Award No. 757
Docket No. MW-745

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of N. C. Moore, W. E. Spruce, Joe Wooley, Joe Wise, Richard Wiggins, Robert F. Taylor, Elmo Chastain, Jess Wise, R. E. Tounzen, P. Love, Ed Sparkman, Fred Lullou, Geo. Branham, Mike Moore, W. P. Hill, J. T. Moore, Henry Gilliland, C. E. Cassady and J. W. Young, for pay for time lost on December 24, 27, 28, 29, 30 and 31st, 1937, at their respective classified rates while they were out of the service through no fault of their own, being laid off by the Carrier on these dates, while the employes of the Halstead Construction Company were performing work which rightfully should have been performed by these regular bridge and building men."

EMPLOYES' STATEMENT OF FACTS: "Upon completion of the day's work on December 23, 1937, these regular bridge and building men employed and holding seniority rights on the Central Division of the Missouri Pacific Railroad were laid off and told by their foreman to report back for work on January 3, 1938. This lay-off caused them to lose all of the regular work hours on each of the dates in question while the employes of the Halstead Construction Company, who hold no seniority rights whatever in the bridge and building department, were doing work of the same class ordinarily done by regular bridge and building forces, such as jacking in corrugated iron pipe at mile posts 524—536 and another location approximately one and one-half miles south of Atkins, Arkansas, also removing a bridge formerly used by the Railroad and Highway jointly, and replacing this bridge with concrete tile approximately four and one-half feet high and twenty-four feet long. During the period these regular men were laid off the Halstead Construction Company used more men than above named parties making this claim."

POSITION OF EMPLOYES: "It is the contention of the employes that the carrier violated Rule 3, Paragraph (a) which reads as follows:

> 'When force is reduced, the senior man in the sub-department, on the seniority district, capable of doing the work, shall be retained.'

"By laying off men holding seniority rights and capable of doing the work, and keeping in its service, through the Halstead Construction Company, men who hold no seniority rights whatever and allowing the men employed by the Construction Company or Contractor to do work that the regular bridge and building forces, who are covered by the scope of the agreement entered into between the Railroad and the representatives of the employes and made effective January 1, 1928, were ready, willing and capable of doing, and were entitled to do by reason of their service with the Railroad and seniority

Contracts covering these two jobs, as stated above, were let in November, 1937, work upon one of them was completed December 24, 1937 and the other January 1, 1938. There is no prohibition under our wage agreement rules with the Maintenance of Way Employes to letting contracts for work of this nature and it has been a practice of years standing without protest from the employes prior to the presentation of this claim.

"In the absence of a rule or established practice thereunder to support the employes' contention in this case, same should properly be denied by your Honorable Board."

OPINION OF BOARD: At the outset it has been strenuously argued on behalf of the Carrier that the Board is not entitled to consider the question of the propriety of the farming out of work to the Halstead Construction Company, because of the fact that the employes in their Statement of Position allege it to be a violation of Rule 3 (a); it is contended that the Board can consider the question only under its Rules of Procedure and reference is made to the rule in the Board's Circular No. 1, reading:

> "Statement of Claim: Under this caption the petitioner or petitioners must clearly state the particular question upon which an award is desired."

That contention is quite without merit. The fact is the "Statement of Claim" does not mention Rule 3 (a) but deals directly with the specific issue as to the propriety of the employment of a Contractor's forces on bridge and building work. Rule 3 (a) may have some application dependent upon facts which are not of record as hereinafter indicated.

It is quite clear, however, that the parties thoroughly understood the controversy between them; in fact so much so that they confined their arguments to abstract questions of principle without furnishing the Board sufficient facts to determine which of the claims is correct.

The employes take the unqualified position that under no circumstances can work of the type covered by their agreement be let out to a contractor; the Carrier takes the unqualified position that because it has been doing so for many years it has an absolute right to let out by contract such of the work as it sees fit. Both of these claims are too broad.

It is well settled by many decisions of this and the First Division of this Board and predecessor Boards, that as an abstract principle a carrier may not let out to others the performance of work of a type embraced within one of its collective agreements with its employes. See awards of this Division, 180, 323, 521 and 615; of the First Division, 351 and 1237. This conclusion is reached not because of anything stated in the schedule but as a basic legal principle that the contract with the employes covers all the work of the kind involved, except such as may be specifically excepted; ordinarily such exception appears in the Scope Rule, but the decisions likewise recognize that there may be other exceptions, very definite proof of which, however, is necessary to establish their status as a limitation upon the agreement. Mere practice alone is not sufficient, for as often held, repeated violations of a contract do not modify it.

In Award 615 of this Division the question was fully discussed in a controversy as to the right as between Clerks and Telegraphers to do certain clerical work. Although there was no written limitation in the Clerks schedule excepting work performed by Telegraphers, it was found that in the light of all the circumstances such a limitation existed as a fact, and accordingly it was deemed that the Clerks Agreement was entered into in the light of such limitation.

There is certain work of the class covered by the Maintenance of Way Agreement which has always, on many roads, been considered as excluded therefrom. For example, take the replacement of a large Missouri river

bridge. Work of this character is generally let out by contract for many reasons, among others, the erection of such bridge requires a plant, a highly skilled force, and other incidents which the carrier probably could not provide, and in any event would not be justified in continuously maintaining for the few rare occasions when they would be required. Again, quite commonly the contract for such a job embraces not only the erection of the bridge but the furnishing of the material as well, as a lump sum contract. Of course, the instant case does not fall within that category, but we are wholly without facts to warrant a determination as to whether the work here let is being let in violation of the Maintenance of Way contract, or whether due to some peculiar condition it is legitimately entitled to be regarded as excluded therefrom. We are not informed as to the reason for contracting the work; the employes state that the work was "of the same class ordinarily done by regular Bridge and Building forces." If this is so it is an invasion of their contract unless some valid reason can be shown to the contrary, and the mere fact that it has occurred repeatedly does not estop the employes from seeking to enjoin continued violation.

It should be unnecessary to say that if the reason for contracting the work out is that the Contractor can do it cheaper by reason of paying his employes a lower scale of wages or subjecting them to less advantageous working conditions than those stipulated by the collective agreement with the employes, that such letting out would constitute a flagrant violation of the collective agreement.

Another point on which the record is obscure is this; the claim is for 19 members of Bridge and Building forces, all of whom were laid off beginning December 24th. Apparently there was no relation between their lay-off and the contracts which had been let more than a month previous, but the record is in the dark as to whether the contractor performed any of the work which would ordinarily be performed by the laid-off men or merely continued the performance of their contract. Further, it does not appear whether the men laid off would have performed work the contractor was doing had it not been let. These facts are necessary to a determination of the reparation claim if it is found the contracting itself was an invasion of the Maintenance of Way contract. In this aspect of the matter Rule 3 (a) may be determinative.

In view of the stated paucity of facts it is necessary to remand the case to develop these facts and if possible adjust the controversy within the principles above indicated; if adjustment is impossible the matter may be returned to the Board with the additional facts.

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 the case be remanded in accord with Opinion.

AWARD

Case remanded.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, 18th day of November, 1938.