Award No. 11540

Docket No. MW-9947

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

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 an office building in its Ashley Yard at Ashley, Pennsylvania to a General Contractor whose employes hold no seniority rights under the provisions of this Agreement.

(2) Each Carpenter, Mason, Plumber, Painter, Helper and Machine Operator on the Pennsylvania 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: Commencing on July 10, 1956 the work of constructing an office building in the Carrier's Ashley Yard, Ashley, Pennsylvania was assigned to and performed by a General Contractor whose employes hold no seniority rights under the provisions of this Agreement.

The building is of brick construction, approximately 17 feet in width by 59 feet in length, with a portion one story in height and a portion, approximately 17' x 20', three stories in height. It has a concrete foundation and the necessary water and sanitation facilities. The interior, as well as the necessary portions of the exterior, of the building was painted.

The employes holding seniority as House Carpenters, Masons, Plumbers, Painters and their Helpers and Machine Operators on the Pennsylvania Division were available and have heretofore performed work of a similar nature and character to that referred to above, using Carrier owned equipment.

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

Claim was handled in the usual manner on the property and was declined at all stages of the appeals procedure.

(2) Steel Tower, Bethlehem, Pa. — 2 story brick masonry and cinder block construction.
1st story 16'x55'—280 square feet
2nd story 16'x18'—288 square feet
= 1,168 sq. feet

(Contracted by Earl Ecker, Inc., August 1951 - May 1952).

(3) Retarder Tower Westbound Yard Allentown, Pa. — 5 story brick masonry and cinder block construction.
1st story 22'x50'—1100 square feet
2nd - 5th stories— 672 square feet
(14'x12'—4x168)
= 1,772 sq. feet

(Contracted by Wagner Construction Co., February 1952 - August 1953).

(4) Ashley Yard Office Building — 4 story concrete block and brick masonry building.
1st & 2nd stories
17½'x60' — 2x1050 — 2100 sq. feet
3rd & 4th stories
17½'x20' — 2x 350 — 700 sq. feet
= 2,800 sq. feet

(Contracted by W. Heck, July 1, 1956 - May 1957).

It will be noted that the claim herein (identified as Example #4 above) involves the construction of a new building, the square-foot area of which far outdistances other construction projects which have been performed by contract in the past, during which time the organization did not assert that this work should have been performed by their employes. In Award 6299 of the Third Division, it is stated, "However, we can hardly believe that there would be many instances where the erection of a new passenger station would long escape the notice of the Organization's responsible representatives" and, likewise, the organization on this property was cognizant of the fact that the work of constructing new buildings had traditionally been performed by contract and, apparently, did not regard it as a violation of their contract.

Third Division Awards 5563, 6299, 6300, 6706, 7600 and 7861, among many, have denied similar claims submitted to it for adjudication.

It is the position of this Carrier that we may not be precluded from contracting a project for which it does not possess and may not be reasonably expected to acquire the necessary skilled help and equipment for an isolated job of the magnitude of that involved in the instant claim.

Therefore, for the following reasons, namely,

1. The magnitude of the job (2,800 square feet),

2. The unavailability of necessary skilled help and equipment,

3. Claimant B&B employes lost no employment or compensation, and

4. Work of this nature has been traditionally performed in this manner,

this claim lacks merit and should be denied in its entirety.

Carrier affirmatively states that all data herein and herewith submitted has been previously submitted to the employes.

OPINION OF BOARD: The material facts are not in dispute. On July 10, 1956, a General Contractor commenced the construction of an office build-

ing in Carrier's Ashley Yard, Ashley, Pennsylvania. The work on the building was completed in the month of May, 1957. The Organization never at any time agreed to the contracting out of this particular work. It became aware of the project from the reading of a newspaper article dated January 30, 1956. The General Chairman of the Organization reacted promptly to this information by writing Carrier's Vice President and General Manager the following letter:

"February 6, 1956

Mr. N. N. Baily
Vice Pres. & Gen. Man.
C.R.R. Co. N.J.
Jersey City, N.J.

Dear Sir:

We note from an article on January 30, 1956, in the 'Wilkes-Barre Record' and the 'Times Leader, the Evening News' of Wilkes-Barre that your company has announced that one million dollars or more would be spent to modernize the Ashley yards and to erect a three story office building.

These articles state that all track changes will be made by the Railroad's forces and that the concrete structure of three stories will be contracted to local Contractors.

We, of course, cannot agree that any of the work in connection with the modernizing of the yards or of erection of buildings can be contracted under our agreement.

Therefore, please be advised that we must contend and will continue to maintain that all of the work of building, repairing, and maintaining of all buildings, bridges, structures, tracks and appurtenances thereto, is work which belongs to and shall be performed by employes represented by our Brotherhood.

"It has been and still is our desire to cooperate with you and the other officers of the railroad in these matters, and it is our opinion that because of the cooperation we have already given we have been able to get along very well and without any great difficulty. However, if the statement as it appears, in these Newspapers is reasonably correct, and if and when your railroad lets to contract any work of building or maintaining bridges, buildings, tracks or appurtenances thereto, then, of course, there will be nothing left for us to do but to take whatever action we deem necessary to protect the interests of the people represented by our Brotherhood.

We earnestly hope that the statement as it appears in these Newspapers is not correct and that all of this work will be performed by the employes under our agreement.

Very truly yours,

/s/ Carl Bello

cc. T. F. Holleran
Don Kneedler
B. J. Minetti"

Carrier did not answer this letter or make any reference to it of record. It did not negotiate the matter with the Organization. The work project proceeded and was continued to conclusion. Subsequently, the instant claim was processed.

The Organization predicates its claim upon the provision of the Collective Bargaining Agreement of the Parties, and we quote pertinent provisions thereof:

Rule 1, captioned SCOPE, reads:

> "The rules contained herein shall govern the hours of service, working conditions, and rates of pay of all employes in any and all sub-departments of the M. of W. and Structures Dept., represented by the Brotherhood of Maintenance of Way Employes, **and such employes shall perform all work in the M. of W. & Structures Dept.** . . ." (Emphasis ours)

The remaining portion of the above rule designates **exceptions** which are not applicable to the case at hand.

Rule 48, captioned RATE OF PAY reads:

> "The rate of pay of employes covered by this agreement shall become a part of and be included in this agreement and when new classes of employes are brought into the Maintenance of Way and Structures Department a suitable rate of pay for such new position shall be negotiated."

We shall not quote the portions of the effective June 1, 1941 Agreement, as amended, which list all of the agreement-covered positions, but it should be noted that the listing includes (among many others): masons and mason helpers, carpenters, painters, plumbers, roofers, truck drivers, pipefitters, and machine operators.

It should be further noted that the contractual clauses pertaining to the "Structures Department" make no distinction between repair and/or maintenance work and work involving new construction.

In its handling of this matter on the property and in its ex parte submission to the Board, the Carrier alleged that its complained of action was justified on the following grounds: that the work in dispute was so "specialized" it could not be handled by its limited force of B&B employes; that it would be virtually impossible to augment the B&B forces with sufficiently skilled and experienced men within the limited time the building had to be constructed; that work of the magnitude involved (this building being a four story structure having 2800 square feet) was usually and traditionally performed by contract; that during the construction period all of the B&B claimants were fully employed and compensated therefor; and that these claimants were, in effect, seeking a "bonus" for services not performed.

As to the contention that the work was too specialized for B&B employes to perform, Carrier offered no probative evidence to explain or show in what degree or particulars its B&B crews lacked the necessary skills required. Since this ground for Carrier's denial of the claim is based almost entirely on mere assertion, it must be rejected. Awards 4671, 4920, and 4921—among others.

Nor can we accept Carrier's argument that it was impossible to augment its B&B forces. There is nothing of record to indicate any effort in this regard was made.

In respect to the issue of past practice, we do not believe that the three examples referred to by the Carrier on the property and in its ex parte submission are sufficient to establish the proposition that work of the type involved herein was usually and traditionally performed by contract. A well-documented showing that a certain practice existed over a long period of time may be strong proof that the Parties themselves had mutually adopted an interpretation of their Agreement which would make the practice permissible; but in the case at hand, it does not appear to our satisfaction that a mutual interpretation had been adopted by the Parties in regard to this matter—the quoted letter of General Chairman Bello (written five months before the disputed work was commenced) indicating that although the Organization had been and was willing to cooperate and negotiate in reference to such contracting, it had not relinquished its right in regard to the performing of agreement-covered work.

The best evidence offered by the Carrier was presented at the Oral Hearing before the Board, viz., its Exhibit "A", an itemized list of seventy-seven buildings which had been constructed by contract on the property since 1919. Since this listing (which does not disclose the circumstances under which contracting of this type was done) was not presented or discussed on the property—or made a part of Carrier's ex parte submission—we must disregard it as evidence. Award 11081. For the same reason, Carrier's contention that the building in question came within the jurisdiction of its Engineering Department (and was, therefore, of no concern to its Maintenance of Way and Structures Department) is not entitled to our consideration.

Turning to a basic issue herein, viz., whether the work in dispute was reserved to the Organization by the terms of the Agreement, we conclude that is was.

In the handling of this claim on the property and in its ex parte submission. the Carrier relied lightly (if at all) on the contention that the quoted scope rule was "general" in character and, therefore, did not vest in the Employes any special rights in reference to the type of work in question. Carrier stressed this argumentation at said Oral Hearing, and the best points raised in this regard emerged at the subsequent panel discussion.

While the scope rule involved herein is brief and generalized, it contains some significant terminology not included in many of the general scope rules we construe. We refer to the portion of this scope rule which we emphasized in quoting the rule in full supra. On the property, the Carrier made a brief statement to the effect that (among others not specified) our Awards 6299 and 6300 supported its position in this case. An examination of these Awards reveals that the scope rule involved therein is not the same as the one in the case at hand; the different rules are materially distinguishable. E. g., in the interpretation of contracts (and statutes) the word "shall" has attained a meaning of especial significance.

In reaching the conclusion that the Organization was deprived of agreement-covered work, the referee attached significance to the listing of the various positions covered by the provisions of the Agreement. In his opinion, the designation of such positions sheds some light on the problem of defining the work of the Organization. Such words as "mason," "carpenter," "plumber,"

"painter," and "structure" are explicitly defined in **Webster's Collegiate Dictionary.**

Finally, the referee concluded that if the Organization did not have the contractual right to perform the work in dispute in this case (under the terms of an Agreement which make no distinction between new construction and repairs), it had no right to perform any particular work by virtue of the written contract. This interpretation would be untenable.

We adhere to our Awards which hold that the burden is upon the Carrier to justify the contracting out of work: Awards 11027, 7836, 6109, 4920, 4760, 4671, 2338, and 757—among many others. In the case at hand, we believe that the Carrier failed to justify its complained of action.

We do not find recent Awards 10217 and 11081, which involve the same parties, agreement, and rules as in the instant claim, sufficiently in point to be of help in resolving the issues herein. Award 10217 involved a jurisdictional dispute between the Brotherhood of Maintenance of Way Employes and the Brotherhood of Railroad Signalmen in regard to the painting of "Signal Masts;" the Board remanded this controversy for negotiations. Award 11081 pertained to a misunderstanding between this Organization and the International Association of Machinists in regard to the repairing of machines taken into the Elizabethport shop for repairs. Neither of these Awards dealt with the issue of outside contracting; however, Award 11027 did, and it was a sustaining Award.

Moreover, in Award 11081 (which in the main was addressed to argumentation pertaining to past practice), the referee therein was obviously impressed by the circumstance that in three letters written by the General Chairman on the subject involved, he had seemingly indicated that the work of repairing machines in the "shop" belonged to the Machinists. In the instant claim, however, it is unrefuted that the General Chairman made the position of the Organization clear five months before the disputed work was commenced.

Having found a violation of the Agreement, we turn to the difficult problem of applying the proper remedy.

We believe that the most desirable solution to the problems arising from this claim is to sustain Item (2) thereof to the extent that furloughed employes, if any, (in categories specified) were affected.

These employes should be paid as follows:

(1) Each should be paid at the straight time rate of pay established for his position.

(2) Each should be paid for the total number of man hours he could have been used on the work project in his own category during the period of construction.

We so hold.

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 violated.

AWARD

Claim sustained to the extent shown and indicated above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of June, 1963.

DISSENT TO AWARD NO. 11540, DOCKET NO. MW-9947

Award 11540 is in conflict with interpretations placed by this Division on this same Scope Rule of the Agreement between the parties hereto, viz., as not reserving work by specific reference therein, and consequently holding that conduct of the parties through practice is controlling and that the burden is on Petitioner and not on the Carrier to prove by specific evidence that it had been the practice for disputed work to be performed exclusively by Maintenance of Way Employes. These principles have been consistently adhered to by this Division under such Scope Rules.

Award 11540 minimizes Carrier's citation in the handling on the property of "the retarder tower building at Allentown, Franklin Tower at Franklin Junction, Steel Tower at Bethlehem, etc." as evidence supporting the practice. It disregards Carrier's Exhibit "A" which lists 77 other buildings which Carrier constructed by contract since 1919, notwithstanding that the term "etc." in connection with the illustrations of practice cited on the property indicated that there were other such instances and laid the groundwork for the citation thereof, if necessary, and notwithstanding that Carrier states that Petitioner did not deny or refute its statement of the practice in the handling on the property or in its Ex parte submission.

While Rule 1, Scope, refers in general terms to work "in the M. of W. & Structures Dept.", Award 11540 holds that this clause makes no distinction between work involving new construction and maintenance or repair work by concluding as "not entitled to our consideration" as evidence of record that this new building was under the jurisdiction of the Engineering Department and had not yet been turned over to the M. of W. & Structures Dept.

Award 11540 disregards Petitioner's request for a rule which would prohibit contracting of work except by agreement, which request the record shows was still in the negotiation stage on the property, and disregards consistent

holding by this Board that such requests are evidence that the agreement as now worded does not contain such a prohibition.

For the foregoing reasons, among others, Award 11540 is in error and we dissent.

/s/ W. H. Castle

/s/ P. C. Carter

/s/ D. S. Dugan

/s/ T. F. Strunck

/s/ G. C. White