

Award No. 3823
Docket No. MW-3932

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

H. Nathan Swaim, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

(1) That the Carrier violated agreement in effect by contracting the work of making repairs to buildings at various points, St. Joseph Division, to outsiders who had no seniority rights in the Bridge and Building Department on the railroad, during period June 18, 1945, to October 31, 1945, inclusive;

(2) That B&B Mechanic L. E. Doolittle shall be paid the difference between what he received as a bridge and building mechanic and that which he should have received at the rate of pay applicable to a bridge and building foreman, during the period that the contractor was engaged in this work;

(3) That Bridge and Building Helpers, O. Jumps, K. D. Foster, T. L. Prussman, W. R. Bolinger, L. W. Root, C. A. Wood, E. R. Boham, J. A. Jackson, R. L. Elston and V. W. Smith shall be paid the difference between what they received as bridge and building helpers, and that which they should have received at the rate of pay applicable to B&B mechanics, during the period that this work was being performed by the contractor.

JOINT STATEMENT OF FACTS: During the period June 18 to October 31, 1945, employees of the Lawhon Construction Company made repairs and alterations to buildings and structures located on the St. Joseph Division, as follows:

E. Leavenworth, Missouri	— Sec. Foreman's dwelling, coal house, toilet, raise section house, remodel porches and install cellar, electrical work.
Armour, Missouri	— Depot, freight house, coal house, toilets, electrical work.
Atchison, Kansas	— Freight house, loading dock.
Bartlett, Iowa	— Depot, freight house, coal house, toilet, electrical work.
McPaul, Iowa	— Depot, freight house, coal house, toilet, construct 3 pen stock yard, electrical work.
Craig, Missouri	— Depot, freight house, coal house, toilet, electrical work.
Bigelow, Missouri	— Depot, freight house, coal house, toilet, electrical work.

(2) The Carrier has proved that a sufficient number of employes could not be recruited to maintain six B&B gangs. This claim is premised upon the establishment of two additional gangs. This was a physical impossibility.

(3) It being impossible to establish two additional B&B gangs, the service made a basis of controversy, if not contracted, could not have been performed.

(4) It is a settled principle of law that in order to collect damages because of an alleged breach of contract there must be proof of damage. In this case no such proof has been presented as the record demonstrates by a preponderance of evidence that the claimants would not and could not have been advanced to the next higher occupational classification in mythical gangs.

(5) In the light of the record, a sustaining award would be unwarranted, untenable, inequitable and in total disregard of the evidence presented by the parties.

Exhibits not reproduced.

OPINION OF BOARD: This Docket presents three claims:

1. That the Carrier violated the Agreement by contracting the work of making repairs to buildings at various points on the St. Joseph Division in 1945.

2. That B&B Mechanic L. E. Doolittle should be paid the difference between what he was paid as a mechanic and what he would have received as a foreman during the period this work was being done by a contractor.

3. That ten Helpers be paid for the period the difference between their pay as helpers and what they would have received as mechanics.

The work which the Carrier contracted was repairs and alterations to various buildings and structures on the St. Joseph Division. This is the type of work done by the employees covered by the Agreement.

It has been many times held by this Board that the Carrier may not contract to others the performance of work of a type covered by one of its agreements with its employes because such contracts cover all of the work of the type involved, except such as may be either specifically excepted or excepted by reason of the particular work or other circumstances. Our awards have also held, however, that on work which is not specifically excepted there must be very definite proof by the carrier of the facts or circumstances showing that the work in question is not under the agreement. Award 757.

Where work under an agreement has been contracted out to persons not covered by the agreement and loss has been sustained by employes covered by the Agreement this Division has awarded damages to the employes sustaining such losses. Awards 3060, 3251 and 3687.

The work here in question was ordinary maintenance work, the repair of various buildings and structures. There is no attempt to show that any of the work required any special equipment or special skill. There is definite proof that during the period in question the Carrier tried unsuccessfully to procure more men as employes in its Maintenance of Way Department and that all of its employes in said department were working full time.

However, in the absence of a showing that it was necessary to do the work during the period in question we see no justification for contracting the work out to persons not covered by the Agreement.

The claims of the individual employes for compensation are all based on the theory that had the Carrier done this work with its own employes these particular employes would have been promoted to higher classifications and would, therefore, have been entitled to the higher pay claimed. During the period in question each of these employes was working in his highest seniority rating, so there is no claim here for loss of time. The individual claims are based solely on the contention that they should have been promoted.

The Brotherhood makes the bald assertion that these claimants who were Helpers would have been entitled to the higher rated positions of carpenters, but gives no facts to support this assertion.

Rule 19 provide that:

"Promotions shall be based on ability, merit and seniority; ability and merit being sufficient, seniority shall prevail."

The Carrier's submission contains the following statements as to the qualifications of these claimants:

"Not one of the helpers had established seniority as a carpenter. They were all comparatively new employees in the Carrier's service and were not qualified to perform carpenter's work. * * * Therefore, it was not feasible to establish the necessary gangs, even if some of the claimant helpers had been qualified for promotion, which they most emphatically were not."

These statements were not denied. They furnish the only factual statements as to the ability and merit of these men.

We must, therefore, hold that these helper claimants have failed to meet the burden which was on them as claimants to prove that the action of the carrier deprived them of promotion.

Nor has the Brotherhood met the burden of proof as to its second claim that Mechanic Doolittle should have been promoted to the position of Foreman.

The Carrier has shown that on the St. Joseph Division there were six Bridge and Building gangs and each had a foreman; that each of said gangs during the period in question was short 3 to 9 employes; that there were many employes from this department in the military service; that Master Carpenters and Foremen were instructed to hire all carpenters and helpers they could find, but none were available.

In view of the above statements of fact which are not denied it must be taken as a fact that the Carrier during this period was unable to secure sufficient men to fill the six B&B gangs on the St. Joseph Division on each of which gangs there was a regularly assigned foreman. It follows that the Carrier could not have secured a sufficient number of new employes to form a seventh gang and thereby have made necessary a seventh foreman.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived hearing thereon;

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 by contracting the work in question to persons not covered by the Agreement. The Brotherhood failed to show that any of the Claimants was adversely affected as claimed.

AWARD

Claim 1 sustained. Claims 2 and 3 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD.
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 22nd day of March, 1948.