Award No. 8148
Docket No. MW-7728

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE BALTIMORE AND OHIO RAILROAD COMPANY

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

(1) That the Carrier violated the Agreement when it contracted with the Trimble Construction Company for the performance of construction, remodeling, and other bridge and building work at its Wheel Shop in the Glenwood Shops at Pittsburgh, Pennsylvania;

(2) That each of the Bridge and Building employes hereinafter named 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 in performing the work referred to in Part (1) of this claim.

CLAIMANTS ARE AS FOLLOWS:

L. L. Shoup	Robert S. Brownlee	M. W. Colbert
Fred M. Hopkins	Lloyd Rikten, Jr.	C. E. Boucher
C. E. Miller	John Walsh	R. A. Simpson
George L. Marburger	W. D. Raley	R. C. Bigen
J. I. Ritchey	C. A. Bicehouse	M. Cashdollar
V. D. Sprowls	James Hite	John W. Higley
Vaughn D. Sprowls	G. M. Bicehouse	Walter Umbel
Donald W. Sprowls	A. S. Cartwright	Henry A. Clutter
Galen L. Clover	A. A. Schaible	

EMPLOYES' STATEMENT OF FACTS: The Wheel Shop at the Carrier's Glenwood Shops, Pittsburgh, Pennsylvania, was originally designed and used for the repairing of steam locomotives. With the increased purchase and use of Diesel locomotives and the retirement of steam locomotives, it was decided to convert this wheel shop into a Diesel locomotive repair facility.

Plans and specifications were therefore drawn up to cover the necessary work and upon the approval thereof by responsible Carrier officials, Master Carpenter Foreman Raley and the Assistant Division Engineer were furnished with copies of said plans and specifications. Shortly thereafter, the Assistant Division Engineer and the Master Carpenter met with Bridge and Building Foreman A. S. Cartwright and jointly discussed and checked the plans and specifications so that Foreman Cartwright, who was in immediate charge

of procedure is clearly not contemplated by the Railway Labor Act. If the Organization is seeking to change the existing scope rule, which is apparent from both its prosecution of this case and the serving of its notice under Section 6 of the Railway Labor Act, it should follow the latter procedure and not attempt to have this Board change the rule by an obviously improper interpretation or construction thereof.

The Carrier has shown conclusively the magnitude of the project, the work contracted out to the Trimble Construction Company; the need of many special skills and special equipment not possessed by the Carrier; the necessity to complete this project as soon as possible; and, that the Maintenance of Way forces were not available to perform this service without impeding progress on other Maintenance of Way projects.

In view of the above and all that is contained herein, the Carrier submits that the claim made here is without merit and should be denied.

This dispute has been handled in accordance with the provisions of the Railway Labor Act. No agreement on a settlement thereof having been reached between the parties, it is hereby submitted to the National Railroad Adjustment Board for decision.

(Exhibits not reproduced)

OPINION OF BOARD: This docket is very similar to that involved in our recent award 7837 which the Carrier's representative urges should be reversed, while the employes' representative urges that that award is controlling of the instant dispute. The referee was furnished the master file in Award 7837, and has studied it in relation to the present case.

From the argument in both cases it is apparent that the major dispute is as to who has the "burden of proof." The Carrier insists very strongly that since the adoption of the new agreement with the employes on April 1, 1951 the burden is on the employes to show that the Carrier did not fulfill those conditions which would exempt the Carrier from complying with the agreement. The Carrier says that when those conditions exist the agreement does not apply and it is free to contract its work as it pleases.

In that assumption (that the employes must prove non compliance) the Carrier is clearly mistaken, and it is apparent that the real basis for award 7837 is that the Carrier failed to prove its contentions that would exempt it from the operation of the Scope Rule. We think the same is true here. Carrier admits in its brief "the burden would be on the Carrier to establish an exception to the Scope Rule if it relied on such as a defense."

Employes state that during the handling of the dispute on the property the Carrier stated: "Because of the size of this project, the requirement of special skills and of special equipment in performing much of the work, it was perfectly obvious from the start that the general project could not be handled by the B. and B. forces and a contract was therefore entered into with the Trimble Construction Company on June 24, 1952, covering the performance of the whole work". This indicates that Carrier was relying upon exceptions as a defense.

It will be noted that in the above quote the Carrier relies on (a) Size of the project (b) Special skills and equipment. This claim only covers the work at the wheel shop which Carrier admits "was just a small portion of the entire project." As to the special skills and equipment, the Employes state "The only equipment used by the contractor's forces in the performance of the work in dispute over and above that readily available from the normal complement of equipment and tools furnished by the members of a Bridge and Building gang were **an air compressor and a jack hammer.**" (Emphasis supplied)

Carrier's position assumes that it was under no obligation to segregate the work involved in this claim. This referee is not committed to that con-

cept, (Award 6645) for the reason that it places a power in the hands of the Carrier to freeze out work that concededly belongs to the employes.

Lest the Carrier thinks that the Employes' segregation of the claim in this case is based upon the unsupported statement of the employes we refer to the pictures, Exhibits A, B and C submitted by the employes, from which it appears that the claim covers a comparatively ordinary operation and the work clearly is included in Rule 1 C of the Scope Rule.

It is not denied that claimants were furloughed during the time, July 18 to July 31, 1952, for which claim is made here, nor does the carrier show that the installation of the wheel press, which Carrier says "is the center of this dispute" took place during this time.

We cannot stress too strongly that the incorporation of the usual exceptions in the Scope Rule does not change the burden of proof. The Carrier must still prove it is within them.

Finally, it may be conceded that the present rule does not require a conference with the employes before letting a contract, but in doing so the carrier takes the chance of "an error in judgment."

Enough has been said to indicate that the carrier violated the agreement and that the claim must be 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 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 in accordance with the Opinion.

AWARD

Claim sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 26th day of November, 1957.

DISSENT TO AWARD 8148, DOCKET MW-7728

The majority finds that the Carrier failed to prove that the work in the period July 18 to 31, 1952, which is the center of this dispute, did not accrue to the Petitioners on account of its magnitude. It ignores the strike in the Steel Industry which was the immediate cause of the force reduction. It relies upon recent **Award 7837,** which involved the same parties. The total estimated cost of the project in that case was $63,000.00. In this dispute, the work claimed was a small integral part of a project which cost $1,320,000.00, or approximately 21 times greater. Timewise, the difference between the two claims is approximately 52 days in the former case as compared with nearly four years required by the contractor to complete the entire project. These two simple comparisons make out a case of magnitude on its face.

But then the Referee blandly announces that he is not committed to the concept that the Carrier is not obliged to break down a contract project into its component parts in order to determine whether an integral part of the whole project could have been performed by its Employes. That principle is firmly established with this Division (See, e. g., **Awards 5304, 5090**), and its soundness is hardly open to attack at this late date. The Agreement which we had before us for interpretation is unique in the railroad industry in that the parties have incorporated, as a matter of agreement, those conditions which this Division has found to constitute exceptions to the ordinary Scope Rule, such as the parties had in their previous Agreement, dated April 17, 1930. By following the lead of the Referee in this regard, the Majority has lost sight of one of the basic reasons for which this Board was established.

Award 4569, Referee Whiting:

> "One of the basic purposes for which this Board was established was to secure uniformity of interpretation of the rules governing the relationships of the Carriers and the Organizations of Employes. To now add further fuel to the pre-existing conflict in our decisions upon this subject would only invite further litigation upon the subject and would be contrary to one of the basic reasons for the existence of this Board."

Likewise, in finding that the incorporation by the parties of the usual exceptions into the Scope Rule of the new Agreement does not change the burden of proof, the Majority has decreed that the parties' negotiation of their new Scope Rule was simply a useless act.

Award 6723, Referee Donaldson:

> "* * * Whatever the reason, the exception is clearly stated by the rule and represents the outcome of past negotiations of the parties. * * *
>
> "* * * We should not assume that the parties intended to do a useless act in negotiating Rule G-II, nor, should we so interpret an Agreement so as to result in an absurdity when a path is open to effectuate an expressed intent. * * *"

Award 6903, Referee Coffey:

> "The keystone of the scope rule is, as the Employes usually contend, a right to lay claim to and perform all work subject to scope of the Agreement to the exclusion of all others. Hundreds of claims have been sustained by this Board on that premise alone. It would tend to unsettle a principle, now fairly well settled, should we honor this claim by saying that the Employes, when they agreed that work of a stated character was to be excepted from the Agreement so far as an exclusive right to the work is concerned, meant to retain something which they presumably had and which we say they contracted away on agreeing that:
>
> > '(a) This Agreement shall not be construed as granting to employes coming within its Scope the exclusive right to perform the work * * *.' "

From these few observations, it is clear to see that the Award of the Majority contributes nothing to logic or to the stability of industrial relations in the railroad industry.

Award 2025, Referee Shaw:

> "* * * Agreements between carriers and brotherhood are intended to promote efficiency as well as harmonious relations, and

the public looks to this Board for fair interpretations of the rules to that end. * * *"

For these reasons this Award is in error and we dissent.

R. M. Butler
J. F. Mullen
C. P. Dugan
J. E. Kemp
W. H. Castle

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 8148

DOCKET NO. MW-7728

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employes.

NAME OF CARRIER: The Baltimore and Ohio Railroad Company.

Upon application of the representatives of the employes involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

Request for interpretation of Award 8148 has been made by the Organization because of Carrier's refusal to pay the claim according to the construction placed upon the award by the Organization, viz., that payment should be made on the claim as made.

Carrier has offered to pay the named claimants only for the time that they were on furlough, i. e., from July 18 to July 31, basing its position on the language in the award reading as follows: "It is not denied that claimants were furloughed during the time, July 18 to July 31, 1952, for which claim is made here." But Carrier does not complete the paragraph which goes on to say "nor does the carrier show that the installation of the wheel press, while Carrier says 'is the center of this dispute' took place during this time (i. e., July 18 to July 31, 1952)."

The time that these men were furloughed has nothing to do with the validity of the claim which is made here. True it is that this referee relied upon Award 7837, but as he points out, "* * * it is apparent that the real basis for Award 7837 is that the Carrier failed to prove its contentions that would exempt it from the operation of the Scope Rule. We think the same is true here."

To make it perfectly clear what was meant by the award, let the Carrier figure out the total man-hours used in the "construction, remodeling, and other bridge and building work at its Wheel Shop" and divide them by 26 and pay the claimants straight time rates for their proportionate share.

The fact that these men were furloughed on the dates mentioned, supra, is all the more reason they should have been employed because the contract employes were working in the Wheel Shop during the time.

The Carrier's statement that employes are only "seeking compensation for the period they were furloughed, that is, July 18 to July 31, 1952" is not supported in the joint submission or anywhere else in the record. As to this statement the employes state—

"On page 2 of the 'Position of Carrier,' it is erroneously asserted that the Employes are seeking compensation for the period they were furloughed or from July 18th to July 31st, 1952. It is suggested that the Carrier might do well to review the Statement of claim as submitted jointly by the two parties to this dispute so as to determine the error of its assertion."

That statement stands unrefuted to this day.

Referee Norris C. Bakke who sat with the Division, as a member, when Award No. 8148 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1959.