Award No. 13237

Docket No. MW-13232

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

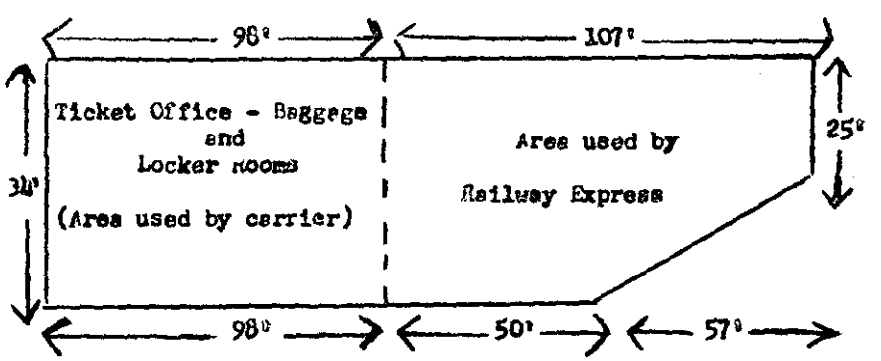
STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the agreement when it assigned the work of renewing the roof on the building housing the passenger depot at Madison, Wisconsin to forces outside the scope of this agreement.

(2) That each of the employes whose signature was affixed to the claim letter of November 4, 1960, be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours consumed by the contractor's forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Carrier entered into a contract with Durfee Brothers Roofing Company for the application of a built-up roof on its Madison, Wisconsin Station. The contract was made without consultation or agreement with the Employes.

The following sketch roughly illustrates the dimensions of the roof, the area of the building used by Railway Express Agency and the area used by the Carrier:



Approximate totel roof area - 6700 square feet.

As pointed out above, it is the carrier's position that the contracting of the work in question was done in accordance with the existing practices on this carrier. However, even if this had not been the practice, the contracting of this work would be a change in work method within the contemplation of Article I. Since Article I of the Agreement of October 7, 1959 specifically recognizes the right of the carrier to make changes in work methods, it specifically permits the contracting of the work in question even of it had not been a continuation of the existing practices.

In the negotiations of the Mediation Agreement of October 7, 1959, particularly Article I thereof, it was definitely recognized by all concerned that "a material change in work methods" included among other things the contracting of work even if the work so contracted had previously been performed by employes of the carrier.

In this case, however, there can be no question but that it has been the practice on this property to contract similar if not identical work.

The claims in this case are not supported by the provisions of the schedule agreement between the Chicago and North Western Railway Company and the Brotherhood of Maintenance of Way Employes. In any event, even could such claims be considered to have been valid prior to the agreement of October 7, 1959, under that agreement the organization specifically recognized the right of the carrier to contract work even if that were not in accordance with the existing practices.

The claims are without merit and should be denied.

(Exhibits not reproduced).

OPINION OF BOARD: In September 1960, Carrier renewed a roof on its passenger depot at Madison, Wisconsin. The work was performed by Durfee Brothers Roofing Company under contract.

The work involved a hot application process. The material used consisted of five-ply tar and gravel roofing laid with one dry sheet, two fifteen-pound felt sheets, three fifteen-pound felts mopped to the base followed by a coating of hot tar impregnated with gravel. The contractor utilized 62 man days for the work. There is no evidence in the record that the Claimants herein suffered any actual monetary loss or hardship as a result of the contracting out of the work.

CONTENTIONS OF PARTIES

Petitioner contends that: (1) the work involved is within the scope of the Agreement; (2) the contracting out violated the Agreement; (3) having violated the Agreement the prayer for monetary damages, in paragraph 2 of the claim, should be sustained as presented.

Carrier contends that: (1) for Petitioner to prevail it must prove an exclusive right to the work; (2) Carrier was free to contract out the work because it did not have the necessary equipment to perform it and the roofing installed by the contractor was "bonded"; and, (3) since Claimants were fully employed during the period this work was performed, the claim for monetary damages must be denied.

PERTINENT PROVISIONS OF AGREEMENT

The following, excerpted from the Agreement, are pertinent:

"PREAMBLE

The following agreement will govern hours of service and working conditions of employes of the Chicago and North Western Railway Company enumerated in the scope rule, and will supersede all previous agreements and ruling thereon in conflict herewith.

SCOPE

Employes (not including supervisory officers above the rank of foremen) engaged in or assigned to building, repairs, reconstruction, and operation in the Maintenance of Way Department.

" * * * * * *

RESOLUTION

The work covered by the Agreement includes "repairs". It is beyond question that the work involved is within the category of "repairs". Except as to "exclusive right to the work", which we discuss, **infra**, the defenses advanced by Carrier are affirmative and the burden of proof, as to them, is Carrier's.

A. Exclusive Right to the Work

Carrier's contention that it has the right to contract out work coming within the Scope of the Agreement unless Petitioner proves that it has exclusively performed such work, on the property, is without merit. This we say with the knowledge that in some of our Awards this so-called "exclusivity test" has been honored in cases involving the contracting out of work.

A study of the Awards discloses that the test, a decisional rule, is concerned with Carrier's right to assign work to **its employes** in more than one craft or class. We have almost consistently held that when the scope of a particular Agreement includes work which has not been exclusively performed, on the property, by the craft or class of employes covered in the Agreement, it is not a violation of the Agreement if the Carrier assigns the work to **its employes** in another craft or class. Note, we do not say the work is not covered by the particular Agreement; only that the employes covered by it do not have the exclusive right to the work.

We do not hold that the "exclusivity test" applicable as between employes of a Carrier should be extended to a contracting out of work to **non-employes.** Where, as here, the Agreement covers the work, the Organization has legal standing to claim violation if the work is contracted out without its assent. Carrier is then left to affirmative defenses, such as, emergency, lack of skill among its employes, lack of special tools, magnitude of the project, etc. And, Carrier has the burden of proving its asserted affirmative defense.

B. Carrier's Affirmative Defenses

Carrier states that it did not have the necessary equipment to perform the work. It adduced no evidence to support the statement. Petitioner controverts the statement. Therefore, as to this defense Carrier failed to meet its burden of proof.

Next, Carrier raises, as a novel defense, that the work performed by the contractor was "bonded". This defense fails for two reasons: (1) it was not raised on the property; and (2) it is not a justification for contracting out work.

C. Conclusion

For the reasons set forth above, we find that Carrier violated the Agreement.

MONETARY AWARD

The Awards of this Board are in confounding conflict as to the Board's power to issue a monetary award in cases where it has not been proven that Claimants suffered monetary damages because of a violation of an Agreement. They run a gamut from: (1) if the violation be proven it is of no concern to a Carrier to whom the prayed for monetary damages, as prayed for, are awarded; to (2) the Board has no power to assess a penalty. Consequently, we must look to and be bound by judicial pronouncements in cases where the issue has been raised.

To the best of our knowledge the highest court in which the issue of penalty against damages has been adjudicated is, **Brotherhood of Railroad Trainmen v. The Denver and Rio Grande Western Railroad Company,—F 2d—,** (C.A.10, decided November 19, 1964). Therein the court held that in the absence of proof of special damages, the Board, "as in 'other civil suits'" is limited to awarding "nominal damages", since the Agreement, as here, "contains neither a provision for liquidated damages nor punitive provisions for technical violations". Further, the court held that "The Board has no specific power to employ sanctions and such power cannot be inferred as a corollary to the Railway Labor Act". Accepting the Tenth Circuits decision as the law, unless and until reversed or modified by the Supreme Court, we find our power is limited to awarding Claimants nominal damages which we set in the amount of ten dollors ($10) each.

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 Carrier violated the Agreement.

AWARD

Paragraph 1 of the claim is sustained.

Paragraph 2 of the claim is limited to nominal damages in the amount and for the reasons set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1965.

CARRIER MEMBERS' DISSENT TO AWARD NO. 13237, DOCKET NO. MW-13232

Award 13237 is in error.

The Referee recognizes the exclusivity doctrine but is confused as to its proper application. It is axiomatic that if the work complained of is not reserved exclusively to claimants, then it is not a violation of the Agreement for it to be performed by other than claimants, regardless of who may perform it. The conclusion that the exclusivity doctrine does not have application to work contracted is contrary to logic and to the basic principle enunciated by this Division in Awards too numerous to require citation.

The Petitioner having failed to meet its burden of proving that the work involved was Maintenance of Way work and reserved under the Scope Rule to employes covered by the Agreement, the claim should properly have been denied.

/s/ T. F. Strunck
/s/ D. S. Dugan
/s/ R. E. Black
/s/ P. C. Carter
/s/ G. C. White