Award No. 7304
Docket No. MW-7084

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John Day Larkin, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, that: (1) The Carrier violated the effective Agreement when it assigned a general contractor to perform the brick masonry work in the remodeling of its power plant at Burnham Shops, during the period July 3 to August 7, 1952, both dates inclusive;

(2) Bricklayer F. C. Cesario and Hod Carrier Homer Carpenter each be allowed two hundred (200) hours at their respective straight time rates account of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Carrier has a power plant at its Burnham Shops which it decided to remodel some time during the year of 1952. Inasmuch as the power plant consisted of six boilers, it was decided to remodel two boilers at a time, so that there would always be four boilers operating to provide the necessary power at the terminal.

The Carrier's Bridge and Building forces were assigned to remove and clean all bricks from both the interior and the exterior of the boiler enclosures. All pipe work in connection with the remodeling of the power plant was assigned to and performed by employes in the Carrier's Mechanical Department in compliance with the provisions of the Agreeement between such classes of employes and the Carrier.

However, when the power plants were ready for replacement of the interior and exterior brick lining, the Carrier assigned its Bridge and Building forces elsewhere and employed a General Contractor to replace the brick lining. The Contractor's forces consumed approximately 400 hours in the performance of the brick-laying work, consequently, claim was filed and progressed in behalf of Bricklayer F. C. Cesario and Hod Carrier Homer Carpenter for 200 hours pay each, at their respective straight time rates. The Carrier has declined the claim.

The Agreement in effect between the two parties to this dispute dated February 1, 1941, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 1 of the effective Agreement reads as follows:

All data in support of Carrier's Submission have been submitted to the Organization and made a part of this particular question in dispute.

The right to answer any data not previously submitted to Carrier by the Organization is reserved by Carrier.

OPINION OF BOARD: The Carrier has a power plant at its Burnham Shops which was remodeled in 1952. Since there are six boilers, it was decided that only two would be repaired at one time, leaving the other four in readiness to provide the necessary power at the terminal. The Bridge and Building forces of the Carrier were assigned to remove and clean all bricks from both the interior and exterior of the boiler enclosures. The pipe work was assigned to and performed by employes of the Carrier's Mechanical Department, as required by the Agreement. However, at the point of replacing the brick lining, the Carrier assigned Claimants F. C. Cesario and Hod Carrier Homer Carpenter to work elsewhere and hired an outside contractor to complete the reconstruction of the boilers.

Claimants contend that this action on the part of the Carrier violated both the Scope Rule and the Seniority Rule of the parties' Agreement.

It has been repeatedly said in the awards of this Division that a Carrier may not contract out work of a type intended to be covered by an agreement with its employes. (Awards 4367, 4920, 4921 and cases cited.) The Agreement with these employes covers all the work of the kind involved. The only specific exceptions noted in the Scope Rule are pipefitters, pipefitter helpers and scale inspectors. If there are to be other exceptions definite proof, and not mere allegations, is necessary. Award 757.

The work here involved was primarily repair work, not new construction such as we had under consideration in Award 6549. It was bricklaying work. The record indicates that Claimant Cesario held seniority in Classification (2) under the Scope Rule. He had been awarded the position of Bricklayer (Mechanic) through the exercise of his seniority as a result of Bulletin 39, dated July 3, 1952. And in the same manner Claimant Carpenter had been assigned to the position of Hod Carrier in Classification (3) under Rule 1. There is no proof in the record that these men were incapable of performing the work of relining the furnaces. The Carrier makes some claims that special skills were required and states that Claimant Cesario could not do the necessary blueprint reading and other technical work required. But there is no proof of this before us. On the contrary, there is evidence that Cesario could read blueprints and that at other times and places he had performed work comparable to that performed in the instant case.

The Carrier has claimed that the Watson Construction Company of Denver, the contracting firm, possessed a unique approach to the type of "boiler setting" here required. But we note that another Denver firm was hired by the Carrier to do a similar job at its Pueblo Shops. It is not even claimed that special equipment of any kind is required in the repair or conversion of these furnaces.

Nor can we find that there was any necessity for speed in the completion of the work. There was no emergency. Of the six boilers only two were being worked on. The remaining four boilers were, according to the best evidence before us, quite adequate to meet current needs.

As to the fact that the Carirer made a contract with another Denver firm to perform the same type of repair at its Pueblo Shops, this matter is not an issue before us. But one or more such incidents do not alter the obligations of the parties under their Agreement. Repeated violations of a contract do not modify its terms.

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 Agreement was violated.

AWARD

Claims (1) and (2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of April, 1956.