Award No. 11104

Docket No. MW-9824

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Raymond E. McGrath, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when, on or about February 15, 1956, it assigned the work of replacing a thermopane type window pane in the Kirk Yard Retarder Tower Building, No. 155, at Gary, Indiana, to a general contractor whose employes hold no seniority rights under the provisions of this Agreement.

(2) The Painter Foreman and the four (4) senior painters holding seniority on the Gary Division 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.

EMPLOYES' STATEMENT OF FACTS: On or about February 15, 1956, the work of replacing a thermopane type window pane in the Carrier's Kirk Yard Retarder Tower Building, No. 155, at Gary, Indiana was assigned to and performed by a General Contractor whose employes hold no seniority under the provisions of this Agreement.

The work consisted of the removal of the defective window pane, the cutting, fitting and installation of the new thermopane type window pane. Approximately, twelve (12) man-hours were consumed by the contractor's forces in the performance of this work.

The afore-mentioned glazing work is neither new nor novel, but is work of the character that has heretofore been assigned to and performed by the Carrier's Bridge and Building painters.

The employes holding seniority in the painter group of the Bridge and Building Sub-department were available, and could have readily performed the glazing work described above.

November 8, 1939. The last paragraph of this memorandum specifically reserves the right of the Carrier to contract out work. Such being the case, the Carrier did not violate the effective agreement in this claim, as the Organization alleges.

In addition, the second paragraph of Rule 62 of the effective agreement prohibits payment to the Claimants and necessitates dismissal of the claim since the Claimants suffered no pecuniary loss. This position is fully supported by Award 7585 of this Division.

In view of the foregoing, the Carrier asks that this claim be denied in its entirety.

All material data included herein have been discussed with the Organization either in conference or correspondence.

OPINION OF BOARD: The Claimants state that the work is of the nature and character that has heretofore been performed by the Carrier's Bridge and Building Employes, using Carrier-owned equipment, and that the Employes holding seniority in the painter group of the Bridge and Building Sub-department were available, and could have readily performed the glazing work described above.

Since the pertinent sections of both the Agreement and the Memorandum of Understanding of November 8, 1939 have been quoted verbatim in the submissions by the parties they will be referred to only in part in this opinion.

It is the position of the Carrier that the controlling Agreement expressly reserves to Carrier its right to contract out repair work.

While the Carrier relies essentially on the Memorandum of Understanding as supporting denial of this claim it also cites a need for special equipment and skill.

It is also claimed by the Carrier that the Claimants were fully employed at the time of the alleged violations and therefore suffered no pecuniary loss. The Carrier claims that Rule 62 of the Agreement applies and that under this Rule the Claimants' recovery is limited to "actual pecuniary loss".

The Employes reply that this latter argument was never raised on the property while this dispute was still confined thereto and that hence its validity is not available as defense to the allowance of the claim stated herein.

In further rebuttal of this last proposition submitted by the Carrier the Claimants maintain that the parties to this dispute wrote Rule 62 out of their Agreement when they became signatories to Article V of the August 21, 1954 National Agreement, and that Rule 62 in its entirety no longer applies.

Employes further maintain that the claim here involved was not a "time claim" and therefore outside the purview of the second paragraph of Rule 62 and that the present claim was filed primarily for the purpose of protesting the Carrier's unilateral decision to contract out the work.

There is no question that if we read Rule 56 I, sub-paragraph (a) through sub-paragraph (i), it would appear that the work involved herein was exclusively reserved to the Claimants, but sub-paragraph (j) of this same Rule reads as follows:

> "(j) All work described under Rule 56 (I) shall be performed by employes of the B&B sub-department, except as provided in Memorandum of Understanding dated November 8, 1939, and agreement with shop crafts effective April 3, 1922."

The Memorandum of Understanding above referred to reads in part as follows:

"GENERAL:

> "It is understood where reference is made in this Understanding to fabrication of parts of iron, tin, sheet metal or other material or materials, that no such reference shall in any way prohibit the railroad company from purchasing such parts from outside manufacturers and that the right of the company to have repair work performed by outside contractors, agencies, etc. is not disturbed."

From the above it is clear that we must now determine whether or not the work herein involved can properly be classified as "repair work" within the meaning of the above Memorandum.

After examination of the record the Board finds that the work involved here, that is, replacing a thermopane type window pane, was "repair work" within the meaning of the Memorandum. A distinction is made in one of the arguments by the Claimants as to whether or not the work was repair work or maintenance work, but the Board fails to see the distinction as applied to the facts in this case.

The Board finds that the Memorandum of Understanding is valid and is in effect; that the wording of the Agreement and the wording of the Memorandum are both clear and that they are not indefinite or ambiguous and under such circumstances the plain meaning controls. There is a statement in the record that this is the first time the Carrier has asserted this defense, but the record does not support this statement. Even if there had been a different mutual interpretation in the past either party to the Agreement could proceed to enforce the Agreement as made at any time. This latter statement follows the reasoning of this Board as set out in Award No. 7294 (Edward F. Carter, Referee.)

Both sides have thoroughly presented awards favoring their position as to the application of Rule 62, but in view of the decision on the merits of the case it is not necessary to discuss this question in this opinion.

The Board, therefore, finds that the work involved herein is repair work within the meaning of the Memorandum of Understanding; that the Carrier has specifically reserved its right to contract out repair work; and that it was within its rights in doing so in this case, and that, therefore, the Agreement has not been violated.

The claim will, therefore, be denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and uopn 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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 1st day of February 1963.