Award No. 4702
Docket No. MW-4710

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 reconstruction of certain facilities at Sixth and Main Street Terminal, Los Angeles, California, on or about June 10, 1947;

(2) That all employes in the Bridge and Building Sub-department on the Los Angeles District, holding seniority under the agreement 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 June 10, 1947.

EMPLOYES' STATEMENT OF FACTS: On or about July 10, 1947 the Carrier contracted with Miller and Miller Construction Company to perform certain Maintenance of Way work in connection with the reconstruction of certain facilities at 6th and Main Street Terminal, Los Angeles, California. This work assigned to the Contractor was completed on or about October 4, 1947.

This reconstruction work involved the construction of umbrella sheds and walkways on the viaduct at the rear of the Pacific Electric Building. The rates of pay to the employes of the contractor ranged from $2.00 to $2.50 per hour. The rates of pay of the Carrier's B&B forces ranged from 94½c to $1.23 per hour up to September 1, 1947 and after September 1 ranged from $1.10 to $1.39 per hour.

The Carrier's B&B forces performed a small part of this reconstruction work. The balance of the work was performed by the contractor's forces. The Employes have contended that the contracting of this work in question was a violation of the Maintenance of Way agreement and have requested compensation for the B&B employes adversely affected. The Carrier has declined the claim.

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

POSITION OF EMPLOYES: The scope rule of the effective agreement states as follows:

In Award 4158, Referee Francis J. Robertson participating with the Board when the award was rendered held that the carrier did not have the right to let to outside contractors maintenance (replacement) work, but would have the right in the case of **new construction.** Accordingly, he denied that part of the claim involving **additional or new construction** (which work is identical in category and classification with the Sixth and Main facilities involved in the present dispute) and sustained that part of the claim involving the replacement of certain old flooring in the shop at Clinton, Iowa.

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 extension to a platform by a contractor was permissible.

The Board is respectfully requested to deny the claim of the Employes in full.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a companion case to Award No. 4701. Although the type of work involved was of a different nature and the project was of greater magnitude, the same principles are applicable. Here again we do not find sufficient facts to warrant a conclusion that the Carrier has sustained the burden of establishing any exception to the general rule that Carrier may not contract out work the performance of which is of a type embraced within an Agreement with its employes.

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 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.