

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

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

(1) The Carrier violated the effective Agreement on August 7, 8, 11 and 12, 1952; on September 3, 4 and 5, 1952; and on dates subsequent thereto when it assigned employes of a general contractor to perform the historical and traditional duties of Work Equipment Operators on the grade elimination project at Waverley, Massachusetts;

(2) All Work Equipment Operators holding seniority on the Terminal 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 the work referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: On August 7, 8, 11, and 12, 1952, and on September 3, 4, and 5, 1952, and on dates subsequent thereto, the Carrier assigned a general contractor's employes to perform the historical and traditional duties of Work Equipment Operators on a grade elimination project at Waverley, Massachusetts.

Essentially, the work involved the operation of the general contractor's crane in assisting Carrier-owned and operated work equipment (Crane W-3304), in the handling of rails and ties in connection with a temporary retirement of the main line tracks, the excavation to the finish grade and the handling of rails and ties in the reinstallation of the main line tracks on the aforementioned project.

Employes holding seniority as Work Equipment Operators on the Terminal Division were available, fully qualified, and could have performed the Work Equipment Operators' duties described above if the Carrier had so desired.

Claim was filed in behalf of all Work Equipment Operators holding seniority on the Terminal Division, requesting that they be allowed pay at their respective straight time rates of pay for an equal proportionate share of the total man hours consumed by the contractor's forces because of this improper work assignment; the claim was declined.

CARRIER'S OPENING STATEMENT: Without access to Petitioner's submission, Carrier offers the following, requesting an opportunity to reply more fully upon receipt of Petitioner's ex parte submission.

CARRIER'S STATEMENT OF FACTS: In the elimination of the grade crossing (E. G. C.) at Waverley, Mass., it was necessary to detour trains from the Fitchburg Division main line to a paralleling track called the Central Massachusetts Branch for the westbound and then install a temporary strip of track for the eastbound for a distance of approximately three-quarters of a mile.

This elimination was accomplished by dropping the main line so that at the point of the former grade crossing, the tracks, when relaid, would be at the bottom of a deep cut.

This required heavy excavation. Prior to the excavating or the start to make the cut, it was necessary to remove the material (track, ties, etc.) and store them on both sides on the banks of the cut.

The Railroad Track Crane was working along with Sectionmen in the reinstallation of the main line (at the new lower level), which gradually dropped as the work progressed, and made it more difficult for the Track Crane to reach the material on the banks of the cut.

Eventually the Track Crane was unable to bring down the material from the steep banks, thereby preventing the relaying job to continue, as the Railroad Track Crane could not move forward without tracks to run upon.

Therefore, it was necessary to employ the services of a Contractor with a truck crane, which could reach the material on the steep banks of the cut and lower ties and tracks to the bottom of the cut.

POSITION OF CARRIER: The use of the Contractor's Truck Crane was essential for the completion of this project. Carrier's Statement of Facts is self-explanatory as to the reason for using the services of a Contractor.

The Petitioner's letter to Supervisor of Buildings and Bridges, under date of October 8, 1952, reads in part:

"... the Railroad employees and equipment should have been used to the limit of their endurance (16 hours per day) on dates mentioned and the Saturdays and Sundays adjacent to these dates before outside help be hired. This not being the case, we further contend that Work Equipment Operator Height was deprived of overtime work, thereby, and claim is herewith submitted in his behalf."

Third Division Award No. 4194, Opinion of the Board, reads, in part:

"The purpose of the punitive rate as it applies to overtime is to penalize the Carrier for working an employee in excess of eight hours in any one day. Its purpose is not, as some seem to suppose, to create work for which time and one-half may be demanded."

Therefore, the Petitioner's demand that the men should be used to the "limit of their endurance" is absurd.

Furthermore, part two of the claim should not be honored. Many Awards have frowned upon generalities and blanket statements such as part two of this claim. Therefore, this part of the claim should be ignored.

The claim should be denied.

All data and arguments herein contained have been presented to the Petitioner in conference and/or correspondence.

OPINION OF BOARD: In connection with a major grade crossing elimination project at Waverley, Massachusetts, the Carrier entered into a

contract, independent of and outside its Agreement with the Organization, for a general contractor to furnish a crane and operator to assist Carrier-owned and operated work equipment in the handling of rails and cross ties in connection with the temporary retirement of the main line tracks, excavating to the finish grade, and the handling of rails and ties in the reinstallation of the main line tracks on the elimination project.

Claim was first made "that Work Equipment Operator G. C. Height be reimbursed by the Railroad to cover his financial loss." Midway of progressing the claim on the property the statement of claim was revised and the claim later disallowed in its present form by the Supervisor of Schedules and by the Chief of Personnel, Carrier's highest ranking officers designated for handling appeals.

Question first comes to mind whether the claim is properly before this Board, account of some change being made therein during handling on the property. We find and hold that the amendment goes to the form and not to the substance of the claim. The basis for claim continues to be an alleged violation of the Agreement account of persons not under the contract being used to do work that is contended for as being subject to the contract. Who is to be paid in event of a sustaining Award is not material to a decision on the merits, and the Board will retain jurisdiction.

There can be no serious question about the position of Work Equipment Operator being a covered position under the subject Agreement, both as to the work which is the subject of contract and the right to claim the work in accordance with seniority.

Work Equipment Operators on the Terminal Division were available, fully qualified and could have done the work which was performed by the general contractor's employees. All that interfered with the Carrier fulfilling its contractual obligations to have its work performed by those with and for whom it first had contracted, was that it lacked the type of crane necessary to do the work efficiently and safely.

It is to be remembered that the subject of the Carrier's contract with its employees is work and not equipment. If the Carrier has equipment and no work and its equipment stands idle, no rights accrue to the Employees under the contract. If the Carrier has work but not equipment, and under those circumstances alone, could contract out its work a second time with impunity in every case, the last vestige of right which the Employees have under the collective bargaining agreement would disappear.

The Board has been quite liberal in its interpretation of the scope rules of Agreements by denying claims where the Carrier does not have the men, equipment and facilities for performing its work, depending in each instance on differences in rules, practices and the peculiar facts and circumstances of record. Some of those Awards are relied on by the Carrier in this docket. The Employees' Representative cites opposing Awards in support of its position.

Without attempting to resolve conflicts in the cited Awards or to labor points of distinction, it is sufficient to say that a test which in some measure is one of practicability is of questionable application where available and qualified employees for positions covered by contract have been deprived of contractual rights by the process of farming out work piecemeal, as the record shows was done in this docket, because the Carrier found that it lacked a necessary piece of equipment and contracted for both equipment and someone to operate it when it already had Work Equipment Operators under contract.

The Employees have no right to object because the Carrier, in the exercise of its managerial judgment, has seen fit to contract for equipment. They have no right to interfere if the Carrier also permits, or contracts with others to operate that equipment in violation of its Employees' contractual right to

do the work. The only remedy is to make claim for an equal amount of time as was done.

The Carrier also defends against these claims on the grounds that this was a public works project of some magnitude. Even so, the disputed work was only a small part of the whole. In the performance of its third party contract it had undertaken and agreed to use its men, facilities and equipment. It had full, complete and exclusive jurisdiction and authority over the work, and was using the contract with its Employees to get the work done. There was and is no greater sanctity in one contract than in the other under circumstances here present, and in this case the Carrier was under a continuing duty to comply with that contract which it holds with its Employees.

We find and hold that the Carrier did not comply with the last mentioned contract.

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 Carrier violated the contract with its Employees.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois this 18th day of February, 1955.