Award No. 4701
Docket No. MW-4709

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

PACIFIC ELECTRIC RAILWAY COMPANY

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

(1) That the Carrier violated the agreement by letting out by contract or otherwise, the construction of a Sub-Station building in the vicinity of Sierra Park Station on the Pasadena Short Line on or about February 9, 1948;

(2) That all B & B employes holding seniority under the agreement on this seniority district, during the period involved be compensated at their proper rates of pay for an equivalent number of hours, day for day, that these outside parties were allowed to perform this B & B work subsequent to February 9, 1948.

EMPLOYES' STATEMENT OF FACTS: On or about February 9, 1948 the Carrier contracted the erection of a building on the right of way east of the Section Tool House at Sierra Park Station. This building was erected for the purpose of housing the sub-station that had been located in a box car on a spur track at this location for many years.

The Employes contend that the erection of this building was work properly covered by the scope of the effective agreement and contended that its Maintenance of Way Employes should have been assigned to the performance of this work. The Carrier has denied this claim.

The Agreement in effect between the two parties to this dispute dated Mareh 1, 1947 and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: In the handling of this claim upon the Carrier's property the Carrier's Manager of Personnel, Mr. L. R. McIntire, wrote the General Chairman under date of June 11, 1948 as follows:

"June 11, 1948

Mr. R. L. Bailey, General Chairman
Brotherhood of Maintenance of Way
453 P. E. Building
Los Angeles 14, California

Dear Sir:

Under date of May 21, 1948, you submitted appeal from decision of Mr. E. C. Johnson, Chief Engineer, concerning claim arising out

The following is of extreme interest to illustrate the reasoning of Referee Robertson as to the application of Awards 3251 and 3423:

> "It follows from the expression of views given above that in some respects, at least, the Carrier has violated the Agreement. Without indicating that we view all new construction as being outside the Scope of the Agreement, we do agree with the Carrier that some distinction can be made with respect to new construction and maintenance insofar as the Scope Rule of the Agreement is concerned. There may be some question as to whether or not the Carrier violated the Agreement in contracting the work of building the roadway. However, in this instance, in view of the surrounding circumstances, we believe the Carrier is entitled to the benefit of the doubt. We do not view the work of replacing the old flooring in the same manner. In our view, it was quite clearly maintenance work and hence in that respect, at least, this case is hardly distinguishable from that which confronted this Board in Awards Nos. 3251 and 3423."

Award 4159 was a companion case to Award 4158 involving the allegation by the employes that the carrier violated the provision of the effective agreement by contracting certain work in connection with the extending of a concrete platform at its Milwaukee Passenger Station. Referee Robertson also participated with the Board in making the award. In the opinion it is stated that the principles applicable to a decision of the case are the same as those expressed in the opinion of the Board in the aforesaid award (Award 4158). The opinion also states that the Board views the construction of the extension of a platform in the same light as the construction of the concrete roadway involved in the previous case.

From the information we have before us covering Awards 4158 and 4159, we conclude that we have had modification limitations placed upon the principles included in Awards 3251 and 3423; that is, these latter mentioned awards apparently **did not distinguish between maintenance work and new construction,** while Awards 4158 and 4159 apparently added an entirely new and additional factor in placing that distinction. Thus, it would appear proper that Awards 3251 and 3423 should be considered sound and applicable only in instances where the work contracted could properly be classed as **maintenance** and that instances involving **new construction** do not necessarily require the application of the principles of "negotiations" as enunciated in Award 3251 where, as stated in Award 4159, "because of special circumstances and surrounding facts" the construction of the extention to a platform by a contractor was permissible.

We conclude that Awards 4158 and 4159 confirm the practice which has been pursued by the Pacific Electric Railway Company since 1911.

The Board is respectfully requested to deny the claim of the Employes in full. (Exhibits not reproduced).

OPINION OF BOARD: Carrier contracted for the construction of a sub-station building in the vicinity of Sierra Park Station on the Pasadena Short Line on or about February 9, 1948. The building was of permanent brick construction, approximately 35'x40', and was erected for the purpose of replacing a portable sub-station. Employes assert a violation of the Scope Rule.

The Scope Rule of the involved Agreement reads as follows:

> "These rules govern working conditions and hours of service of all Maintenance of Way Employes in the Engineering Department, except supervising employes above the rank of foremen."

"RULE 5

The Seniority Rule of the Agreement reads in pertinent part as follows:

CLASS SENIORITY

Seniority of employes in a sub-department shall be carried by classes.

The seniority classes of employes in each sub-department shall be grouped as follows:

Bridge and Building Sub-Department

Group A

Class 1. B & B Foremen
Class 2. B & Sub-Foremen
Class 3. Carpenters

Group B

All other B & B classes not specifically mentioned in Group A. Each occupation in this Group shall constitute a separate class.

B. & B. Inspector
Painter Foremen
Painter Sub-Foremen
Painters
Plumber Foremen
Plumbers
Plasterers
Truck Drivers
Brick Layers
Pile Driver Operator
Loco-Crane Operator
Steel Workers
B. & B. Helpers
B. & B. Laborers
B. & B. Yardmen
B. & B. Watchmen"

We believe it is clear from a reading of the Scope Rule and the list of classifications of employes in the Bridge and Building Sub-Department that the work of constructing this sub-station was work embraced in the Maintenance of Way Agreement. Clearly, the work involved was in the Engineering Department and obviously employes of the class listed in the Seniority Rule were used in its performance.

Awards of this Division have repeatedly held that the Carrier may not, with impunity, contract out work the performance of which is of a type embraced within one of its collective agreements with its employes. In defense of its action in letting out this work by contract, Carrier relies upon on asserted practice under which such work as is here involved has been customarily performed by outside contractors. The Employes deny this assertion. Carrier also asserts that the work embraced and required specialized equipment and specialized mechanics and that there were no employes assigned to the Bridge and Building Sub-Department of the Company capable of performing the major portion of the work required in constructing the building. The latter primarily included the brick work.

The burden of establishing an exception to the rule is on the Carrier and we do not believe that it has met that burden. With respect to the asserted practice, no supporting facts are given by either side. In any event, in Award 757 this Board held that mere practice alone is not enough to establish exceptions to work clearly embraced in Scope Rules. As to

the assertion that specialized equipment and specialized mechanics were required, we find no facts upon which to apply this exception. As a matter of fact, it appears that the work of installing equipment and facilities in the building was performed by Carrier's own forces. This would leave mostly the brick work as the type of work which the Carrier apparently views as requiring specialized equipment and specialized mechanics. The classification of Bricklayer, however, is covered by the Current Agreement and it cannot be said that Carrier can be relieved of its obligation because of its failure to augment its forces to include sufficient manpower of that class to carry on a project such as this.

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 carried 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of January, 1950.