Award No. 2701
Docket No. MW-2696

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DELAWARE AND HUDSON RAILROAD CORPORATION

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

1. That the Management violated the provisions of the current working agreement between The Delaware and Hudson Railroad Corporation and the Brotherhood of Maintenance of Way Employes when it allowed the work of rebuilding thirteen (13) stalls in the Roundhouse at Oneonta to be performed by men who had no seniority as Carpenters or Carpenter Foremen.

2. That the same number of Carpenter Helpers taken in the order of their seniority, as would have been promoted to Carpenters, had these positions been properly advertised and awarded, be allowed the difference in pay between what they did receive at the Carpenter Helper's rate of 65¢ per hour and what they would have received at the Carpenter's rate of 81¢ per hour.

3. That the senior Carpenter on the Susquehanna Division be allowed the difference in pay between what he did receive at the Carpenter's rate of pay and what he should have received at the Carpenter Foreman's rate of $210.80 per month, from the date these positions were created until the date that they were abolished.

4. That where employes living in boarding cars could have bid in and been awarded positions at Oneonta, where this work was performed and where their homes were located that they be allowed whatever expenses incurred while living in such boarding cars during the period that this work was in progress, because of their not being given an opportunity of placing themselves in a position to which they were entitled because of their seniority and which would have removed the necessity of their living in boarding cars.

EMPLOYES' STATEMENT OF FACTS: On or about September 1, 1942 the Carrier assigned certain work in connection with alteration and enlargement of its roundhouse at Oneonta to the Oneonta Contracting Company, whose employes had no seniority rights in the Bridge & Building Department of the Delaware and Hudson Railroad. The employes of this contracting company used much of the railroad's equipment in connection with this work. The contractor's employes were thus engaged until on or about April 15, 1943.

The agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

The Contractor completed his work on April 19, 1943. However, certain portions of the roundhouse were in use previous to that date. Stalls 26 and 27 were turned over to the Motive Power Department for servicing engines on February 4, 1943. All work around these stalls was not finished at that time. Stall 25 was turned over February 5th with the same conditions applying. Stalls 22, 23, and 24 were turned over to the Motive Power Department on March 12, 1943. At that time all work was completed in these stalls. At the time these latter stalls were turned over, Stalls 25, 26, and 27 were taken out of service for completion of work there. Full completion of the work was accomplished April 19, 1943, when the entire new addition to the roundhouse was put in use.

At the time the work was performed, there were no furloughed employes in the classes for whom claim is made in this case. All such employes were engaged in performing urgent maintenance work.

In connection with that part of claim identified as Item No. 2—the negotiated rate of pay for carpenters employed by this Carrier under the scope of Maintenance of Way Agreement was 81¢ per hour at the time of this claim. That is the only rate the Carrier is required to pay for service performed under the agreement and claim for a higher rate cannot be sustained under any rule in the agreement. The Carrier has no knowledge of or any interest in rates paid by the contractor performing the work.

The Carrier has, at certain times in the past, used Maintenance of Way employes for construction work, resulting in additions to road property in order to keep our forces stabilized.

This particular job was of such magnitude and so necessary to rush to completion before the winter weather set in, that it could not possibly have been done by Maintenance of Way employes, all of whom were employed on urgent maintenance work.

Claim should be denied for the following reasons:

1. The work performed by the contractor, which consisted of new construction, was not within the scope of agreement covering maintenance of way employes.

2. The Carrier did not have a sufficient force nor could it hire additional employes to perform the work, the regular force being engaged on urgent maintenance work.

3. It was necessary that the addition to the roundhouse be finished as promptly as possible as the new larger locomotives were already being received.

OPINION OF BOARD: The question for determination in this case is whether the Carrier violated the agreement when it let out the work of rebuilding 13 stalls in the roundhouse at Oneonta to a contractor not within the agreement.

On account of the purchase of larger locomotives, it became necessary to enlarge 13 stalls in the roundhouse at Oneonta. The work was let to the Oneonta Contracting Company on August 25, 1942. Work was commenced on October 30, 1942 and completed on April 19, 1943. At the time the work was contracted, there were no extra or furloughed men available. It is the contention of the Carrier that this was a construction job not covered by the current agreement and that all Maintenance of Way employes were engaged in urgent maintenance work.

The scope rule does not specify the work which falls within the agreement. That it was intended that certain work did belong to Maintenance of Way employes cannot be questioned. If no work was reserved to Maintenance of Way employes by the agreement, there would be no reason for a contract at all. For if no work is thereby reserved, the Carrier could by the simple

expedient of assigning the work to others defeat the contract itself. On the other hand, the contention of the Organization that the scope rule in effect provides that Maintenance of Way employes shall perform all work in the Maintenance of Way Department is also without foundation. There is no language in the scope rule which even by the most liberal interpretation could logically lead us to any such conclusion. Yet, as we have heretofore said, the agreement does reserve work. Having reached this conclusion, the work reserved by it must be susceptible of definite determination if the contract is to have validity. In the absence of a specification of the classes of work reserved by a collective agreement, we are of the opinion that it reserves all work usually and traditionally performed by this class of employes who are parties to it. Clearly this was the intent of the parties, otherwise a specification of included and excluded work would have been required in the scope rule of the agreement.

Was the work of rebuilding the 13 stalls in the roundhouse in question within the scope of the agreement? We think it was. The construction, repairing and maintenance of an ordinary roundhouse is work common to all railroads. It is not of such a type as to lodge it in the generally recognized exceptions from the scope rule, a number of which are discussed in Award 2465. Not only is this true, but the record discloses that about two years previous, Maintenance of Way employes rebuilt 7 stalls in this identical roundhouse and performed all the work incidental thereto. The Carrier does not question the ability of the Maintenance of Way employes to do the work but claims that it did not have and could not hire the men to do the work. We think the record is replete with evidence that the work usually and traditionally belonged to the Maintenance of Way employes and is subject to the terms of the current agreement.

The next question to be answered is whether, under the circumstances shown, there is a justifiable claim for monetary loss. It is not disputed that all Maintenance of Way employes were working during the whole period that the 13 stalls were being built. In other words, there was no loss of employment on the part of any regular, extra or furloughed employe. When similar situations have arisen, this Board has uniformly held, where the work contracted out was of the same class and apparently subject to the same wage scale as the work performed by the employes during the period that the contract was being performed, that no monetary loss occurred. Awards 1453 and 1610. Does the fact that the work on the roundhouse stalls would have produced a higher wage scale change the rule?

This precise question does not appear to have been previously before this Board. Awards 1453 and 1610 appear to have decided that as the claimants therein were not deprived of work that no basis for a monetary claim exists. It is evident in those cases that the same class of work was done under the farming out contract as the employes entitled to it were then doing. We assume that the wage rate would have been the same although the opinions of the Board do not appear to have given consideration to that fact.

In the case before us, the Maintenance of Way employes were engaged in necessary Maintenance of Way work. The Carrier contends that it could not take them off of their regular work because of its urgency, to do the roundhouse rebuilding work. It is also pointed out that the Carrier needed to have the contracted work done before winter and, not having men available to do it, necessity required that the work be contracted. The fact that the contractor had difficulties and failed to get the work done in accordance with time limits is not material. The Carrier is bound only by the situation with which it was faced at the time it contracted the work out. There is no provision in the agreement that requires the carrier to defer work of this kind until regular Maintenance of Way employes can get to it. We think the situation called for the exercise of managerial judgment as to what the apparent necessities of the situation required. But in considering the situation with which it was confronted, it could not arbitrarily disregard the

agreement made with its employes. Consequently if it chose to leave its regular Maintenance of Way employes on ordinary Maintenance of Way work and to contract the higher rated work to one not within the agreement, we think it is obligated to reimburse the Maintenance of Way employes for their monetary loss resulting therefrom. Where one of the two parties to the collective agreement must suffer loss, we feel obligated to adhere to the strict meaning of the agreement as it has been previously interpreted and allow the loss to fall on the party bound to absorb it under the terms of the agreement. Before the emergent situation confronting the Carrier can constitute a valid defense to the claim, it will have to be negotiated to be such.

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 contract was violated as alleged.

AWARD

Claims 1, 2, 3 and 4 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 20th day of November, 1944.

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Even if this job was of such a character as was intended to be covered by the Agreement and was not of such type as to lodge it in the generally recognized exceptions from the Scope rule, the facts and circumstances of the case do present a situation clearly showing the contracting of this work to not have been in violation of the July 1, 1939 Agreement.

With all Maintenance of Way employes engaged in necessary and urgent maintenance work, and being unable to hire new men, the Carrier was confronted with the necessity of contracting this job in order to provide adequate housing to efficiently service and maintain its locomotives, which were vital and necessary to handle the heavy volume of traffic moving under abnormal conditions.

Efficient maintenance of facilities is essential to safe and satisfactory operation, and the extension of the roundhouse was essential to make that facility adequate. Lacking force to adequately maintain its property and build essential additions thereto, the Carrier would be faced, under this Award, with deferring either maintenance or extension of the roundhouse. But the Opinion holds, "There is no provision in the Agreement that requires a Carrier to defer work of this kind until regular Maintenance of Way employes can get to it." This being true, the circumstances, i. e., lack of adequate

force and volume of traffic, made it necessary to contract the job as the only means of providing the added and necessary facility.

Under such conditions the sustaining Award, including monetary payments, imposes restrictions and penalties not contemplated by the Agreement.

R. H. Allison
C. C. Cook
A. H. Jones
C. P. Dugan
R. F. Ray