Award No. 12937
Docket No. MW-11970

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when, on September 2, 1958, it assigned employes of a contractor to perform the traditional duties of a Tractor Operator in connection with roadbed stabilization work between Greensboro and Sanford, North Carolina.

(2) Tractor Operator C. E. Dodd now be allowed pay at his straight time rate for a number of hours equal to the number of hours consumed by the contractor's employes in performing the tractor operator's work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On September 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, October 1, 2, 3, 6, 7, 8, 9, 10, 13 and 14, 1958 and on dates subsequent thereto the Carrier assigned employes of Contractor W. E. Terry who hold no seniority rights under the provisions of this Agreement, to perform the historical and traditional duties of a Tractor Operator on its Winston-Salem Division.

Specifically, the work consisted of the operation of a Ford Tractor, equipped with a nine-inch auger, fifty-six inches in length for the drilling of holes beneath the track in cuts to be filled with sand in connection with roadbed stabilization work between Greensboro and Sanford, North Carolina.

The claimant, who has established and holds seniority as a Tractor Operator on the Winston-Salem Division, was available, fully qualified and could have expeditiously performed the Tractor Operator's work assigned to contract.

The Agreement violation was protested and the instant claim filed in behalf of the claimant.

The claim was declined as well as all subsequent appeals.

The Agreement in effect between the two parties to this dispute dated August 1, 1947, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

we cannot lose sight of the record as shown here that Carrier did not possess the equipment or the facilities to perform the work by its employes. We do not agree with the Organization that such action constitutes a violation of the agreement as alleged. The record before us does not support a sustaining award."

All of the above-referred-to awards clearly recognize the Carrier's right to contract work where special equipment is required. Here small lightweight rubber-tired farm tractors specially equipped with power operated 9-inch augers, 56 inches in length were required to drill the holes in the roadbed between the ties. The Carrier does **not** own or have in its possession machines of this type, nor would it be justified in purchasing and maintaining such machines for use on infrequent occasions. Carrier was, in these circumstances, fully justified in contracting the boring of the holes in the roadbed. Thus, under the principles of prior Board awards, the claim is not valid.

CONCLUSION

Carrier has shown that:

(a) The claim is vague and indefinite and is barred.

(b) The effective agreement was **not** violated as alleged and the claim and demand are **not** supported by it.

(c) That the effective agreement does not restrict the Carrier's right to contract work has been conceded by the Brotherhood.

(d) Prior Board awards support Carrier's action in contracting the boring of the holes in the roadbed with special equipment.

Claim, being barred, should be dismissed by the Board for want of jurisdiction. However, if, despite this fact, the Board assumes jurisdiction, it cannot do other than make a denial award, for to do otherwise would be contrary to the terms of the agreement in evidence.

(Exhibits not reproduced.)

OPINION OF BOARD: There is no dispute concerning the facts from which this claim arises. The Carrier engaged a contractor to bore holes between ties for the purpose of filling them with sand to correct the roadbed levels. The contractor furnished two lightweight rubber-tired farm tractors, fitted with nine-inch augers fifty-six inches in length and also furnished tractor operators to drive and operate the mechanisms.

Track laborers coming under the Maintenance of Way Agreement were used to flag trains, throw out the clay and dirt deposited by the drill, fill the drilled holes with sand and tamp down the sand in the holes.

According to the statement of the Petitioner, the work of the contractor was done on thirty-one consecutive working days from September 2, 1958 through October 14, 1958 "and on dates subsequent thereto". The Carrier states that, "The contractor began the drilling of holes prior to the date named in the claim and worked thereafter until the job was

Claim is made that the work of drilling holes was improperly denied to employes covered by the Agreement and Petitioner seeks the payment to Tractor Operator C. E. Dodd of pay at his straight time rate for time equal to that consumed by the contractor's employes in performing the tractor operator's work.

The Petitioner's basic contention is that the seniority provisions of the Agreement between the parties restrict the right to perform work comprehended within the scope or coverage of said Agreement to the seniority class involved (Tractor Operator, in this instance) and that the operation of the tractor here involved is work within the scope and coverage of the Agreement.

The Carrier's basic position (aside from its contentions concerning the defects in specificity of the claim and absence of damage alleged) is that the contested work, not having been previously performed by Petitioner's constituents employed here, and requiring special equipment not owned by the Carrier, is outside the coverage of the Agreement.

Although neither this type of tractor nor the attachment here used are specifically named in the Scope Rule, they are so much within the generic types of jobs listed therein and so closely related to the specified variants of vehicles and mechanisms cited and so much within the functional area of projects to which the listed jobs are addressed, — that we must find in the first place that the work in issue is embraced within the Scope Rule.

But inclusion within a Scope Rule of this general type is not in itself a guarantee of work assurance. It is now well settled that to successfully support a claim to such work, the Claimants must show that they have as a class been, in practice, exclusively assigned to said work over a substantial period of time.

Such a showing is not literally possible here for the precise work done, because neither party avers that this particular variant of work has been done before. But there is no dispute that these employes have by established practice done the general work of tractor-driving (albeit this explicit type has not been in use) and various earth-moving and hole-digging jobs in connection with road-maintenance (notwithstanding that this particular mechanism has not before been utilized).

Absent any other counterfactors, we must, under such circumstances, conclude that the work should be reserved for the Maintenance of Way employes. This would follow from our finding that the work is within the functional area of the Scope Rule. The only logical presumption therefrom is that, lacking any history of practices for this particular variant of work, it falls within the general classes there enumerated.

But the dictates of practical good faith limitations on such obligations and our Awards dealing with these problems have established certain exceptions which are pertinent here. Even where work is covered by the Agreement and is within the general comprehension of work which has been customarily done by the Claimants, we have upheld contracting out where in its particular form or method or means of performance the work is novel, needing skills different from those exercised by Carrier's personnel, or requiring equipment not in possession of Carrier and not reasonably to be expected to be in Carrier's possession or to be supplied by it under circumstances of limited use and prohibitive cost. For example, Awards 5304, 10715, and 12670.

The criteria for such exception are whether they are unavoidably within objective standards of business necessity, yet with due regard for good faith response to Agreement obligations. This is sometimes a difficult demarcation to make, as we pointed out in Award 6112.

In the instant matter, the Carrier has stated without contradiction that it does not own or have in its possession the small, lighweight, rubber-tired farm tractors specially equipped with the power-operated augers used here. It further argues that it would not have been justified in purchasing and maintaining such machines for use on infrequent occasions when it might be needed.

For these facts and the specific span of work here in issue, we must find that the Carrier could not be expected to buy the special and costly equipment required in view of the very limited use to which it could be put.

But this settles the factor of equipment, not necessarily that of personnel. A significant question on this subject is raised in Petitioner's submission which merits consideration. Petitioner states:

> "Moreover, the Carrier has not advised the Employes of any attempt to obtain the equipment necessary to the performance of the subject work from outside concerns on a rental basis."

Might it have been possible to use a covered employe to run the rented equipment? Petitioner points out:

> "This Board has frequently held that a party may not assert its own negligence or want of foresight as constituting an emergency."

In its statement to us, Carrier does not reply to the question of whether it would have been possible to use its own employe to run this equipment, nor does it deal with this question at any other place in the record.

In the absence of any affirmative statement or showing that it would not have been practicably possible to rent the equipment or for a covered employe to operate it, we cannot and will not attempt to make any surmise of conjectures on the subject. We find here a significant weakness in the Carrier's claim of unavoidability or impossibility of performance.

The initial burden of proving its case is necessarily on the one who seeks correction and redress, — the Petitioner. But the necessity for proving an exceptional situation, dictating a deviation from strict contract obligations is on him who seeks the exception. The burden here shifts to the respondent, — the Carrier. We regard it as part of the responsibility of the Carrier in this case to have shown that it was compelled to get both operator and equipment. It is silent on this subject.

We said in Award 6112:

> "The burden of proof is on the Carrier to show by factual evidence that its decision to contract work out is justified under the circumstances."

(See also Awards 4701, 6109 and 6305.)

In the instant matter, the Carrier has failed to meet that burden. We must find it in violation.

THE CONTENTION THAT THE CLAIM IS VAGUE AND INDEFINITE

The Carrier contends that the demand for monetary award must be dismissed because it is for an unspecified amount on unnamed days.

We do not agree. Accordign to the Carrier, the work in issue was begun prior to the dates named in the Petitioner's Submission and continued "until the job was completed". The possibility that the work took place over a longer period of time than that identified by the Petitioner does not make the claim vague and indefinite in this matter as to its essential and unmistakable characteristics. Both parties are completely agreed on the nature of the work, the means by which it was accomplished and the project for which it was undertaken, and confront each other on a clear claim supported by a statement of a specific time during which the work admittedly was done.

THE APPROPRIATENESS OF REDRESS CLAIMED

It is apparent from the Petitioner's Ex Parte Submission that as part of the exchanges on this claim, Carrier had contended that the named Claimant was not entitled to remedial compensation on the grounds that he had been employed during the period of claim and had suffered no loss by reason of the wrongful acts alleged.

In its Statement of Facts, Petitioner states:

> "The claimant, who has established and holds seniority as a Tractor Operator on the Winston-Salem Division, was available, fully qualified and could have expeditiously performed the Tractor Operator's work assigned to contractor."

It later states however, under Position of Employes:

> "The Carrier has also contended that the claim should be disallowed because the claimant was fully employed on the dates involved here."

The Petitioner thereupon responds by citing certain Awards it deems to support penalty payments even when Claimant has suffered no loss. It does not however, make any statements concerning Claimant Dodd's situation on the dates in question.

In its reply to the Petitioner's Ex Parte Submission, Carrier states:

> "* * * Carrier concedes that Claimant Dodd holds seniority on Eastern Lines as tractor operator. However, it denies emphatically that he was available, fully qualified, and could have expeditiously performed the here complained of work. During September 1958, Mr. Dodd was employed in T & S Gang No. 2. In October 1958 he was on vacation three days and on other days was employed in T & S Gang No. 4 * * * *"

In spite of its general statement that the Claimant was "available, fully qualified and could have expeditiously performed" the work in question, it is clearly apparent that Petitioner has not supported Claimant's availability by affirmative proof. It has chosen instead to argue the propriety of restitution even when Claimant is not available. The burden of establishing a claim is on the party asserting the claim, and that burden has not been met

here by any probative showing that Dodd was unemployed and available. From the record, we can only assume that it is conceded that Dodd was employed fully (or on paid vacation) during the period in question. The issue to be decided is whether or not, having incurred no loss, he is nevertheless entitled to restitution.

This subject has been presented to this Board many times and our Awards have not consistently confined themselves to either side exclusively in the choice between a "make-whole" position or a "penalty" position.

We believe however, that the stronger precedent for such circumstances as there is for denying payment where specific loss to the Claimant has not been demonstrated.

In sum, although the Agreement was violated, no consequent damage has been proved and our findings must therefore be without the imposition of a remedy.

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 Carrier violated the Agreement but is not liable for restitution claimed.

AWARD

Item (1) of Claim sustained.

Item (2) of Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1964.