

Award No. 4920

Docket No. MW-4933

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY

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

(1) That the Carrier violated the agreement by employing the Packard Pipe and Pump Company to perform certain maintenance and repair work in the rest rooms of the Carrier in the Office Building on Hoyt Street, Portland, Oregon;

(2) That the following B&B employees:

William V. Nelson—Carpenter
Orville W. Nutter—Carpenter
Elmer E. Wildfong—Carpenter
Kenneth Benedict—Carpenter
Herbert Jones—Painter
Frank H. Cogan—Painter

be compensated at their respective pro rata rates for a number of hours, each, divided equally, equal to the total number of hours worked by the employees of the contractor.

EMPLOYEES' STATEMENT OF FACTS: On or about March 1, 1948 the Carrier contracted with the Packard Pipe & Pump Company, a construction contractor, for the performance of certain repairs including painting in the building used for offices by the Carrier located at 1035 N. W. Hoyt Street, Portland, Oregon.

On April 8, 10, and 12, 1948, the Carrier reduced its B&B forces and the claimants in this case became unemployed. The contractor completed the work referred to on or about May 5, 1948. The work performed by the contractor was not any specialized work but was rather ordinary maintenance work that is customarily performed by B&B forces on this Carrier.

The Employees have contended that the Carrier violated the agreement by employing the contractor rather than assign such work to the B&B employees. The Carrier has declined this claim.

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

POSITION OF EMPLOYEES: There appears to be no dispute regarding the actual facts pertinent to this claim.

already earned for all hours that the contractor employed carpenter helpers to perform the above described work.

"(d) That the senior Water Service Mechanic and the senior Water Service Mechanic's Helper be paid at the time and one half rate for all hours that the contractor's plumber and the plumber's helper worked on the above described work, in addition to wages already earned."

Claim on behalf of water service mechanic and helper was withdrawn in conference July 14, 1949 as claimants were not licensed by the City of Portland to do plumbing work. The Contractor had used a plumber 20 hours and helper 40 hours.

Although original claim included B&B Foreman for 8 hours at time and one half rate, this was omitted without explanation when employes presented revised Statement of Claim January 12, 1949.

The original claim for other B&B employes contained request for payment at time and one half rates, which was later changed to pro rata rates, again without explanation.

It is significant that employes acknowledged the inability of claimants to do plumbers' work and in order to substantiate their claim to other work it is necessary that they show that claimants possessed necessary skill to perform this work as heretofore outlined. Such proof or evidence has not been submitted to the Carrier.

The time worked by Carpenter's employes, excluding Superintendent, Carpenter Foreman, Plumber and Laborer (Helper), was as follows:

Carpenter	360½ hours
Painter	152 hours
Total	512½ hours

Claimants were employed as follows during period April 1, 1948 to May 5, 1948:

William V. Nelson	Carpenter	Laid off account force reduction April 4, 1948
Orville W. Nutter	Carpenter	Laid off account force reduction April 4, 1948
Elmer E. Wildfong	Carpenter	Worked full period
Kenneth Benedict	Carpenter	Worked full period
Herbert Jones	Painter	Off acct. force reduction Apr. 12, 1948
Frank H. Cogan	Painter	Off acct. force reduction Apr. 12, 1948

It is the position of the Carrier that the claim is without merit and must be denied for the following specific reasons:

1. The work involved has not heretofore been recognized as belonging exclusively to employes of the Maintenance of Way Department.

2. Some of the work was new construction, and the majority of all work required skills not possessed by claimants, nor are such skills ordinarily possessed by employes of this Department.

OPINION OF BOARD: The Carrier contracted with the Packard Pipe and Pump Company to do certain remodeling in an office building owned and used by it. The work consisted of remodeling the men's and women's rest rooms by replacing plumbing fixtures, installing acoustical tile ceiling, tile flooring, plywood wainscoting, refinishing walls and general painting. The Brotherhood of Maintenance of Way Employes asserts that the Carrier violated the terms of the Agreement with the Brotherhood by permitting persons to perform this work who had no rights under their Agreement; and claim

compensation for certain named employees at their respective pro rata rates for a number of hours, each, divided equally, and equal to the total number of hours worked by the employees of the contractor.

The claim is premised on Article I of the Agreement, which rule is denominated "Scope", and is set forth in the submissions.

No employees of the Carrier are licensed by the City of Portland to do plumbing work, and no claim is made for such work performed by employees of the contractor.

The work was commenced on or about April 1, 1948, and continued to May 5, 1948, inclusive.

The Claimants, who had seniority rights under the Agreement, were laid off on account of force reduction as follows:

William V. Nelson	April 4, 1948
Orville W. Nutter	April 4, 1948
Herbert Jones	April 12, 1948
Frank H. Cogan	April 12, 1948

The following claimants worked throughout the period of April 1 to May 5, 1948: Elmer E. Wildfong and Kenneth Benedict.

The position of the claimants is that the work performed by the contractor was work within the Scope of the Employees' Agreement with the Carrier and to which they had prior rights. The position of the Carrier is that the work had not theretofore been recognized as belonging exclusively to employees of the Maintenance of Way and Structures Department; that some of the work was new construction, and that the majority of the work required skills not possessed by claimants; and that it was for the Carrier to exercise its judgment when contracting of work was necessary.

The work described in the submission of installing acoustical tile ceiling, tile floors, plywood wainscoting and painting is clearly the work of carpenters and painters and having been performed upon a structure of the Carrier is work intended to be embraced within the scope and classifications provisions of the Maintenance of Way Agreement. (See Articles I, X and XV).

The contention that this kind of work had not previously been recognized as belonging to employees of the Maintenance of Way and Structures Department has been made. The work was performed on a structure owned by the Carrier and used as its office in connection with the operation of its railroad. It clearly falls within the Scope of the object of the Agreement. A past practice of ignoring the full intent of the Agreement does not alter its terms.

It has been often said in the awards of this Division that a Carrier may not contract out work of a type intended to be covered by an agreement with its employees. Exceptions to this general rule have been when the work contracted was a new project and when the work required specialized skills not available among its normal complement of workers. The Carrier claims the benefit of these exceptions, but the work described here does not appear to require skills not usually possessed by carpenters. The burden is on the Carrier to show the exceptional skill required. The mere assertion that such is the case is not persuasive.

The contention is also made that by reason of the limited requirements of the Carrier they have no need for employees possessing skill for interior carpentering work; and that because of the infrequency of such class of work there is no opportunity to perfect or train workmen in such skills. This contention was dealt with by the Board, with Referee Stone assisting, in its opinion to Award 4671. The Board there said that the "Carrier should

have sought to recruit help by bulletin, and have conferred with the employees." (See also Award 3251.)

And neither is the work here described to be classified as new work. Of course, what is or is not new work is a matter of degree; but we believe the work described in the submissions is more nearly that of repairs than the erection of a new structure.

We conclude, therefore, that the Agreement with the Brotherhood of Maintenance of Way Employees was violated when the remodeling of the rest rooms in the office of the Carrier was given to a contractor whose employees had no rights under the Agreement.

From the foregoing conclusion it follows, based on Awards 3251, 3423 and 4158, that the claims should be allowed at pro rata rates for a proportionate number of hours each would have worked in his respective classification; that is, carpenters 360½ hours and painters 152 hours.

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 Employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 1, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim (1) sustained; Claim (2) sustained per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of July, 1950.