to preserve the property and get the job done as quickly as possible to restore the facility to operation; therefore, because none of B. & B. forces were deprived of work during the period involved and there was no attempt at evasion of the contract to the disadvantage of the employes, the claim is respectfully declined."

The Employes contend the work in question was maintenance and repair work on property devoted to the Carrier's business and therefore falls within the scope of the current Agreement. In this connection they assert and insist it was work which had been customarily and regularly assigned to employes in the Bridge and Building sub-department and that employes of that department, on numerous occasions, had been assigned to pour concrete floors similar to those here involved. They rely on Rule 1, the Scope Rule; Rule 3 dealing with seniority rights and giving them rights to consideration for positions; Rule 4 providing for sub-departments and showing the Bridge and Building employes to be incumbents of that class and entitled to the work thereof; and Rule 8 requiring the bulletining of new positions and vacancies.

The Carrier does not seriously dispute that the Scope Rule of the instant Agreement comprehends that all usual and ordinary construction, reconstruction, repair and maintenance work is covered by the Scope Rule and belongs to the Bridge and Building employes under the current Agreement. Indeed if it does not actually do so, it impliedly so admits and seeks to bring itself within the exception to the general rule, now so well established as to require no citation of the Awards supporting it, that the Carrier may not, with impunity, contract out work the performance of which is of a type embraced within the Scope Rule of a collective bargaining Agreement made with its employes.

In attempting to bring itself within the exception to the general rule the Carrier, in addition to relying on the reasons set forth in its letter, heretofore quoted, denying the claim now asserts (1) the work was specialized, requiring a permit from the City of Chicago to perform it and that it had no men, B. & B. or otherwise, who held licenses required by the Chicago Municipal Code before any permit would or could be obtained, (2) it could not get men to fill its needs during the time it contemplated making the improvement, (3) it might have become involved in a jurisdictional dispute with other organizations, particularly the Building Trades Unions in Chicago, (4) it did not have the special equipment necessary to efficiently handle the work, i.e., concrete mixers and gas operated buggies to transport mixed concrete. All of the foregoing reasons would have been far more impressive if they had been asserted by the Carrier's highest ranking appellate official at the time of his denial of the Employes' claim. If they had been, the record would not be open to an inference that perhaps most of the reasons now relied on by the Carrier as justification for its action are the product of the fertile minds of ingenious advocates instead of the real reasons for the Carrer's action at the time it contracted the work. Even so they cannot be entirely disregarded and are entitled to be considered for what they are worth along with other pertinent and more persuasive matters in determining whether under the confronting facts and circumstances, the Carrier has affirmatively established the work falls within the exception to which we have referred.

Just where the narrow line of demarcation separating work coming within the scope of an Agreement and that which may properly be the subject of an independent contract has long been one of the most difficult tasks with which this Board has had to contend. It must, we believe, be conceded there is no unanimity in our Awards dealing with the subject and that many of them cannot be reconciled. However, out of past experience have come certain fundamental rules which if adhered to an applied to existing factual situations will tend to remedy that situation. One of these, stated in different forms but nevertheless of uniform application, is that when its conduct in respect to contracting work is challenged, the burden is on the Carrier to justify its action (see Awards Nos. 2819, 4671, 4701, 4702, 4920, 4921 and 5304).

Other rules of the character to which we have just referred, having particular application because of the peculiar facts of this case, will be briefly noted.

One of these is to be found in Award No. 4888 which deals with several contentions here advanced by the Carrier. There we said:

"We must again point out that the Carrier has contracted with B. & B. employes for the performance of all the work that is historically and the customarily performed by this class of employes. To enter into a second contract with persons not within the collective agreement without first negotiating with the Organization has been many times condemned by this Board. We may accept as true the statements of the Carrier as to the immediate need for the building, the shortage of labor, the difficulty of obtaining essential materials and the necessity for using its employes on other urgent work. But this does not excuse the failure to negotiate with the party with which it first contracted for the performance of the work." It is to be noted a similar statement appears in Award No. 4833.

See also Award No. 4921 which with respect to the same point states.

"The Carrier makes the assertion, and it is denied by the claimant, that their employes lacked skill to perform the work. The submission contains no particulars as to what respect the employes were incapable of using reinforcing steel in the construction of cement slabs. There is nothing to show in what degree or particular its crews lacked skill to use reinforcing steel. But attention should be called to Award 4671 where the question of skill was the decisive factor; and there the Board, with the assistance of Referee Stone, pointed out that before the claim of lack of skill on the part of employes could be made available to it in justification of contracting the work, it was incumbent on the Carrier to follow the provisions of the Agreement and attempt to recruit adequate help and to confer with the Organization."

Another such rule is referred to in Award No. 4869. There with respect to failure to comply with a rule similar to Rule 8, here relied on by the Employes, requiring the bulletining of new positions it is said:

"Without having observed the contract provisions pertaining to the procurement of needed manpower, the Carrier is in no position to defend its conduct in contracting out the work in question. Rule 11 (a) of the effective agreement provides for the bulletining of new positions and vacancies. Had the Carrier followed that procedure without success we might have been confronted with a different question, but having failed to do so it cannot be permitted to avoid the consequences by merely asserting that such a step would have been futile.

Neither are we impressed by the proposition that the Carrier's available B & B employes were engaged in other essential tasks, for which they were compensated at straight time. As was pointed out in Award No. 4158, even though these employes were so engaged, they have just cause for complaint, because of the possibility of being deprived of promotions and other pertinent factors there mentioned."

On the same point, see Award No. 4921 which contains a quotation identical to the one last above quoted and adheres to the rule therein announced.

Still another rule, relating to practice, which is also relied on by the Carrier, appears in Award No. 4921, where the following statement appears.

"The Carrier also asserts that it has been the practice for it to contract work 'particularly new construction, as well as maintenance work, when regular Maintenance of Way forces have not been available.' Practice does not alter the terms of an Agreement so as to establish exceptions to work embraced in the Scope Rule (see Awards 757 and 4701). It was the duty of the Carrier to comply with the terms of the Agreement and bulletin the work. Had the Carrier followed such procedure without success, the situation would have been altered."

Preliminary to disposition of the cause on its merits we desire to pause at this point to state we recognize the instant record presents a close and perplexing issue on which the minds of rational men might well differ and frankly concede Awards are to be found in our records which can be construed as supporting contentions advanced by either of the parties. Even so our duty is to resolve the facts and to determine their rights under the current Agreement. We therefore turn to the merits, particularly to grounds relied on by the Carrier as constituting an exception to the general rule. As we do so it should be added that it will serve no useful purpose to further labor the facts or go into detail with respect to those on which we rely as persuasive of our decision.

Summarizing, when those facts are tested by the rules to which we have heretofore referred, we have reached the following conclusions: First, the grounds relied upon by the Carrier's Assistant to the Vice President in disallowing the claim on the property do not afford a sound basis for its denial under the confronting facts; Second, new grounds relied on by the Carrier before this Board, heretofore designated as (1), (2) and (3) are not supported by the degree of proof required to warrant a conclusion the record establishes an exception to the Scope Rule; Third, the same holds true of the ground heretofore designated as (4). In addition, we are convinced the Carrier either had sufficient available equipment to perform the work in question or it could have obtained that equipment without undue cost and expense. Fourth, the project involved reconstruction and maintenance work in the nature of remodeling and of such a character, notwithstanding the extent thereof, that the Carrier was required to confer with the Employes and attempt to negotiate disputes existing with respect to its performance before it could unilaterally elect to regard it as work not encompassed by the Agreement and contract it to individuals not covered by its terms. Fifth, the Carrier has failed to establish a custom or practice permitting its action. Sixth, the work was so extensive and of such nature that under the existing facts and circumstances and applicable decisions of this Board, the Carrier was required to comply with the requirements of Rule 8 of the Agreement. Therefore, having wholly failed to do so, its action resulted in a violation of such rule.

In reaching the conclusions just announced, we have not been unmindful of a contention advanced by the Carrier, heretofore not mentioned, that earlier in the year it had contracted similar work on its Freight House No. 1 without objection or complaint on the part of the Employes. Assuming without deciding this was true, we hold this one act did not establish a custom or practice warranting similar action in the future.

What has just been held does not mean that we are disposed or required to sustain the Employes' claim in its entirety. As we read our decisions there is no established rule fixing the penalty to be imposed for the violation of the Agreement. In that situation we understand we have a right to determine what would be just and equitable under all the facts and circumstances.

Heretofore we have not stressed extenuating circumstances and do not propose to do so although it should perhaps be stated that in the fact of the record we do not regard them as nonexistent. We have however pointed out that the Employes, although they were bound to know what was going on, stood idly by and did not protest the Carrier's action until August 30, exactly 41 days after work was commenced on the contract. The entire project was completed in 86 days, inclusive of Sundays, and so far as the record shows no work was performed on those days or on Labor Day. We have also mentioned the fact the Employes did not protest the work on Freight House No. 1. In fact, it appears they acquiesced in that action. We have also pointed out that the employes involved lost no time as a result of the instant contract and we think the assumption, that under the existing conditions the work was of such a type it could not have been performed on overtime hours, is reasonable. In such a situation we believe a fair penalty to impose for violation of the Agreement is to allow the claimants

one-half of the 8,974½ hours that were consumed by the contractor's forces in performing the work referred to in part (1) of the claim at the pro rata rate, after deducting from that allowance any and all hours of work performed by employes of the contractor not properly classifiable as Bridge and Building employes if they had been working for the Carrier in their respective capacities. It is so ordered.

To clarify what has just been said and held, and to avoid possible confusion, it should perhaps be stated since the Employes admit work was performed by other classes of employes, the hours deductable under the foregoing award shall include all hours worked by electricians, water service employes and plumbers, as well as any other workmen who would not be properly classified as Bridge and Building employes if they had been working for the Carrier instead of the contractor. This it may be added is a matter which can be determined by a joint check on the property and should not require further consideration or attention on the part of this Board.

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.

AWARD

Claim sustained but only to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 7th day of September, 1951.