

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DENVER AND 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 the work of constructing a diesel repair shop building in the Roper Yards near Salt Lake City, Utah, to a contractor whose employees hold no seniority rights under the provisions of this agreement:

(2) Each of the employes holding seniority in the Bridge and Building Department on the Salt Lake Division 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 December 1, 1955 the work of constructing a diesel repair shop building in the Roper Yards near Salt Lake City, Utah, was assigned to a General Contractor, whose employees hold no seniority rights under the provisions of this Agreement.

This building is of steel and concrete construction, 98 feet wide and 288 feet long. Footings and foundation walls are of concrete up to a height of about five (5) feet. The remainder of the walls and the roof are of light steel construction covered by corrugated Galbestos (aluminum corrugated sheets covered by a dark preservative coating). Door and window frames are constructed of steel, and windows are of the steel sash type.

Work of a similar character has heretofore been assigned to and performed by the Carrier's Bridge and Building Department employees.

The employes holding seniority in the Bridge and Building Department on Salt Lake Division were available, fully qualified and could have expeditiously performed the work described above, had the Carrier so desired.

The agreement violation was protested and suitable claim filed in behalf of the claimants.

Claim was declined as well as all subsequent appeals.

Under the terms of the effective collective bargaining agreement, Carrier has agreed it would do or not do certain things. It has not agreed that its Maintenance of Way Employees would have any contractual right to perform new construction work of the magnitude and character here involved. Carrier not having agreed to restrict itself with respect to the performance of such work is therefore free to have it performed by contract or in any other manner desired.

For the information of your Honorable Board, the employes contended in your Award 6549, above mentioned, that the Scope Rule was violated and with respect thereto the attention of the Board is again invited to that portion of the Opinion of Board in Award 6549 reading:

"We feel that the work here under consideration does not come within the rules cited by petitioners. In this claim we are dealing with new construction and the performance of work which by its very nature can only be classified as skilled labor of a definitely technical type. Claims should be denied."

In addition to what has been said with respect to Awards 6549 and 7304, the Carrier holds Award 5563 of your Honorable Board which involves the work of constructing new facilities for use in servicing and repairing diesel locomotives on another carrier, meets on all fours the issue involved in the case at hand and supports the Carrier's action in the instant case.

The Carrier holds the construction of the new diesel enginehouse, which was new construction, was of great magnitude. The Carrier also holds the construction required skilled workmen not in its employ.

The Carrier asserts it has no employes in its Bridge and Building Department who possess the necessary skill to perform the work involved, much less engineer and design the structure as was done by the contractor. It has been the practice for over thirty-five years and never abrogated by agreements, subsequently negotiated, to contract out work particularly new construction.

There is no merit to the claim and it must be denied.

All data in support of Carrier's submission have been submitted to the employes and made a part of the particular question in dispute. The right to answer any data not previously submitted to Carrier by the employes is reserved by Carrier.

OPINION OF BOARD: On or about August 10, 1955, the Carrier entered into a contract with the Garff, Ryberg and Garff Construction Company of Salt Lake City, Utah covering the designing and construction necessary for the entire completion of the job—by the construction of a new Diesel Enginehouse to be located at Roper (Salt Lake City), Utah. The contract, among other things, was to design and furnish all labor, tools, equipment, approved mechanical and other appliances for the proper prosecution of said work. Said contract with said contracting firm provides for such complete construction, several of the principal items being described as follows:

1. The engineering and designing of the new enginehouse.
2. Constructing a new structure 280 feet long; 96 feet wide, with a height varying from 23 feet, 6 inches to 30 feet, constructed of reinforced concrete, steel, 24 gauge Robertson Protected Metal covered

with Galbestos, and with a steel supported roof drip-proof from condensation and caulked at seams to prevent leakage. (The work just mentioned involved excavating, construction of concrete forms; mixing, pouring and finishing of concrete; fabricating, erecting, and riveting of structural steel to satisfy Standards of American Institute of Steel Construction and covering the exterior walls of 24 gauge Robertson Protected Metal with Galbestos.

3. The building of three tracks in the enginehouse, two of which are 220 feet in length and the other 125 feet long, which are built three feet above the floor and supported by steel columns have reinforced concrete inspection pits, 18 inches deep, (Included such work as excavating, construction of concrete forms, mixing, pouring and finishing of concrete.)

4. Four elevated platforms, made of steel and corrugated steel, the platform decks of which were designed to carry an electrically or gas operated mobile crane capable of transporting a 500 lb. load at the end of a 6½ foot boom. Sockets on pipe sleeves were provided at edges of all platforms to engage future 1½ inch pipe rail posts. (Included such work as furnishing and installing steel stairs, steel platform decks, etc.)

5. The building of a reinforced concrete drop pit, water tight, 66 feet long, 8 feet deep and 8 feet, 6 inches wide which serves all three service tracks. (Included such work as excavating, construction of concrete forms, mixing, pouring and finishing of concrete, installing electric circuit, etc.)

6. Building of two offices, one for the Master Mechanic 35 by 22 feet and the other for the Shop Foreman 22 by 20 feet. Also the building of a supply room 60 by 22 feet; and a locker and wash room 55 by 22 feet. (Included such work as constructing partitions, construction and erection of new doors, windows, etc.)

In addition to the work just enumerated, the construction company also installed a drainage system; installed general utility outlets and the lighting system, including the electrical wiring, as well as the power wiring system and the heating and ventilation system."

A claim was filed by the Organization on the property claiming the Carrier violated the effective agreement, in behalf of each of the employes holding seniority in the Bridge and Building Department on said Salt Lake Division.

Employes claim that work of a similar character has heretofore been assigned to and performed by the Carrier's Bridge and Building Department and that employes were available, fully qualified and could have expeditiously performed the work above set forth, had the Carrier so desired. And that said work is within the purview of the Scope Rule and that Carrier violated said Rule.

As a part of their case, employes have submitted the following:

In 1950 Carrier's B & B forces constructed:

1. Ice house building approximately 100 feet in width by 300 feet in length. This building was of frame construction, had a concrete foundation and concrete floors.

2. In 1947, office in Pueblo Division 40 feet in width by 100 feet in length: building had pre-fabricated wall and roof panels, as well as a concrete foundation and concrete floors.

3. In 1955, Carrier's B & B forces constructed an addition, 30 feet wide by 90 feet long, to the laboratory building at Burnham, Colorado. This was of brick construction.

In addition, employes state that Carrier's B & B forces in the four years preceding had constructed four other projects.

Carrier contends that all of the jobs cited by employes were not of any magnitude and that said jobs could and should be erected by its Bridge and Building forces. The cost of these jobs indicate that none of them could be compared with the job under consideration, which cost \$395,000.00.

Carrier in referring to Award No. 6549 stated it desired to make Award 6549, Docket 6565 a part of its submission in the case at hand. The record in that case shows that between June, 1923 and November, 1952, 31 jobs of new construction have been contracted out.

The principles applicable to this dispute are well settled by numerous awards of this Board:

First, as a general rule the Carrier may not contract out work covered by its collective bargaining agreements. This raises the question in this case as to whether the work performed by the outside contractor belongs exclusively to the Maintenance of Way Employes, under the Scope Rule here involved. The Scope Rule in question is very broad and does not contain any description of the kind of work intended to be covered. This type of question has been before the Board on many occasions and where, as here, the Scope Rule is completely ambiguous as to the kind of work covered. It is interpreted to reserve all work usually and traditionally performed by the class of employees who are parties to the agreement. There then remains to be decided in each case whether the particular type of work involved has been "usually and traditionally" performed by the Claimants. (See Award 7216)

Second, work may be contracted out when special skills, equipment or materials are required or when the work is unusual or novel, or involves a considerable undertaking. (See Awards 5563, 6549, 7304.)

Third, the work is to be considered as a whole and may not be sub-divided for the purposes of determining whether some of it could be performed by employes of the Carrier. (See Awards 3206, 4776, 4954, 5304 and 5563.)

Fourth, the burden is on the Carrier to show by factual circumstances that its decision is justified under the circumstances.

Carrier has presented factual data as to many projects over the years showing that it has contracted out numerous projects involving in many instances similar construction work, to show that the particular work, involved in the instant case has not been "usually and traditionally performed" by Claimants. (See Award 7216.)

The record shows that all of the work performed by the contractor was new construction. The project was one of major proportions involving the construction of special facilities and building to make possible the handling of

dieselized equipment. While there is evidence in the record that Maintenance of Way employes have done construction of buildings, none were of the magnitude of the present contract nor did any of them present the problems with which we are here concerned. Over the years the Carrier has contracted out new construction work where special equipment, material, equipment and skills were required.

We are of the opinion the claim should be denied.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December, 1961.