Award No. 7943
Docket No. MW-7662

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Whitley P. McCoy, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

JOINT TEXAS DIVISION OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY-FORT WORTH AND DENVER RAILWAY COMPANY (Burlington-Rock Island Railroad Company)

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

(1) The Carrier violated the effective Agreement when it assigned the work of installing drainage pipes and/or culverts to replace Bridges 241.84 and 242.07 to the contractor whose employes hold no seniority under the effective Agreement.

(2) Each employe holding seniority in the B&B Department 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.

EMPLOYES' STATEMENT OF FACTS: On or about August 15, 1953, the work of installing drainage pipes and/or culverts to replace Bridges 241.84 and 242.07 was assigned to and performed by the Armco Drainage Metal Products Company.

Heretofore, the work of installing five (5) such drainage pipes and/or culverts to replace certain bridges was assigned to and performed by the Carrier's Bridge and Building Department employes, using carrier owned equipment.

In November of 1953, the Carrier abolished Bridge and Building gang No. 2 and reduced the personnel of Bridge and Building gang No. 1 to eight men.

The Agreement violation was protested and a suitable claim was filed in behalf of the employes holding seniority in the Bridge and Building Department.

The claim was declined as well as all subsequent appeals.

The Agreement in effect between the two parties to this dispute dated January 16, 1948 and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

OPINION OF BOARD: Between September 3 and 25, 1953, the Armco Drainage and Metal Products Company performed and completed a contract theretofore entered into with the Carrier for the furnishing of all tools, equipment, material, and labor in installing culverts to replace two open deck pile trestles. Fifty-eight feet of No. 5 gauge multiplate pipe, 9½ feet in diameter, with No. 8 gauge galvanized interlocking sheeting one-half height headwalls were used for replacing Bridge 241.85, and seventy-eight feet of No. 5 gauge multiplate pipe, 9 feet in diameter, with similar sheeting were used for replacing Bridge 242.07. The Brotherhood filed this claim on October 9, 1953, contending that the installation work belonged to the Bridge and Building forces. Subsequently, in November of 1953, the Carrier abolished B & B gang No. 2 and reduced B & B gang No. 1 to eight men.

Before taking up the merits of the claim it is necessary to dispose of some procedural issues which have been raised. These are based upon Rule 20(a) of the applicable Agreement between the parties, which reads as follows:

> "Should an employe subject to this agreement believe he has been unjustly dealt with, or any of the provisions of this agreement violated, he or his representatives will present such grievance or claim to the appropriate superior officer who will render a decision within twenty (20) days. A claim or grievance not presented within sixty (60) days from date of occurrence will not be recognized by either party."

As earlier stated, the claim was originally filed on October 9, 1953, and was addressed by the local chairman, Mr. Sullivan, to S. K. Autry, B & B Supervisor, the "appropriate superior officer" as specified in the rule. Mr. Autry did not reply to the Local Chairman's letter, either within twenty days or ever. Although the Local Chairman's letter requested "an early reply setting out **your decision**" (emphasis supplied), Mr. Autry merely forwarded it to his superior, Mr. G. A. Carroll, with the statement: "I do not agree with Mr. Sullivan that the Railroad Company violated the current agreement". A copy was sent to Mr. Sullivan.

On November 9, Mr. Carroll wrote Mr. Sullivan an acknowledgment of his letter to Autrey, and stated: "I do not agree that railroad violated current agreement and therefore decline your claim". On November 24 the general chairman wrote to Mr. Ruffner, the highest officer of the Carrier designated to handle such matters "an appeal of claim . . . declined by Mr. S. K. Autrey and Mr. G. A. Carroll". On December 11 Mr. Ruffner replied: "It is not felt that the contractual rights of our B &B employes . . . were violated and it is not consistent to allow the claim". Although the writer expressed a willingness to discuss the matter in conference, we think the letter is fairly to be interpreted as a denial of the claim. We feel that Mr. Ruffner so intended it, as his next letter (Jan. 13, 1954) was far beyond the 20 day time limit provided for his answer in Rule 20(b). We think the recipient of the letter interpreted it likewise, for no contention has been made that Mr. Ruffner conceded the claim by violating the time limit.

The first contention of a procedural nature was made by Mr Ruffner in his next letter to the general chairman, dated January 13. In this letter he calls attention to the fact that "the claim does not name any employes, which I do not feel conforms to the Railway Labor Act", and adds: "Therefore, believe it necessary that you name the parties for whom the claim is made so that we may check on their activities." The general chairman promptly complied with this request by naming, in a letter dated January 15, fifteen men to be added to the claim.

Then followed several conferences between the general chairman and Mr. Ruffner, a written request by the general chairman for the final position of Mr. Ruffner, a reply saying neither "yes" nor "no" but clearly implying "no", a letter by the general chairman announcing intention ot appeal to this Board, and finally a letter from Mr. Ruffner, dated December 20, 1954,

in which he states: "You are well aware that you did not name any employes as having the claim within the period specified in Rule 20 of our agreement with your organization; further, the date that the work was performed . . . has never been made a part of your claim. It is now too late to amend your claim". The general chairman countered with a letter calling attention to the fact that the first violation of Rule 20 had occurred when Mr. Autry failed to answer the original claim within 20 days.

The Carrier argues before this Board that the claim was defective in not naming employes as allegedly required by Rule 20 and by Section 3, First (i) of the Railway Labor Act; and that the attempt to amend by the letter of January 15 came too late, as 60 days had then expired for filing a claim. The Brotherhood counters by arguing that the claim should be considered as conceded by the failure of Mr. Autrey to comply with the 20-day rule.

We are not persuaded that any of these procedural arguments are sound. The above recitation of facts shows that the Brotherhood treated receipt of copy of Autrey's letter to Carroll as a denial of the claim by Autrey, but in any event Autrey's default was waived by the acceptance of Carroll's letter as a denial of the claim and appealing to Mr. Ruffner, not on the basis of a default but on the merits. Mr. Ruffner waived any defect in the claim, if there was one, by denying it on the merits without calling attention to any defect. But in any event we do not find any defect in the claim. This Board has consistently sustained claims of this general character in behalf of all the members of a seniority unit where work belonging to that unit was contracted out. Neither Rule 20 nor the Act require the naming of names in cases of this character. The bridges in question were specified in the original claim, and the nature of the work. The Carrier therefore had knowledge of the dates involved. Under our decisions the claim did not need amendment, but if it had, the Carrier would hardly have been in position to object to an amendment when it had specifically requested it. Since the claim as forwarded to this Board is in its original form, without names added by amendment, we will consider it as unamended.

We turn now to the merits. It is conceded that under the Scope Rule work of the general character of the work involved here belongs to the B&B forces and cannot be contracted out. But the Carrier defends the contracting of this particular work because of the large size of pipe involved (9 and 9½ feet), the special skill required in handling that size pipe, and the lack of equipment owned by the Carrier for the handling of it. In its original Submission, the Carrier asserted that its B & B forces had never installed culverts of this size and that the Carrier did not have the equipment necessary. But in its Rebuttal dated November 7, 1955, the Carrier retreated from this position. It stated that "the carrier will not challenge any contention" that pipe of comparable size had been installed in the past by the B & B forces. It then proceeded: "As before stated, the facility in handling—not the size —is the determining factor. Makeshift equipment had been used in the past in installing pipe aproaching the size involved herein . . .". Although the Carrier then refers to safety, efficiency, and economy, there is no attempt at proof in this Record that comparable installations made in the past by the B & B forces had been unsafe, inefficient, or uneconomical. We think that in the above quotations the Carrier has conceded the case.

We turn now to Item (2) of the Claim, relating to the remedy. The claim is that "each employe holding seniority in the B & B Department be allowed pay at their respective straight time rates for an equal proportionate share of the total men-hours consumed by the contractor's forces". There is ample authority in the decisions of this Board for the granting of relief in this form. See Award No. 6305 (Referee Smith). But where, as here, it appears that some employes having seniority in the B & B Department, such as painters and water service mechanics, could not have suffered special detriment from the violation of the agreement, and others have suffered a special loss from being laid off shortly after the work in question was per-

formed by the contractor, some modification of the relief specifically requested should be granted. The Carrier makes no denial that B & B gang No. 2 was abolished and gang No. 1 reduced to eight men, within a month or so after the completion of this work. There was no showing that this work had to be done at the time it was done. In the absence of such showing, it would appear that the lay-offs could have been postponed if this work had not been contracted. The relief granted in Award No. 3687 (Referee Wenke) seems appropriate here, namely that the employes adversely affected by the violation be recompensed as demanded in Item (2) of the claim. Who such employes are is a matter readily ascertainable by the Parties. An award such as this has many precedents to support it, including Award No. 4482 (Referee Robertson). The sum which the Carrier is obligated to pay is certain; the manner of its distribution to employes of the B & B Department may safely be left to the Parties.

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 Carrier violated the Agreement.

AWARD

Claim (a) is sustained; Claim (b) is sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 3rd day of June, 1957.