

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD
COMPANY

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

1. The Carrier violated the effective Agreement when it assigned the excavation and backfilling work in connection with the installation of drainage facilities at Aberdeen, South Dakota to the Kyburz Construction Company whose employees hold no seniority rights under the provisions of this Agreement.
2. Roadway Machine Operator Scott W. Grey be allowed pay at the straight time rate for an equal number of hours as was consumed by the contractor's employe in performing the work referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: During September and October, 1954 all of the work, except excavating and backfilling, in connection with the installation of drainage facilities at Aberdeen, South Dakota was assigned to and performed by the Carrier's employees.

The necessary excavation and backfilling work was assigned to and performed by the Kyburz Construction Company without negotiations with or concurrence by the employe's authorized Representatives.

Essentially, the work involved the operation of a backhoe machine in the performance of the excavation work, and a crane equipped with a clam shell bucket in performance of the backfilling work. 53 man-hours were consumed by the Contractor's employees in the performance of the above referred to work.

The Carrier had a backhoe machine as well as a number of drag lines located at various points on its property which are frequently utilized in the performance of excavation work of the character here involved. The Carrier also had on its property several cranes equipped with clam shell buckets

covered by the agreement perform work which the carrier has to offer. Had the carrier been able to offer the work of trenching to Claimant Grey and had Claimant Grey performed that work, then and only then would the Scope Rule apply.

As shown in the Carrier's Statement of Facts the carrier used its own employes to the greatest extent possible in getting the work accomplished and all work in connection with the installation of drainage facilities with the exception of trenching was performed by carrier forces. The carrier's decision to contract the work of trenching was prompted by the following:

- (1) The unavailability of and lack of carrier-owned off track back hoe equipment of the type required.
- (2) Unsuccessful effort to secure rental equipment of the type required on a non-operated basis to be manned by carrier forces.
- (3) Emergency time requirements in order to complete the installation of drainage facilities before freezing weather.

In Third Division Award 5304 it was held that:

" * * work may be contracted out when special skills (Awards 3206 and 4712; compare Awards 4158, 4701 and 4920), special equipment (Award 5151; compare Awards 4671 and 5227) or special materials (Awards 757, 3839 and 5044; compare 4921) are required; or when the work is novel (Awards 2465 and 3206; compare Award 4671) or of great magnitude (Award 5151; compare Award 4760); or when emergency time requirements exist (Award 5152; compare Award 4888), which present undertakings not contemplated by the agreement and beyond the capacity of the Carrier's forces."*

The carrier asserts that it has shown by factual evidence that its decision to contract was fully justified and respectfully requests that the claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim is based on the contention that the Carrier violated the applicable Agreement when it assigned the work of excavating and backfilling in connection with the installation of drainage facilities at Aberdeen, South Dakota, to an outside contractor. The gravamen of the Carrier's defense is that employment of the contractor was required because the machine which Carrier deemed necessary for the performance of certain trenching work in connection with the drainage installation, was not available and such a machine could not be obtained by rental without an operator. The Carrier asserts that an off track back hoe machine was required for the work, that its back hoe machine was then engaged in urgent work elsewhere, that it had on order such a machine which was not delivered until several months after the work was performed, that it was unable to rent such equipment from the contractor and other construction companies on a non-operated basis, and that installation of the drainage facilities had to be completed before freezing weather occurred.

Claimant is a Roadway Machine Operator who holds seniority in Group 1 of the Carrier's Roadway Equipment and Machine Sub-Department. Consid-

eration of Rules 4 and 46 (f) of the applicable Agreement indicates that operation of the type of equipment referred to and which performs excavating or trenching work is embraced within the scope of the Agreement. Where the work in question is regarded as covered by the agreement, as here, this Division has held repeatedly that the Carrier has the burden of establishing that the prevailing circumstances justified the diversion of the work to a contractor. Awards 4701, 5304, 5470, 5485, 7836, 9566.

Carrier's contention that it was unable to rent the type of machine which it determined was necessary for the work is an essential link in the chain of circumstances relied on by it to show justification for the assignment of the work to the contractor. The defense of lack of availability of the necessary machine is bottomed on that contention as well as the statement that Carrier's only back hoe machine was urgently engaged elsewhere at the time.

The record contains assertions by the Carrier that it was unable to obtain the use of such equipment on a non-operated rental basis from the contractor who performed the work and from other construction companies. However, the record is entirely barren of any probative evidence to support these assertions. Although such supporting factual information was peculiarly with the knowledge and control of the Carrier, no such proof was submitted. In this connection, it should be noted that Petitioner's "Oral Argument On Behalf of Employees" dated February 5, 1957, stated that:

"The Carrier contends that it attempted to rent a Backhoe from Kyburz Construction Company but was unsuccessful in that respect. No proof is offered to support such contention, but, in any event, there is no contention made that it attempted to rent such equipment from other sources."

Nevertheless, the Carrier failed to furnish probative evidence in support of its assertions concerning its unsuccessful efforts to rent such equipment even though it submitted a reply dated March 5, 1957 to Petitioner's "Oral Argument" and a reply dated April 12, 1957 to another "Employees' Statement".

In this posture of the record, we cannot find that the Carrier's showing is sufficient to justify its diversion of the work to the contractor. See Awards 7837, 8908. Nor is the fact that Claimant was fully employed on the dates on which the contractor performed the work in itself a valid defense to the claim. See Awards 4158, 4869, 6234, 7836.

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 Employee involved in this dispute are respectively Carrier and Employee 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

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of November, 1960.

DISSENT TO AWARD NO. 9612, DOCKET NO. MW-8299

For the reasons expressed in the dissents to Awards 6234 and 7836, insofar as the facts and principles therein are similar to those involved in Award 9612, we dissent.

/s/ J. F. Mullen

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp