Award No. 6645
Docket No. MW-6644

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CENTRAL OF GEORGIA RAILWAY COMPANY

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

(1) The Carrier violated the effective agreement when they assigned the work of constructing two trestles between Krannert Junction and Krannert, Georgia, to a contractor whose employes hold no seniority under the effective agreement;

(2) The Carrier's System Iron Bridge Gang employes each be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours consumed by the contractor's forces in performing the iron and steel work on the trestles referred to in part (1) of this claim;

(3) Each of the Bridge and Building employes holding seniority on the Carrier's Columbus Division be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours consumed by the contractor's forces in performing all of the work referred to in part (1) of this claim, except for that portion of the work referred to in part (2) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Carrier constructed two and nine-tenths (2.9) miles of trackage in order to serve two industries located near Krennert, Georgia.

All track work in connection with the above referred to project was assigned to and performed by employes in the Carrier's track sub-department.

It was necessary to install two trestles on this line of railroad, one of which was to have a steel span.

The Carrier assigned the work of installing the two trestles to a contractor whose employes hold no seniority under the effective agreement. This contract was let without benefit of conference with or approval and/or knowledge of the Employes' Committee and is the first instance within the knowledge or memory of the Employes that this Carrier has ever contracted for the performance of work of the nature and character herein involved without seeking and securing the approval and consent of the Employes through conference with the Employes' Committee.

tract to the disadvantage of the employes, we are of the opinion that no loss resulted to claimants".

Also see Third Division Awards 1610, 3215, 3254, 3255, and 3839 as to principle of wage loss. In claims denied by Awards 3254 and 3255 of this Division, the Employes claimed that certain employes **be made whole for wage losses** allegedly sustained because of alleged agreement violations. The Employes cannot, therefore, in good conscience now demand that the Board construe the agreement as meaning that **penalties** or **fines** are to be imposed upon this Carrier.

Also see First Division Awards 5396, 5401, 5402, 6758, 8251, 10351, 10812 and others.

Last but not least, the Employes waited until the entire job was completed before filing any protest whatsoever. Does this exemplify good faith, or "dealing across the **board**"?

CONCLUSION

In conclusion, Carrier respectfully submits that:

(1) It has been proven that this claim is not properly before the Board.

(2) There is no rule support of the claim. There is no Work Classification Rule, in fact, none of the rules of the Agreement give any basis whatever to the alleged violation.

(3) Great weight must necessarily be given to the fact two large companies with valuable freight traffic were pressing the Carrier to construct its tracks to their new plants.

(4) A definite and long past practice, proven by Carrier's records, is by itself sufficient evidence to prove the correctness of the Carrier.

(5) Certain special equipment not owned by the Carrier was necessary in connection with the construction of the trestles, drainage work and grading.

(6) Carrier has definitely shown that a penalty claim is not in order and is inconsistent with previous claims before the Board. There is no rule support of a penalty claim. All employes involved were employed and suffered no wage loss.

The Carrier has shown that the claim here presented has not been properly progressed on the property, and that the claim now before the Board is not one that has ever been handled on the property. The Carrier has shown that the claim is completely erroneous in stating that Carrier violated the effective Agreement, and the claim should be denied. Further, the Carrier has also shown conclusively that new construction work is not regular maintenance work, and is work that may properly be done by contract.

The Carrier urges that this claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The tests to be applied in determining the validity of a claim like this seem to be fairly well stabilized. No single Award seems to involve all the tests or exceptions which will allow the Carrier to contract work ordinarily coming within the scope rule of the Employes, but it seems to be enough if the Carrier can bring itself within one of the exceptions to that rule.

Award No. 6199 fairly illustrates the conditions which have to be met by the Carrier before it may contract with an outsider for such work. The Carrier here relies largely on the exception of "new construction".

In Award No. 6199, we said in part,

> "Therefore, it would not fall under awards of this Board that state claims involving a small integral part of the work contracted out are not sustainable if the entire project, considered as a whole was properly subject to be contracted out (Awards 2819, 3206, 4753, 4776, 5304, 5521). Furthermore, the nature of the work farmed out is not such as to bring it within any of the exceptions (underscoring supplied) to the general rule announced by this Board on numerous occasions. These exceptions refer to special skills, special equipment, special materials or work of great magnitude or emergency. None of these exceptions is present to the extent that it should be considered in this claim."

It will be noted that the above quotation does not mention "new construction" as an exception, and we have been unable to find a single Award saying that "new construction" or "new work" by itself works as an exception.

Certainly this project was not a "package job" within the meaning of the above quotation because these claims are only for the construction of the trestles, and when we get right down to the narrow issue in this case it resolves itself into the Carrier's allegedly not having a large enough crane to set the 13-ton steel span on to its awaiting abutments. We are not convinced that by the use of two smaller cranes which Carrier did own that the job could not have been done, but even assuming that a larger crane was needed, no doubt arrangements could have been made for the temporary use of one to get the job done.

The very fact that the Carrier tried to bring itself within a number of the well known exceptions is proof that it did not rely on "new construction" alone. While the Carrier lays some stress on the fact that the total cost of the entire job was $357,000, indicating that it was one of "great magnitude", the cost of these two trestles was a minor part of that total cost, and that is all that this claim covers. As to the other exceptions the Carrier did not sustain its burden by a preponderance of the evidence.

As to the contention that this claim is not properly before this Board because it is not identical with that first submitted on the property, that is no serious matter. The substance of the claim is the same viz., that the Carrier improperly used outsiders to build these two trestles. The change made in connection with the method of calculation of payment has been recognized and approved by this Board on previous occasions.

We think this case falls far short of fitting into the purview of Awards 5151 and 5152, which are the two best Awards that Carrier relies upon for denying this claim, but even in Award No. 5151, we said:

> "The building of new grade and the construction of new track under ordinary conditions is within the scope of the Maintenance of Way Agreement. It is only when such new construction comes within recognized exceptions heretofore alluded to, that it can be said to be outside its scope".

It may be noted too, that in those Awards (5151-5152) the Carrier did attempt negotiation with the Organization before letting the Contract.

We conclude that a violation of the Agreement was shown.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 25th day of May, 1954.

DISSENT TO AWARD 6645, DOCKET MW-6644

The project involved in this dispute was the construction of approximately three miles of new railroad, over new right-of-way acquired for that purpose.

The Carrier contracted with one contracting firm to construct the necessary fills, do all the grading, installation of drainage pipe, the construction of two trestles, and the concrete work.

Trestle No. 1 was of pile bent construction.

Trestle No. 2 was of pile bent construction, with a steel span.

Off-track machinery was used by the contractor on the entire project. After the contractor had completed the job, the laying of the track was performed by Carrier's forces.

No claim is made by the Organization for work performed by the contractor other than construction of the two trestles and erection of the steel span.

The Scope Rule of the controlling agreement reads:

> "These rules govern the hours of service, working conditions and rates of pay of employes in the Maintenance of Way and Structures Department, * * *."

Nowhere in the agreement is there any reference to "construction," "reconstruction," or "new construction."

The Referee relies upon Award No. 6199.

In Award 6199, the controlling agreement contained a Scope Rule reading:

"2. Bridge and Building:

B&B Foremen, * * * engaged in **construction** or maintenance of buildings or other structures under the jurisdiction of the Maintenance of Way Department." (Emphasis added.)

No such Scope Rule is to be found in the agreement involved in Award 6645.

Furthermore, the project involved in Award 6199 was **not** contracted as a whole to one contractor, but the work was let by the Carrier to several different contractors. Award 6199 is distinguishable.

Awards 5151 and 5152 (both denied), referred to in the opinion in Award 6645, recognized the use of equipment not possessed by a Carrier as justification for contracting the work as a whole.

The docket in Award 6645 discloses the Carrier did not possess the type of off-track equipment required to construct the two trestles and place the steel span in position. The Carrier's Engineer of Maintenance of Way appeared before the Division, with the Referee present, and testified to the fact that the Carrier did not have the off-track machinery necessary to perform this work. The majority opinion dismisses this testimony in holding:

"* * * We are not convinced that by the use of two smaller cranes which Carrier did own that the job could not have been done, but even assuming that a larger crane was needed, no doubt arrangements could have been made for the temporary use of one to get the job done."

Here we find the majority substituting its judgment for that of the Carrier's responsible officers who are skilled in construction work—also dealing in speculation.

For the above reasons we dissent.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ J. E. Kemp