NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20372
THIRD DIVISION Docket Number MW-20033

Irving T. Bergman, 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 Agreement when it used outside forces (San San Incorporated) to repair certain areas in the Rexford Tunnel and refused to assign Carpenter Foreman Joseph Piccin, B&B Carpenters Peter Cieresewski, John A. Panepucci, Albert P. Fiutem, Louis Katona, Jr. and W. C. Hoskinson to perform said repair work (System File MW-BRS-71-10).

(2) Each employe named above be allowed pay at his respective rates for all time worked by outside forces since April 29, 1971 in repairing Rexford Tunnel.

OPINION OF BOARD: This case involves the Carrier's right to contract oat an interior tunnel repair job without using its B & B employes for all or any part of the work. Rule 40 (a) of the Agreement states: "All work of--, repair--of,--,tunnels,--, built of brick, tile, concrete, stone, wood or steel,--, as well as all appurtenances thereto, loading and unloading and handling all kinds of bridge and building material, 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--or the Railroad Company does not have proper equipment to perform it."

The work of stabilizing inner surfaces of the tunnel had been done in the past by a Gunite process. This consisted of covering with metal Lath and filling with hydraulically applied concrete. It is not disputed that in 1958 the parties agreed by exchange of Letters that the Gunite work could be done in a tunnel by a contractor using its equipment, a superintendent, a nozzle man and a hose man with the preparation work being done by B & B forces ; the superintendent to tell the B & B foreman what he wanted and the foreman to convey the information to the B & B forces.

The Organization has argued that this letter understanding should also control the present situation. The Carrier contends that this was not a formal supplemental agreement to cover all future situations. In addition, the claim is now made that B & B forces can perform all of the work in this case. Petitioner argues also that repair work has been piecemealed in tunnels as it was done in 1958, until October 1970 when the Carrier had all the work done by a contractor. The Organization made a claim in 1970 similar to the present claim en the same facts which was pending when this claim was made in-1971. Since then, the pending claim was dismissed because it was not properly presented on the property in a manner which would have permitted the Carrier to meet the issue involved. Nevertheless, in that case Award 19976, it was stated that Rule 40 (a) is not general or ambiguous in requiring that tunnel repair work be performed by B & B forces. The claim was not determined on the merits.

The Carrier's position is based primarily on the fact that upon finding that the Gunite process was not satisfactory, it has substituted the Shotcrete process claiming it to be new and different, requiring equipment that it does not own and requiring skill beyond that of the B & B forces. The Shotcrete process is described by the Carrier only as using a different material and method of application. The Organization has gone into greater detail in explaining that Guniting is done with a mixture of pea gravel, sand, water, cement and a sealer applied in the same manner as Shotcreting. The only difference being that Shotcrete, mixed with the same material, uses three quarter inch stone instead of pea gravel. Petitioner has also detailed, without contradiction in the handling on the property, that the B & B forces had worked in the same Rexford Tunnel involved in this claim for a total of 184 hours in December 1971, scaling and installing roof bolts. Additionally, Petitioner has cited from the 8th Edition of Railway Track & Structures Cyclopedia published in 1955 that shotcreting was used prior to 1955. Quoted from the text is the following: "Shotcrete, a material composed of cement, sand and water, and applied pneumatically with a cement gun, --." The Carrier's final position is that it tried to prevail on the contractor to work with the B & B forces but that the contractor would not guarantee the job unless it used its own employes for the preparation of the surface as well as for the application of shotcrete.

Petitioner shows that in Award 18628 between the same parties, Rule 40 (a) was held to be clear and free from ambiguity. Award 6905 held that scope rules cover work not equipment and that a claim for equal amount of time worked by contractor employes is proper. Award 9612 held that where work is within the Scope Rule,

Carrier has the burden to justify an exception and that no loss of work by claimants, is not a defame. Award 19158 held that exceptions prove the rule and that by consenting to piecemealing the Rule has not been waived. Award 6892 held that the Carrier has the burden of showing that its employes are not qualified and, in Award 18056, that assertions are not proof.

The Carrier has submitted many Awards to support their position. On the subject of use of contractors, the Awards may be summarized as showing special circumstances that are not present in this case such as Award 11493, where the Carrier lacked equipment costing 8278,870, used once in many years; Award 11856, Carrier proved diligent effort to rent equipment for its own use without success; Award 11969, involved danger to lives of Carrier's employes; Award 13272, involved contractor's equipment costing $220,800; Award 13966, held the Scope Rule to be a general one; Award 18046, set forth adequate proof to support use of a contractor including necessity for a licensed engineer. Award 10255, involved a broad ambiguous Scope Rule and factual data submitted by Carrier to prove its point. Other Awards were concerned with the need for the Petitioner to prove exclusivity when the Scope Rule is general which is not the determining factor in the present case. Awards on the subject of piecemealing granted to the Carrier the right to exercise managerial judgment as in 3559, 3278 and 2186. In other Awards large Lump sum jobs were given to Contractors, as in Award 11208 for $500,000, also involving unique, complicated work requiring special proven skills; and Award 9335, where twenty classes of employes were used represented by thirteen different unions; and Award 12532 where management was not required to investigate the possibility of giving one small piece of the work to its employes.

The record in this case discloses that the Carrier has not submitted proof that Shotcreting is different from Gunite so that now of the B&B forces could be used. Continued assertions without support by factual data sufficient to overcome the clear unambiguous Scope Rule does not meet the required burden of proof to establish an exception which is not stated in the Agreement. We do not find that in all future similar situations the Letters in 1958 control this situation. We are of the opinion that contracting out the work has been justified, with B&B forces being used as agreed upon in 1958. Also, the record does not show that preparatory work which B&B forces have performed under the direction of the contractor was specifically rejected by this contractor as being unsatisfactory or that other contractors were contacted for this job who also would not use B&B forces. Taking all of the above into consideration, we believe that B&B forces are entitled to perform repair work in the tunnel, and in this case, to the extent that they were used in 1958.

FINDING: 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

The Agreement was violated.

A W A R D

Claim disposed of as and to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 6th day of September 1974.