NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19976
THIRD DIVISION Docket Number MW-19830

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Norfolk and Western Railway Company

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

(1) The Carrier violated the working agreement dated April 1, 1951 when it contracted work out to San San Incorporated beginning on October 12, 1970 to repair certain areas in the Rexford Tunnel located at MP 183.82 near Pittsburgh Junction, Ohio. Carrier refused to assign B&B carpenter foreman Joseph Piccin, B&B carpenters Peter Cieresewski, John A. Panepucci, Albert P. Fiutem and Louis Katona, Jr. to perform the above-mentioned work as of October 12, 1970. (System File MW-BRS-71-4)

(2) That Carrier pay claimants Joseph Piccin, Peter Cieresewski, John A. Panepucci, Albert P. Fiutem and Louis Katona for all time worked by contractor employes beginning on October 12, 1970 at their respective rates of pay up to and including the date contractor employes have been relieved of said work.

OPINION OF BOARD: In its Submission, the Organization alleged that the Carrier violated Article IV of the May 17, 1968 National Agreement. On the property, the Organization failed to raise that issue. Accordingly, consistent with numberous prior Awards of this Board, we are now precluded from considering that assertion. See, for example, Award 19857 and other Awards cited therein.

Concerning the claim of Scope Rule violation, we are confronted with a conflict of lines of nuthority. On the one hand, we note a number of Awards holding that a Carrier's lack of equipment may be a basis for contracting out and on the other hand, we are confronted with Awards dealing with expressed exceptions to Scope Rules. Further, a resolution of the dispute is not aided by the manner in which the Claim was developed on the property.

Rule 40(a) states:

> "All work of construction, maintenance, repair or dismantling of buildings, bridges, tunnels..., shall be bridge and building work, and shall be performed by employes in the Bridge and Building

> "Sub:-department. Construction work may be done by contract where there is not a sufficient number of properly qualified furloughed employes available to perform such work or the Railroad Company does not,. have proper equipment to perform it." (underscoring supplied).

In October of 1970, Carrier advised the Organization that it had contracted out repairs of a severe crack in one of its tunnels, because of the Lack of special equipment for applying "shotcrete" material and the lack of personnel having the technical training for that type of work.

The parties debated the capabilities of Carrier's, employees to perform the work and the Organization asserted that "shotcrete" repair is virtually the same. as "gunite" repair and that the employees had, on prior occasions, assisted contractors who repaired tunnels using the "gunite" process.

This Board has held that a Carrier may contract out work if it does not possess the necessary equipment; such necessary equipment is not reasonably available; or if the magnitude of the project is such as to require special equipment.'

See, for example, Awards 11493 (Moore), 9335 (Weston), 4776 (Stone), 11208 (Coburn), 11856 (Dorsey), 11862 (Seff), 11969 (Stack) and 13272 (Reagan).

But the above cited Awards do not dispose of this dispute. Rule 40(a) of the Agreement states that all work of repair of tunnels shall be performed by employees in the Bridge and Building Sub-department, and the Rule is, as noted by Referee Ritter in Award 16628, "..clear and free from ambiguity and, therefore; not subject to more than the interpretation..."

> "It is a principle of contract. construction that where the terms of a contract are unambiguous any party has the right to insist upon compliance with its terms. Past practice to the contrary, if any, is material and relevant in the interpretation and application of the contract only when its terms are ambiguous." Award 18287 (Dorsey).

In addition to the specific 'nature of the Rule, we note the exception in its final sentence. Construction work may be done by contract under certain circumstances.

In Award 19158, Referee Cull noted:

> ". ..It is a recognized rule in the construction of

> "contracts that where one or more exceptions to a rule are expressed no other or further exceptions will be implied." (underscoring supplied)

That Referee made the same finding in Award 19189 referring to the above as "a cardinal rule of agreement and contract construction."

In Award 18287, Referee Dorsey noted:

> "It is also a principle of contract construction that expressed exceptions to general provisions of the contract must be strictly complied with and no other exceptions may be inferred. Were we to digress from those principles we would exceed our jurisdiction."

The Agreement under consideration contains an exception dealing with construct ion work. In a letter to the Organization (advising of the contracting out), the Carrier specifically stat-cd that the tunnel needed "repair ."

While the burden of establishing the employment of outside forces is upon the Organization, certainly the burden of proving that an exception is material to the dispute is upon the Carrier. See Awards 13349 (Hutchins), 14982 (Ritter) and 12980 (Coburn) /dealing with a similar-Scope Rule but containing an exception for all work - not just construction/. Because the exception in this Scope Rule deals solely with "construction", the Carrier would seem to be precluded from shouldering its burden oi showing that the facts of the case fall within the terms of the exception. Accordingly, under the specific wording of the Scope Rule in question, it would appear chat all work of tunnel repair is to be performed by the Claimants.

Notwithstanding our view of the specific nature of Rule 40(a), the Board is unable to issue a sustaining Award, in whole or in part, in this dispute, because of the posture of the record developed on the property.

For obvious reasons, the claim presented to this Board must be substantially the same as processed on the property. See Awards 18389 (Rosenbloom) and 16607 (Devine).

The parties reached an understanding in 1958 under which a contractor supplied the equipment, a superintendent, a nozzelman and a hoseman, but the B and B forces performed the rest of the tunnel repair work. (The record also contains some rather inconclusive references to withdrawal of a similar claim in 1962). Here, although a violation of Rule 40(a) is asserted and Organization seeks a damage Award concerning all work contracted out; in its Initial claim

the Organization mentioned the 1958 understanding and seemed to object to the Carrier's refusal to follow that ". ..long-established practice." In prosecuting the claim on the property the Organization reiterated its position - apparently only seeking a portion of the work.

Thus, we question that the Organization's handling of the matter properly framed an issue or afforded Carrier an opportunity to fully present its contentions for consideration here.

For example, Carrier urges that Organization's claim to only a portion of the work was a recognition that the employees were unable to properly perform all of the work, and a consideration of an all-inclusive claim on the property would have placed greater focus upon the question of which party made concessions when the 1958 understanding was reached, etc.

For the reasons stated above, the Board is precluded from sustaining the claim in its entirety.

Further, under this record, the Board is precluded from awarding partial damages. While we do not now pass on the limited issue of whether an Organization entitled to perform all phases of a project may successfully prosecute a claim for only a portion of the work, we do hold that such an issue must be framed, on the property, with greater clarity than present here.

Certainly, concerning instances where the Carrier is permitted to contract out projects because of lack of equipment, etc., this Board has determined that:

> ". ..it is neither proper nor practicable to require the Carrier to have subdivided the project to determine whether some of it could be handled by its own employees ." Award 9335 (Weston)

Work to be contracted out is to be considered as a whole, and not subdivided. See Awards 11208 (Coburn) and 5304 (Wyckoff). See also Second Division Awards 4091 and 4092 (Johnson), 2186 (Carter), 3359 and 3276 (Carey).

Whether or not Carrier can produce evidence sufficient to overcome the specific wording of Rule 40(a) - concerning the totality of work - is, of course, speculative. Further, at this time, contentions of the parties concerning a right to a portion of the work under an exclusive specific Scope Rule are, likewise, speculative. Suffice it to say that under the procedural concepts of this Board, a Carrier is entitled to full exposure to an Organization's claim on the property. A sustaining Award, in whole or in part, could be issued only after such a claim was processed.

For the reasons stated above, the Claim is dismissed.

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 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 claim be dismissed.

A W A R D

Claim dismissed for the reasons stated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A W. Pasbos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1973.