

Award No. 9626

Docket No. MW-7968

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Thomas C. Begley, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA
(Texas and New Orleans Railroad Company)**

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

1. The Carrier violated the effective agreement when it assigned the work of erecting a diesel oil steel storage tank at San Antonio, Texas to a General Contractor whose employees hold no seniority rights under this agreement;

2. The following System Water Service Construction Gang employees, Eleuterio Ramirez, Amadeo Tagle, Hector Flores, Frank Tagle, Nicolas Mireless, Jesus A. Espinosa, A. Montelongo, Pete Caudillo and Fernando S. Paez each 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: In 1953 the carrier erected a ten thousand barrel capacity diesel oil steel storage tank at San Antonio, Texas.

The work of constructing the foundation and levee, installation of the connecting diesel oil transmission lines, and the painting of the tank was assigned to and performed by the carrier's forces.

Commencing on or about November 5, 1953, the work of erecting the aforementioned steel storage tank was assigned to and performed by a General Contractor without negotiations with or concurrence of the employees' authorized representatives.

The work consisted of unloading all materials, constructing the necessary scaffolds, placing and welding the sectional steel parts of the tank, erecting steps around the outside of the tank, and other work incidental thereto.

The employees holding seniority in the System Water Service Construction Gang were sufficiently skilled and equipped to have expediently performed the above referred to work, having heretofore performed similar steel tank erection work.

not entitled under some contract provision which is susceptible of no other interpretation.

In conclusion, the Carrier avers:

1. That the claimants were not entitled either by expressed or implied provisions of any agreement to perform the work.
2. That the claimants were not entitled by past practice to the work.
3. That the claimants were not qualified to perform the work and had never worked on a tank of the type involved.
4. That the Carrier did not possess and was not justified in acquiring the specially trained engineering force needed to design the tank involved.
5. That the Carrier had no facilities to fabricate the tank.
6. That the work contracted, being specialized in nature, had to be performed by men trained as specialists in the special work.
7. That the claim is not based on any words or provisions of the agreement, and hence is tantamount to a request for a new rule which the Board has consistently avowed it does not have the authority to grant and that it therefore will not do so.
8. That the agreement was not violated and the claim should therefore be denied.

All data and arguments herein contained have been presented to the Organization in conference and/or correspondence. The Carrier does not know what the Organization will say in its submission and therefore desires also to file its answer.

OPINION OF BOARD: The Carrier had a steel diesel oil storage tank erected at San Antonio, Texas between November 5 and November 24, 1953, by an outside contractor.

The employees state that this work belonged to them under the effective agreement and by reason of past practice; that they performed the preliminary work necessary and incidental to the erection of the 10,000 barrel (420,000 gallon) welded steel tank for the storage of diesel oil; that after the tank had been erected they performed the painting of it. The employees do not contend that they had the right to design or to fabricate this tank but they claim the right to erect it. The employees set forth that they have performed work on other tanks in the past which have been prefabricated by employees outside of their agreement and that they later erected said prefabricated tanks.

The Carrier states that it had a need for this steel tank in which to store fuel oil on its property within the City Limits of San Antonio, Texas, and the location was in a restricted fire zone, in close proximity to a residential area. It was necessary to obtain a permit from the officials of the City of San Antonio before construction could begin. It did obtain such a permit from the City of San Antonio but had to agree that the proposed oil storage tank would be an all-welded steel tank which would be constructed according to the specifications established by the American Petroleum Institute. The claimants could not construct such a tank under these specifications; therefore,

the Carrier contracted with the Banks Moreland Company, a Division of the Graver Tank and Manufacturing Company, Inc., to design, fabricate and erect a 420,000 gallon all-welded steel, oil storage tank which would meet American Petroleum Institute Standard 12-C specifications. The contractor informed the Carrier that it was its policy that they would not design or fabricate a tank of this kind for erection by others as they could not guarantee its compliance with the American Petroleum Institute specification unless erected by its own forces and that this was a condition of its contract to design, fabricate and erect the tank in question.

It is a well established rule that a Carrier may not let out to others the performance of work of a type embraced within one of its collective agreements with its employees. There are, however, exceptions to this rule which will be applied only upon their establishment by definite proof. One of these exceptions may be said to exist when it appears that the work requires equipment and skill which the Carrier itself cannot provide (Award 2338). The employees have not shown that in the past they ever have erected a tank requiring the American Petroleum Institute specifications that were required by the City of San Antonio, Texas. The Carrier has shown that the outside contractor would not design and fabricate such a tank unless it erected the tank; therefore, the Carrier did not violate the effective agreement, when it had this work performed by the Banks Moreland Company between November 5 and November 24, 1953. The Carrier did give to its employees the work that could be performed by them before the tank was erected and the painting of the tank after it was installed.

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 did not violate the effective agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of November, 1960.