Award No. 4869
Docket No. MW-4839

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, 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 violated the Agreement by assigning to the Contractor, Charles R. Baum and Sons the construction of an addition to Freight House Building No. 197, Houston Terminal, during the period from May 6 to June 10, 1947:

(2) That the following B&B employes:

O. H. Walston
J. E. Heath
J. F. Barkley
Fritz Caswell
J. B. Tyboroski
T. A. Ray
Louis Dickey
Ben Powloski
W. T. Bruce
R. C. Rodriquez

be compensated at the pro rata rate for an amount of time equivalent to that required by the employes of the contractor to perform the work involved in this claim;

(3) That each of these claimants be paid for his proportionate share of the total time worked by the employes of the Charles R. Baum and Sons, Contractor, during this period from May 6 to June 10, 1947.

EMPLOYES' STATEMENT OF FACTS: An agreement effective August 1, 1938, is in effect between the Missouri Pacific Lines and the Brotherhood of Maintenance of Way Employes. There are no provisions in this effective agreement whereby a Carrier could properly allocate to individuals or groups outside of the agreement, work which is recognized as Maintenance of Way work and which is customarily done by Maintenance of Way employes. The work that is in dispute in this instance was performed by Charles R. Baum and Sons, Contractor, who built an addition to the Texas Freight House Building No. 197 in the Houston Terminal. This building, constructed by the contractor, is approximately 32' x 96' and is of wood or frame construction covered by corrugated sheeting. It was constructed by the employes of Charles R. Baum and Sons during the period from May 6th to June 10, 1947.

Employes covered by the Brotherhood of Maintenance of Way Agreement were available for the performance of this work and could have been used outside of their regular working hours if the carrier determined that

2. Any work that may have been performed by contractor during the period in question was due entirely to inability of the Carrier's B&B forces to perform it.

3. Under the circumstances there was no violation of the agreement as alleged by the Employes.

4. It has always been the practice for the Carrier to have work performed by contractors where the Carrier did not have sufficient force to perform it, and the character and urgency of the work was such as to preclude its being deferred indefinitely, and until comparatively recently the practice has been acquiesced in by the Employes.

5. Claimants lost no time in any capacity as a result of any work being performed by contractors.

6. Your Board has previously denied claims for pay in favor of Carrier forces when work was performed by contractors, even though it was recognized that such work properly belonged to Carrier Maintenance of Way forces, when the Carrier forces lost no time. (Third Division Awards 1453, 1610; Second Division Award 1042).

7. 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 claimant has not presented any consistent theory supported by facts which would entitle him to prevail.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim grew out of the fact that the Carrier contracted for the erection of an addition to its Houston Terminal Freight House Building No. 197, instead of using B & B employes for that purpose.

There is no contention that the project called for special skills or construction equipment. The Carrier attempts to justify its conduct by asserting: (1) that it contracted for the work because it was unable to procure certain essential building materials, which the contractor could and did supply; (2) that the complaining B & B employes were engaged in other work for the Carrier which could not be deferred and for which said employes were compensated at straight time during the period involved; and (3) that additional B & B employes were unavailable.

The contractor supplied the galvanized siding and the asbestos roofing material used in the structure. All other materials appear to have been furnished by the Carrier from its stock or were procured by it. While we take note of the fact that there was a general shortage of building materials during May and June, 1947, we cannot say that the evidence before us establishes that this circumstance reasonably justified the Carrier's conduct. The Organization has denied that the Carrier could not have procured the necessary materials on its own initiative and on this state of the record we must conclude that there is no preponderance of proof in support of the Carrier's contention in that regard.

Without having observed the contract provisions pertaining to the procurement of needed man-power, the Carrier is in no position to defend its conduct in contracting out the work in question. Rule 11 (a) of the effective agreement provides for the bulletining of new positions and vacancies. Had the Carrier followed that procedure without success we might have been confronted with a different question; but having failed to do so it cannot be permitted to avoid the consequences by merely asserting that such a step would have been futile.

Neither are we impressed by the proposition that the Carrier's available B & B employes were engaged in other essential tasks, for which they were compensated at straight time. As was pointed out in Award No. 4158, even though these employes were so engaged, they have just cause for complaint,

because of the possibility of being deprived of promotions and other pertinent factors there mentioned.

The evidence before us supports the claim and the Carrier has failed to justify its conduct in the premises.

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 Carrier violated the Agreement.

AWARD

Claims (1, 2 and 3) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 13th day of June, 1950.