Award No. 2819
Docket No. MW-2799

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ILLINOIS CENTRAL SYSTEM

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

(a) That the Carrier violated the Agreement in effect between itself and the Brotherhood of Maintenance of Way Employes by contracting the work of certain alterations and repairs to its roundhouse at McComb, Mississippi; and

(b) That B. & B. Foreman M. J. Powers and Ben Wooten, Wm. McIntosh, H. Brumfield, R. Marsalis, A. Cayton, Isiah Washington, O. Pelder, W. Bates, Wm. Douglas, H. Cousius, Joe Turner, Joe Washington, H. Jones, Jr., David Thomas, George Caston, Lee Cochran, John Garner, Thad Wells, Pat Davis and Clarence Patterson, members of his crew, be paid as per tabulation set forth in Employes' Position on Sunday, August 23rd, Sunday, August 30th, Sunday, September 6th, Labor Day, September 7th, and Sunday, September 13, 1942, days on which this bridge crew was not working while employes of the contractor were engaged in above referred to alteration and repair work.

EMPLOYES' STATEMENT OF FACTS: Certain work in connection with alterations and repairs to roundhouse at McComb, Mississippi was let to and performed by the Ellington Miller Company, general contractors.

Commencing on Sunday, August 23rd, certain work in connection with alteration of structure and shifting of machinery was being performed on Sundays. Contractor's employes were assigned in the performance of this special work on Sundays continuing working Sundays and on Labor Day, September 7th, until and including Sunday, September 13th. The claimants, the regular B. & B. employes, were working on week days but did not work on Sundays or on Labor Day, September 7th.

There is an agreement in effect between the parties, bearing effective date of September 1, 1934, which is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Scope of the Agreement in effect between the Illinois Central System and the Brotherhood of Maintenance of Way Employes reads:

> "SCOPE. This schedule governs hours of service and working conditions of all employes in the Maintenance of Way and Structures Department, except:
>
> (a) Signal Department employes.
> (b) Clerical forces.

To this letter we replied, on January 16, 1944, as follows:

'We are agreeable to joining in submitting this case to the Third Division, National Railroad Adjustment Board, if we can agree on a joint statement of facts. Suggest you submit a proposal and we will either accept it or submit a counter-proposal.'

Since that time and subsequent to receipt of your letter of April 20, 1944, submitting draft of your claim and proposed statement of facts we have, again, carefully studied the facts of the case and we do not find any violation of rule, accepted practice or interpretation thereof which would justify our entering into a joint statement submitting this claim to the Third Division, National Railroad Adjustment Board. The agreement with the Maintenance of Way Employes was entered into under the United States Railroad Administration, December 16, 1919, this agreement being revised July 1, 1921 (with certain articles becoming effective January 1, 1922), May 10, 1923 and September 1, 1934. These rules and the interpretations and practices thereunder existed for more than twenty years without protest and your organization has never put the Carrier on notice that these interpretations and practices were contrary thereto or requested a change therein.

In view of the long standing mutual agreement of the parties regarding the rules and the interpretations and practices thereunder, we do not now feel we can join you in taking this claim to an improper tribunal for decision.

Yours very truly,

(Signed) G. J. Willingham,
Asst. to V. P. & G. M."

The statement of claim refers to (a) "certain alterations and repairs to its roundhouse at McComb," and (b) "That B. & B. Foreman M. J. Powers, et al., be paid on August 23, 30, September 6, 7 and 13, 1942." The facts are that forces of contractor were working in machine shop and mill shop on dates in question and not in the roundhouse.

OPINION OF BOARD: The Foreman and members of the Carrier's B. & B. crew at McComb, Mississippi, were assigned and worked regularly, Sundays and holidays excepted. They claim compensation for work performed by employes of a general contractor in making repairs to shop buildings on four enumerated Sundays and a Labor Day. The sole question is whether the work performed for the contractor was within the Scope of the effective Agreement of September 1, 1934. Said Scope Rule reads: "This schedule governs hours of service and working conditions of all employes in the Maintenance of Way and Structures Department, except:", and is followed by twelve specific reservations, neither of which is applicable, in terms, to the work here involved. This controversy must, therefore, be resolved upon a consideration of what was within the contemplation of the parties when they entered into the Agreement.

The parties appear to agree that the Scope Rule is not all-inclusive, and that there are certain exceptions thereto, in addition to those appended to said Rule. The Carrier says in its submission:

"This agreement was entered into with both barties having a full and comprehensive knowledge of the fact that under certain conditions, when the magnitude of the job to be done was such that it would require equipment which the Carrier did not possess and would not be justified in maintaining, and where engineering forces, skilled in particular types of work, are not available to properly and expeditely progress such repair work to a conclusion, work of this nature had

been and would thereafter continue to be let by contract so that the best interest of the Carrier and its employes would be served."

On this subject, the Petitioner says:

"We agree and recognize that generally speaking the performance of a large construction job comparable to the erection of a bridge across the Missouri River which would require the use of equipment that the Carrier may not have and where quite commonly the contract for such job embraces not only the erection of the bridge but the furnishing of the material as well, may not be in violation of our Maintenance of Way Agreement."

Somewhere within the range of the above concessions, we may expect to find the narrow line of demarcation that separates work coming within the scope of the Agreement and that which may properly be the subject of an independent contract. We think the controlling principles were recently set forth in Award 2812. That Award is authority for these propositions: (1) that said Scope Rule embraces all work in which employes of the class were customarily engaged at the time of the negotiation and execution of this Agreement; (2) that said Scope Rule does not, however, embrace services involving projects which require skilled forces, or equipment that the Carrier does not possess and would not be justified in acquiring and maintaining because of the rare occasions on which these would be used; and (3) when its conduct in respect to contracting work is challenged, the burden is on the Carrier to justify its action.

With these principles in mind, we approach their application to the facts of this case. The record discloses that on May 29, 1942, the Carrier let a contract to the Ellington-Miller Company to make substantial repairs on all important shop buildings at McComb. During August, while this work was in progress, the Carrier instructed its B. & B. Foreman to move and erect certain machinery in said shop buildings, but these instructions were subsequently cancelled and said work given to the contractor under an extension of its contract. In explanation of its conduct, the Carrier says that it discovered that the moving and erection of said machinery was "millwright work," embraced in its current agreement with System Federation No. 99. Whether there was any basis for a jurisdictional dispute between the various organizations with which the Carrier was under contract is, however, no concern of this Board.

Manifestly, a determination as to whether contracted work comes within the scope of the Agreement must be resolved from a consideration of the character of work as a whole, and not by breaking it down into all of its component parts. In other words, a carrier may not be precluded from contracting a project for which it does not possess and may not be reasonably expected to acquire the necessary skilled help and equipment merely because some isolated and incidental part of the work contemplated, if disassociated from the whole, would come within the scope of the Agreement. It would be difficult, indeed, to conceive of any proper subject of an independent contract that would not embrace some elements of work which, standing alone, would come within the purview of the Scope Rule.

It appears from the record that the subject of the independent contract here involved, "consisted of repairs, such as, work on floors, pits, structural timbers, roofs, painting, etc." Turning to the particular service performed on the days for which claim is made, we find that on those occasions a maximum of 5 carpenters, 1 carpenter apprentice, 2 carpenter helpers, 77 laborers, 3 cement finishers, and 1 truck driver were employed. Three of said days were devoted to the repair of the floors in the mill and machine shops, one to the repair of the floor and wall in the mill shop, and one to the renewal of rafters and sheeting in the machine shop.

However considered, we are unable to say that the Carrier has discharged the burden of showing that it was warranted in making the work here involved the subject of an independent contract, under the controlling principles heretofore stated. Awards 1020, 1453 and 2701 support our conclusion.

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 Carrier violated the Agreement as alleged in (a and b) of the claim.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of February, 1945.