

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
SEABOARD AIR LINE RAILROAD COMPANY

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

- (1) That the Carrier violated the provisions of the effective agreement when it assigned the work of re-inforcing piers on the steel bridge, Mile Post 974.4, West Palm Beach, to employees holding no seniority under the said effective agreement;
- (2) That the employees of Bridge Gangs Nos. 1, 2 and 3, as reflected by payrolls for the last half of December 1950, be paid an equal proportionate share of the total man-hours consumed by the Contractor's forces in the performance of the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Carrier owns and maintains a steel bridge which spans the West Palm Beach Canal, near West Palm Beach, Florida and is designated as Steel Bridge, Mile Post 974.4.

The Carrier determined that the center pier of the above structure would require enlargement and reinforcement and subsequently assigned such work to a General Contractor.

The project merely required the building of a cofferdam of approximately the same dimensions as the proposed pier enlargement. The cofferdam is substantially nothing more than the concrete form into which the liquid concrete is to be poured. In this instance the usual procedure of building concrete forms into previously excavated openings was merely reversed because of the existing water and resultant unstable soil.

All water and unstable or loose soil were then removed from the inner limits of the cofferdam, thus leaving a concrete form into which the required amount of concrete was poured.

The Carrier contracted this work to an outside contractor without the approval or consent of the Employees, and made no attempt to secure the Employees' acquiescence in the assignation of the above work to employees holding no seniority under the scope of the effective agreement.

Claim was filed in behalf of employees of Bridge Gangs Nos. 1, 2 and 3, for pay at their respective straight time rates, an equal proportionate

ance of this work, large suction pumps and other pieces of miscellaneous equipment which the carrier did not have available (see Award 2812).

**(3) THE CARRIER HAS KEPT ITS FORCES FULLY OCCUPIED
IN THE MAINTENANCE OF ITS BRIDGES AND BUILDINGS.**

Records definitely show for the period 1947 to the present time, carrier has worked on this Seniority District (North Florida Division) three (3) bridge gangs regularly, performing regular maintenance work. The normal complement of each of these gangs is a foreman, 4 bridgemen and 4 bridge-men helpers.

In consideration of the above, carrier respectfully requests that the claim be denied.

Carrier affirmatively states that all data contained herein has been made known to or discussed with representatives of the Brotherhood of Maintenance of Way Employes.

(Exhibits not reproduced).

OPINION OF BOARD: The question for determination in this present claim is whether the Carrier violated its Agreement with the Brotherhood of Maintenance of Way Employes in contracting the work of reenforcing a pier on the steel bridge at mile post 974.4, West Palm Beach, to a contractor.

The rule is well established and settled by awards of this Board that work covered by the Scope Rule of an Agreement cannot be taken away from the employes covered thereby by contracting that it be performed by others who are outside the Agreement, without violating the rules. See Awards cited in 3839, also Awards 5151, 5563, and 5839.

The Carrier claims that the nature of this work brings it within that line of awards where we have said that from the very nature of the work involved it can be said that the Carrier does not possess sufficient equipment and skill to perform it under the existencies of the situation prevailing and with which it is required to deal. See Awards 2812, 2338, 2465, 3206, 5028, 5151 and 5304.

The burden of proof is on the Carrier to show by factual evidence that its decision to contract work out is justified under the circumstances. See Award 2338, 4671, 5304, 5457 and 5563.

The Carrier asserts regular inspection of the Carrier's bridge near West Palm Beach, Florida, developed that the center pier (pier supporting the drawspan) showed signs of settlement, and was kept under close observation. As a result of this observation it was noticed that there was considerable lateral movement, especially when opening the drawspan. The condition made it necessary for prompt action to be taken to reenforce and enlarge the pier. On August 15, 1950, this Carrier entered into a contract with Cleary Brothers Construction Company to enlarge and reenforce this center pier. This contract provided for sheet steel piling to be driven completely around the afore-mentioned center pier to form a cofferdam, sheet steel to be provided by the contractor. After the construction of the cofferdam was completed, wooden piling was driven all around the existing center pier inside of the sheet steel cofferdam. The cofferdam was then pumped dry, and excavations made around the pier to reach the hard surface, after which approximately 78 cubic yards of concrete was poured into the excavation to the top of the height of the existent pier, and the sheet steel piling was cut off at this level. The project was started August 28 and completed in October 1950.

The Carrier contends that it was not possessed of adequate and necessary equipment to properly perform this type of construction.

The contractor performed the work by the use of a crawler tractor crane equipped with an air operated pile driving hammer for driving the sheet metal piling, but such crane was not operated on the Carrier's bridge or tracks. The contractor constructed a wooden runway bridge from the shore line to the center pier paralleling the Carrier's bridge, and access to the location of the work by the crawler crane was over and by means of this wooden runway bridge. Also, to properly progress this work a 500 cubic foot air compressor was needed and used. The Carrier did not have any such compressor. The largest one it possessed was 210 cubic feet, which was in service and used by a bridge gang Sub-Department No. 3. Additionally, the contractor had and used large suction pumps, and a large concrete mixer, which the Carrier did not have available.

The Carrier asserts that during a period of 15 years or more only six cases of this type of work have occurred in the seniority district involved in this claim; and that this particular type of work is highly specialized and the Carrier has always contracted it out. The Brotherhood of Maintenance of Way Employees at no time questioned the right of the Carrier to so do. Because of the infrequency of such type of construction, and the type of equipment required to perform such work, the Carrier asserts its employees are not qualified or experienced to perform this type of work, nor could the expenditure for the type of equipment required be justified.

During the time this work was being done by the contractor, none of the Carrier's employees were laid off, but were engaged in the maintenance of its bridges and buildings, and suffered no wage loss. As much of the Carrier's bridge and building forces as could be utilized were used to augment the contractor's forces. The Carrier asserts such employees were laborers.

Contra to the Carrier's contentions and assertions, the Employees assert the project merely required the building of a cofferdam approximating the same dimensions as the proposed pier enlargement. The cofferdam is nothing more than the concrete form into which the liquid concrete is poured. In this instance the usual procedure of building concrete forms into previously excavated openings was merely reversed because of existing water and resultant unstable soil. All water and unstable or loose soil were then removed from the inner limits of the cofferdam, thus leaving a concrete form into which the required amount of concrete was poured. Claimants have constructed concrete forms and cofferdams, poured concrete, and driven piling as a routine and usual part of their work. No emergent condition existed. The condition was brought about by the settlement of a bridge pier which required additional support. As to the equipment necessary for the performance of the work, the crawler tractor crane equipped with pile driver hammer is not necessary for this type of construction. The only reason it was used was because it was the only type of pile driver owned by the contractor. The rail-mounted pile driver owned by the Carrier is more efficient for this type of construction and would preclude any necessity of constructing a wooden runway bridge. As to interference with traffic by the use of the rail-mounted pile driver, the Carrier's trains, in such situation, operate under specific regulations and flag protection. Nor would an air compressor such as used by the contractor be required in connection with the operation of the Carrier-owned pile driver; nor were suction pumps or concrete mixers of the size used by the contractor necessary to the project. The Carrier possesses such equipment that could be utilized.

The Employees cite Rule 1 of the effective Agreement captioned "Scope," and which reads in part as follows: "These rules cover the working conditions of employees of the classes in the Maintenance of Way Department, represented by the Brotherhood of Maintenance of Way Employees, in Sub-departments as listed below: * * *." Without enumerating the different positions specified by the rule, we observe it includes employees engaged in the construction and maintenance of buildings and other structures, and included therein are bridgemen and carpenters, together with their respective fore-

men, assistant foremen, and helpers, welders and their helpers, and pile driver operators, which we believe constitutes the classes of employees necessary to the performance of the type of work involved in this claim.

Rule 2 (a), Rule 3 (a), and (n) are cited. These rules have to do with new positions and vacancies, and seniority.

Basically the employees rely on the Scope Rule. There appears to be no question but what the Scope Rule encompasses the sort of work that is in issue in this claim. This Third Division has held that work so covered by the Scope Rule could not be contracted out with impunity unless there are specific exceptions or special emergencies justifying a departure from ordinary procedure. See Awards 757, 4671, 3251, 4765, and 5848.

The project here involved is not of great magnitude, nor one requiring highly skilled employees. It is shown that similar work has been done by employees of this Carrier in the class before referred to, that is, Maintenance of Way Department. No attempt was made to work the matter out with the Organization and to thereafter give this Board the benefit of such negotiations. See Awards 3251, 4888, 5470. Neither are we impressed by the proposition that the Carrier's employees of the bridge gangs were engaged in other essential tasks for which they were compensated. As pointed out in Award 4158, even though these employees were so engaged, they have just cause for complaint because of the possibility of being deprived of promotions and other pertinent factors there mentioned. See Award 4869.

The work described does not constitute a new structure as commonly understood as "new work." If the Maintenance of Way Department is adequately staffed, such work as the pier here, 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 work to be contracted out must be considered as a whole and may not be subdivided for the purpose of determining whether some part was within the capacity of the Carrier's forces. See Awards 3306, 4476, and 4954.

We believe the Carrier had adequate equipment for the use of its employees to perform the work; that no emergent condition existed; this pier had been under observation for some period of time; and the fact that the Carrier claims that sheet steel was not available to it, while this might be true in some degree, we are not convinced that it could not have been obtained insofar as the record shows. We are cognizant that on previous occasions the Carrier has contracted work to a general contractor without protest from the Maintenance of Way Department. We assume, by such acquiescence the propriety of the Carrier in so doing was recognized on such occasions. However, we do not believe past practice in the instant case is sufficient to abrogate the current Agreement between the parties. Practice does not alter the terms of the Agreement so as to establish exceptions to work impressed in this Scope Rule. See Award 757, 4701, and 5457. This is not to say that under appropriate circumstances that past practice may not become pertinent to a decision in contracting work out.

There is some contention in the record that the Employees, by this claim, are endeavoring and seeking to obtain a rule which would prohibit the Carrier from contracting any work that it may have out to others, to a general contractor for instance. We are not in accord with this contention. Awards of this Division are too numerous to cite, which make it clear on what basis the Carrier may contract with others. Some of such awards are heretofore cited.

In addition, the Carrier asserts that there is no justification for sustaining section 2 of the claim for the reason the work on this project commenced August 28, 1950, and was completed October 20, 1950, and claim was presented January 13, 1951, 85 days after the work was completed. A large

number of bridge gang employes carried on the December 1950 payrolls actually entered the service subsequent to the completion of this project. We concur to the extent that employes who entered the service after the date indicated by the Carrier subsequent to the completion of the project, are not here involved. We believe records of the Carrier will properly reflect the true situation when considered in connection with section 2 of the claim. Certainly, the records will show what employes were involved and entitled to remuneration, as shown in section 2 of the claim.

For the reasons given herein the claim is sustained.

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 claim sustained as provided for in the Opinion.

AWARD

Claim sustained as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of February, 1953.

DISSENT TO AWARD 6109, DOCKET MW-5992

The majority opinion in this dispute is so grossly in error we most emphatically dissent to same.

The claim is sustained upon conclusion reached—(1) no emergency existed, (2) the assumption the Carrier was possessed of the necessary equipment and skilled mechanics to have performed this job, and (3) the interference with the flow of traffic which would have resulted if the Carrier had attempted to have performed this work with its own rail pile driver working from this very draw span itself was a minor matter.

The fact that the pier supporting the draw span was found to be settling, which in turn caused a lateral movement in the draw span especially when being opened, created a hazardous condition, which of itself produced an emergent situation. It was necessary for the Carrier to develop the magnitude and location of the settlement of this pier and the degree of lateral movement in the draw span in order to determine the best method of effecting permanent repairs, strengthening the pier, material needed, etc.

The draw bridge in question is what is known as the swing type draw bridge. The draw span rests and turns on this pier, which is under the middle of the draw span, the openings on the north and south side of the draw span

being of equal distance. When the draw span is in the closed position the ends rest on bridge piers and the span is locked at each end to the bridge itself. When in the open position the only support the span has is this draw span pier. This requires that it be perfectly balanced.

Was it practicable to have performed this work with the use of Carrier's rail pile driver? It was not for the following reasons. The original pier was 21 feet in diameter. In order to strengthen this pier and overcome the settlement it was necessary to enlarge the pier to 27 feet in diameter. This necessitated the driving of the steel sheet piling to form the cofferdam, in order to pump out the water and allow for the form work, beyond the 27 feet diameter of the enlarged pier. It would have been necessary for the rail driver to have worked from this damaged draw span. If the pile drive had the radius to drive the piling and the steel sheet piling the required distance to enlarge this pier (which necessary radius the rail pile driver does not have) it would have been necessary to drive considerable of the steel sheet and other piling with the draw span open in order to enclose the entire old pier. This would not only be extremely hazardous, owing to the added weight on the open span and the strain of the machine driving the piling bringing about an unbalanced condition which undoubtedly would have thrown the span and the pile driver into the river, but obviously was impracticable. Such work is usually performed by what is known as a floating pile driver, or in the manner that was used in this situation.

As to the delay to traffic, the opinion dismisses that important item as of no consequence. This bridge is located on Carrier's main line between Palm Beach and Miami, single track, with considerable density of traffic. Delays to such traffic are of considerable consequence.

Not only does the award hold that the Carrier should have attempted the impracticable, but asks a penalty (without agreement provision for same) in that it orders the Carrier to pay the members of Bridge Gangs 1, 2, and 3 a proportionate share of the total man-hours consumed by the Contractor's force in the performance of this work, this notwithstanding all of Carrier's forces were working full time during the period the Contractor was engaged in this work.

This is a glaring example of this Division, without any responsibilities for results, substituting its judgment for that of the Carrier's experienced Engineers.

/s/ C. P. Dugan

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ R. M. Butler

/s/ J. E. Kemp