



Award No. 14940
Docket No. MW-15574

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO AND WESTERN INDIANA RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when it assigned or otherwise permitted individuals outside the scope of the Agreement to perform painting work at the 12th Street Tower on January 29, 31 and February 3, 1964.

(2) Painter Foreman Walter Eichberger and Painters Cyril Jagielski, James Cherry and Steve Martinez each be allowed twenty-four (24) hours' pay at his respective straight time rate because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Because of the damage caused by the derailment of a Santa Fe train near the Carrier's 12th Street Interlocking Tower the Carrier was required to resort to manual operation of its switches at that location.

It was decided to construct a new tower and the Carrier obtained the verbal approval and agreement of the former General Chairman to contract the necessary construction work. This work was assigned the Ellington-Miller Company, who was also assigned the painting work thereon although the Organizations' approval to contract the painting work had not been obtained. The Ellington-Miller Company then sub-let the painting work to the Industrial Painting Company.

A foreman and three (3) painters, employed by the Industrial Painting Company, each performed a total of twenty-four (24) hours' work painting the relay room, locker room, washroom and hallway at the 12th Street Tower on January 29, 31 and February 3, 1964.

The Claimants were available and fully qualified to perform the subject work and would have done so had the Carrier assigned them to it.

Claim was timely and properly presented and handled at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated April 15, 1940, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: On September 1, 1963, Santa Fe outbound passenger train No. 19 derailed two rear cars which in turn demolished the Yardmaster and Leverman Tower, a two-story brick structure, thereby destroying all relays and the interlocking machine controlling all traffic in the Dearborn Station area and placing all operations on an emergency basis.

The Ellington Miller Company was assigned to construct a new tower with dispatch due to the emergency time requirements in existence at that time and the entire project was contracted out as a whole.

In Awards 3206, 4776 and 4954 it has been clearly established that:

"The work contracted out is to be considered as a whole and may not be subdivided for the purpose of determining whether some parts were within the capacity of the Carrier's forces."

In Third Division Award No. 5521, Referee Whiting, it was held:

"We have previously held that claims involving only a small integral part of work contracted out are not sustainable if the entire project, considered as a whole, was properly subject to being contracted out."

OPINION OF BOARD: On September 1, 1963, a partial derailment demolished the two-story brick yardmaster and leverman tower from which all traffic in the Dearborn Station area was controlled. To restore normal operation as soon as possible, the Carrier, with the approval of the Organization, contracted with the Ellington-Miller Company to construct a new tower. The contractors, in turn, let the contract to paint the tower, when finished, to the Industrial Painting Company.

The Organization complained that Carrier violated the agreement by permitting the painting work to be done by the subcontractor; that the painting work was not included in its permission to contract the work; that it was work which was readily divisible from the construction of the tower and required separate agreement.

The central issue is the extent of the permission given by the Organization. Neither side submitted the exact phrasing of the permission but there seems little doubt that it involved the complete construction of the new tower. The Organization now claims that permission was given only to construct the building and did not include any "subsequent painting."

A careful examination of the record shows no evidence that the Organization placed any such limitation on its permission and that, in the context in which it was given, it was proper for the Carrier to think that permission was granted to do the whole job, not part of it.

The new tower was needed in a hurry because the old one had been wrecked. It was accordingly understandable that the Organization would grant permission to get the job done. It was only later when it learned that the

contractor had sublet the painting work that it raised a protest. If we are to judge the intent of the parties it must be according to the circumstances which existed at the time not according to later developments. There seems to be little reason to doubt that the Organization gave its permission without restriction.

The record also indicates that Carrier contracted with Ellington-Miller to do "all of the work required to complete the construction" of the tower. That this included the painting is apparent because the contractor was the one that decided to sublet the painting work. Once the work had been properly contracted out, the Organization had no right to complain if part of the contract was subcontracted. Nor did Carrier have the obligation to recapture that work.

We hold that the burden of proof was on the Organization to prove that its permission was limited to something less than the finished building. The Organization did not meet that burden.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing,

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 jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of November 1966.