Award No. 4833
Docket No. MW-4737

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI PACIFIC LINES

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

(1) That the Carrier has violated the Agreement by employing contractors to perform certain B&B work on the San Antonio Division beginning in early 1947 and continuing up to the present time;

(2) That B&B employes of Gang No. 4:

(a) J. A. Stephens
G. C. Ashley
C. M. Ashley
Carl Willis
L. J. Barker
Carl Proctor
C. S. Stripling

(b) and B&B employes:
C. E. Starkey
L. N. Locklin
W. M. Elliott
L. M. Wagner
J. C. Flanagan
C. E. Caldwell
H. E. Halsell

be compensated at pro rata rate for a number of hours equivalent to those worked by the employes of the contractors beginning with March 12, 1947 and continuing until the violation of Agreement is stopped;

(3) That each of these claimants be paid for his proportionate share of the total time worked by the employes of these contractors, beginning March 12, 1947 and continuing until this violation of the Agreement is stopped.

EMPLOYES' STATEMENT OF FACTS: Commencing on or about March 12, 1947 and subsequent thereto the Carrier has employed the Guido Constructing contractors of San Antonio, Texas to perform certain Bridge & Building and maintenance work on the Carrier's property. This work for the most part has been performed on the I&GN San Antonio Division.

The work referred to consisted of the rebuilding of a trestle bridge 249-3; a stock pen at Pearsall, Texas, another at Crystal City; complete repair and painting of the section quarters at Tuna, Gardendale, Crystal City, depot and section quarters at Callaghn and Webb, Texas. Also, this contractor subsequent to March 12, 1947 built a carpentry shop at San Antonio, a demineralizing plant and inspection pits and main sewer lines also at San Antonio. In addition they relocated the electrician's shop at this same point.

the Carrier was as of July, 1948 short thirty-six men for service in these gangs. The Carrier is still short men for service in its B&B gangs and is constantly endeavoring to employ experienced personnel. The Carrier now has and has had for some time orders placed with the Texas State Employment office at San Antonio, Houston and Palestine, and with the Railroad Retirement Board for men with carpenter experience; all agents on the San Antonio Division have been requested to send in any men they can find, and foremen of all gangs have the same instructions. Chairman Andre's allegation that the Carrier has not or is not making an honest effort to employ additional men for service in its B&B gangs is entirely without basis.

CONCLUSION

In light of the foregoing record it is clearly evident that the employes' contention and claim in the instant case should be denied for the following reasons:

1. Claim is not supported by any rule in the agreement.

2. Under the circumstances the Carrier was not only forced to but had the right to contract the work here involved.

3. There was no violation of the agreement as alleged by the employes.

4. It has always been the practice for Carrier to contract certain work, particularly that of the character involved in this case, and the practice has previously been acquiesced in by the employes.

5. The Board has recognized in prior decisions that certain work is excluded from the scope of agreements, even though the exception is not expressed therein (Award Nos. 757, 2812, 2338, 2465, 3839).

6. The work and circumstances involved in this claim are within the category of that recognized as excluded from the scope of the agreement.

7. Carrier is charged by law with operating efficiently and economically. The contractor performed the work in question more efficiently and economically than it could have been performed by our B&B employes. As a matter of fact, it has been shown that our B&B employes could not have performed it at all.

8. The Board has recognized that a claimant must assume the burden of presenting some consistent theory which, when supported by the facts, will entitle him to prevail. In this case claimants have not presented any consistent theory supported by facts which would entitle them to prevail.

9. Claimants lost no time as a result of the work being performed by contractor.

10. Claimants did not have the skill nor the tools necessary to perform the work in question.

11. Claims have been withdrawn by claimants.
(Exhibits not reproduced)

OPINION OF BOARD: Claimants contend that the Carrier violated its agreement with the Organization by employing independent contractors to perform certain B&B work on the San Antonio Division on and after March 12, 1947. The claim is that certain named employes of Gang No. 4 be compensated for the number of hours equal to those worked by the employes of the contractors from March 12, 1947 until the violation is corrected.

The record discloses that much of the work discussed in the record which was performed by contractors, was completed prior to March 12, 1947, the effective date of the claim. The claim for compensation, in so far as it relates to such work is not properly before us and it will be given no further consideration.

The record does show that Guido Brothers Construction Company constructed a concrete drain and conduit box, 3′x4′x905′, and a concrete 30″

pipe storm sewer, 500 feet in length. This work was completed on May 30, 1947, and was 25% completed on March 12, 1947. The record shows also that this contractor constructed a concrete driveway 600 feet in length and 10 feet wide which was not constructed until July 11, 1947. We shall give consideration only to this portion of the claim.

The work in question was clearly that which was customarily and traditionally performed by maintenance of way employes. It was therefore within the scope of the Agreement. The general rule is that a Carrier may not contract with others for the performance of work embraced within the scope of a collective agreement. Certain exceptions to this general rule have been announced by our previous awards which, generally stated, involve projects requiring skilled forces or extraordinary equipment, and which were not reasonably contemplated as being within the Agreement. The work here was clearly not within the exception. It was maintenance of way work that was within the collective agreement which the Carrier entered into with its Maintenance of Way employes.

The Carrier asserts that there was a shortage of employes in the Maintenance of Way Department and that it was necessary to contract the work in order to efficiently operate the railroad. It is also pointed out that all its Maintenance of Way employes, including the claimants in this dispute, were used full time and lost no work because of the Carrier's action in contracting the work to persons not under the Agreement.

In this respect, it must be observed that the Carrier has contracted with the Maintenance of Way employes for the performance of all the work customarily and traditionally performed by Maintenance of Way employes and, if such work does not fall within a recognized exception to the rule that all such work belongs to the employes under the Agreement, it may not be farmed out with impunity. If, as the Carrier claims, the Maintenance of Way forces are not adequately manned in order to get the work done with dispatch, negotiation with the Organization, the party who contracted first to perform the work, will ordinarily result in a proper solution of the problem. In the event that an unreasonable attitude is assumed by either party, such fact may be considered by this Board in determining if there was more than a technical violation of the Agreement. Award 3251. But in the instant dispute the Carrier ignored the party to whom it first contracted the work. It not being work falling within the exception hereinbefore noted, it cannot ignore the Agreement with impunity. We hold that the claim is valid as to the work described which was performed on and subsequent to March 12, 1947.

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 Agreement was violated to the extent shown by the Opinion of Board.

AWARD

Claim sustained per Findings and Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 14th day of April, 1950.