

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
NORTHERN PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim as presented by the System Committee of the Brotherhood:

(1) That the Carrier violated Agreement in effect by contracting the work of rebuilding Bridge 1.3, Moxee Branch, Tacoma Division, to outsiders who had no seniority rights in the Bridge and Building Department on the railroad;

(2) That the senior qualified Assistant B&B Foreman shall be paid the difference in rate between what he received as an Assistant B&B Foreman and that which he should have received as a B&B Foreman during the period that the contractor was engaged in rebuilding this bridge.

(3) That the 10 senior second-class carpenters be paid the difference between what they received as second-class carpenters and that which they should have received in the position of first-class carpenters during the period the contractor was engaged in rebuilding this bridge.

EMPLOYEES' STATEMENT OF FACTS: On or about January 15, 1945 the Carrier contracted the performance of certain work in connection with repairing of Bridge 1.3, Moxee Branch, Tacoma Division, to the Fielding & Shepley Contracting Company. The contractor employed one foreman, and an average of ten carpenters, and on some days some laborers in connection with this work. The work performed by the contractor was ordinary bridge and building work. Tools and equipment used by the contractor's employees were similar to tools and equipment ordinarily used by the Carrier's Bridge and Building employees in the performance of similar work. The contractor's employees were engaged in this work until on or about May 15, 1945.

Agreement effective August 1, 1943 between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: Bridge 1.3, located on the Moxee Branch, Tacoma Division, of the Northern Pacific Railway, spans the Yakima River. This bridge consists of 95 spans of pile and timber trestle approaches 1508 feet long and three through pin connected steel truss spans, one 150 feet long and two of 160 feet each, the steel spans being supported on four rock filled pile and timber piers, the piles being driven into the bed of the Yakima River.

class carpenters. Had men been available, the crew would have consisted of a B&B foreman, five first class carpenters, three second class carpenters, and three B&B helpers, so that in any view of this case, the claim presented that ten men should be paid the first class carpenter's rate is erroneous. Moreover, promotion from second to first class carpenters is based upon ability and seniority as provided for in Rule 4(a) of the Maintenance of Way Agreement, reading:

"Except as otherwise provided for in this rule, promotions shall be based on ability and seniority; ability being sufficient, seniority shall prevail, the Management to be the judge, subject to appeal."

The Employees are contending that seniority alone controls promotion, ignoring the provisions of Rule 4(a).

The Carrier has shown that in 1922 an agreement was entered into with the Maintenance of Way Organization covering the right of the Railway Agreement to continue contracting as it had in the past; that this agreement has been recognized by the Employees as valid and binding since it was entered into; and that the contracting of work on Bridge 1.3 was in conformity with that agreement and practice thereunder which has been recognized by the Maintenance of Way Organization as proper.

The Carrier has also shown that such part of the work on Bridge 1.3 as could be performed with Railway Company men and equipment was handled by company forces. On the basis of the agreement of July 25, 1922, the agreed to and accepted interpretation of that agreement and the facts and circumstances in the instant case, there is no foundation for the Employees' claim. The position of the Carrier in this respect is fully sustained by awards of this Division which have been cited.

The protest and claim of the Employees should be denied.

OPINION OF BOARD: On or about January 15, 1945, the Carrier contracted the performance of certain repair work on Bridge 1.3, Moxee Branch, Tacoma Division, to persons outside the scope of the Maintenance of Way Agreement. The Organization contends that this was a violation of the current Agreement and asks that the employees designated in the claim be paid resulting wage losses because they were not used in higher rated positions to which they would have been entitled if the work had been performed by employees within the scope of the Agreement.

The record shows that the work in question was ordinary bridge and building work. Tools and equipment required in its performance were similar to those used by the Carrier's Bridge and Building employees in performing similar work.

The Carrier asserts that the work was required to be done in 1945 during the low water stages of the river passing under the bridge. It contends that Carrier employees were not available to perform the work done and that additional employees could not be recruited to do it. The Carrier also states that all its available equipment was in use on necessary work and that additional equipment could not be acquired at that time, and that all employees in the Maintenance of Way Department were employed and no time was lost by them because of the work performed by the Contractor.

The Carrier further contends that the work could be properly contracted because of a letter agreement dated July 25, 1922, which in part stated:

"In accordance with your statement in conference July 24th that in the event suitable rules can be arranged in lieu of Rules 63 and 64 of the Schedule for Maintenance of Way Employees, effective March 1, 1922, you will waive the application for a contract rule, and that any rule, decision or order covering the contracting of work made effective by the United States Railroad Labor Board will not apply to the Northern Pacific Railway, and that it is agreeable to your organization for the railway company to continue in the future, as it has in the past, in the handling of maintenance of way work."

It is urged by the Organization that the letter agreement of July 25, 1922, was ineffective after the rule revisions of April 1, 1936 and August 1, 1943. The basis of this contention is that the revised rules in each case supersede the agreement in force previous thereto by express stipulation contained therein. While we are in accord with the Organization that the language contained in the 1936 and 1943 agreements would ordinarily have such effect, the parties themselves, by their subsequent course of conduct, do not appear to have given the agreements of 1936 and 1943 any such meaning. Numerous instances are cited in the record in which the Carrier gave effect to the letter agreement of July 25, 1922, with complete acquiescence on the part of the Organization insofar as this record shows. Under such circumstances, we are obliged to say that the Organization is estopped by its subsequent conduct from denying the letter agreement of July 25, 1922, as a valid and subsisting part of the current Agreement.

The Organization contends, in event the letter agreement is sustained, that the work here involved is not within the terms of the letter agreement and that an affirmative award is justified in any event.

It is the position of the Carrier that the right given by the letter agreement to contract work "as it has in the past" means that it may contract where it is necessary (1) due to a shortage of men, (2) a shortage of equipment, or (3) where it is necessary to perform work during certain periods of the year. On the other hand, the Organization contends that the words mean that no work can be contracted except where the construction of large steel bridges and large important buildings are involved.

The record discloses several instances where the Carrier has applied the agreement from 1922 to 1941. Briefly, the work in some of those instances involved the installation of new automatic block signals, the construction of new right of way fence, the building of a bridge, the painting of a bridge, electric welding, the construction of new terminal facilities and the relining of a tunnel. The Carrier gave various reasons for contracting the above work such as a shortage of men, a shortage of equipment, the necessity for completing seasonal work within the period in which it must be done and that regular employees were not deprived of work thereby. The foregoing clearly indicates that the parties themselves construed the letter agreement in the manner alleged by the Carrier. If, as interpreted, it does not represent the mutual intent of the parties as they now view it, it is a matter for negotiation. No basis exists for an affirmative award.

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 Employees involved in this dispute are respectively carrier and employees 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 current Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 10th day of July, 1946.