

Award No. 13571
Docket No. MW-12684

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
KANSAS, OKLAHOMA & GULF RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when on September 5, 1960, it assigned the work of placing rip rap around and on the embankment at Bridges 219.6 and 220.1 to a contractor, whose employees hold no seniority rights under this Agreement.

(2) Furloughed Section Foreman L. E. Burris and the five senior furloughed Section Laborers each be allowed pay at his respective straight time rate 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: In 1960, the Carrier arranged to place rip rap around and on the embankments at Bridges 219.6 and 220.1.

The work of constructing wire enclosures and the work of preparing the embankments for rip rap at both bridges was assigned to and performed by the Carrier's track (section) forces.

The work of placing the rip rap within the enclosures and on the embankments was assigned to and performed by outside forces who hold no seniority rights under the provisions of this Agreement. The contractor started work on September 5, 1960, and paid each of his employees, exclusive of supervision, one dollar and twenty-five cents per hour, which is considerably less than the accepted and agreed to section laborer's rate of pay.

The Claimant Section Foreman and the Claimant Section Laborers, who were in furloughed status, were available, and could have expeditiously performed the above described work which was assigned to contract.

The claim as set forth herein was presented and progressed in the usual and customary manner on the property, but was declined at all stages of the appeals procedure.

The Agreement in effect between the two parties to this dispute dated May 16, 1937, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

"The general rule is that a carrier may not contract with others for the performance of work embraced within the scope rule of a collective agreement made with its employees. There are, however, certain exceptions to this general rule which necessarily exist and which have been recognized by this Board. Generally stated, the exceptions referred to permit the contracting of work where, in performing the work, there is need for special equipment not ordinarily used or possessed by the Carrier, or special skills not normally found in the B&B forces. * * *

* * * A carrier is obliged, of course, to maintain adequate forces that appear reasonably necessary to perform the work included within the scope of the agreement. It is not required to maintain forces to perform work that is not anticipated or out of the ordinary.

With reference to tools and equipment, the rule is somewhat similar. The Carrier is expected to provide the tools and equipment necessary to the usual and ordinary operation of the railroad. It is not required to have expensive equipment whose use is only occasionally needed. It is the function of the management, in the first instance, to determine the kind and amount of equipment needed. Its failure to provide tools and equipment common to the operation of the railroad is not ordinarily a justification for contracting out work that is within the scope of the agreement. On the other hand, the need for expensive equipment for which it has only occasional use may justify a farming out of the work to persons having the equipment to perform it."

To the same effect, see Award No. 5152 of the Third Division.

It is further the position of the Carrier that in the manner of presenting this claim to the Carrier in the first instance and to this Honorable Board, the Organization is in violation of the Railway Labor Act and Rule 6 of the agreement between the Carrier and the Organization, effective May 16, 1937, which is the current existing agreement.

OPINION OF BOARD: Section Foreman L. E. Burris and five Section Laborers make claim that Carrier improperly assigned the work of placing rip rap at bridge headers to outside forces who hold no seniority under the Agreement. They contend that this work is maintenance of way work and under the Scope of the Agreement, it accrues to Maintenance of Way employees — the Section Foremen and Section Laborers. They further argue that this work has been traditionally performed by Section forces.

Carrier contends that the Board does not have jurisdiction over this dispute because it was not handled on the property in accordance with the provisions of the Railway Labor Act, Section 2, Second, and Section 3, First (i). On the merits, Carrier argues that rip rap work is not restricted to Maintenance of Way employees under the effective Agreement and that the past practice has been to contract to outside forces work of this character. Furthermore, Carrier emphasizes that the emergency demanded that it procure the necessary rock as quickly as possible to protect the bridges. Since it lacked the equipment needed to transport such large rocks and dump the reinforcement materials at the bridge ends, it states it found it necessary to give the work to a Contractor.

Under Section 2, Second, and Section 3, First (i) of the Railway Labor Act, a prerequisite for consideration by this Board is that a conference be held between the representatives of the parties. Although Carrier has raised the question of the failure to hold such a conference, Claimants have not responded to this issue. Moreover, the record gives no evidence that a conference took place. Such a conference would have given the parties an opportunity to explore the differences, such as the conflict over past practice and perhaps it may have resulted in a resolution of the dispute. This procedure must be exhausted before petitioning the Board. Our position is in accord with Awards No. 11136, 11434, 13120 and 13097.

In view of the absence of a conference, this Board has no jurisdiction and accordingly, the claim is dismissed.

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 Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has no jurisdiction over the dispute involved herein.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1965.