Award No. 4921
Docket No. MW-4934

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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 contracting to the Packard Pipe and Pump Company the performance of B&B work at Vancouver and Camas during the period from March 29, 1948 to June 2, 1948;

(2) That the following members of B&B Gang No. 6:

George Becker
Harvey Soderlund
Okla Parker
Charles Limberg
Wade Fawcett
William N. Titsworth
Ned Harmala
Clarence C. Lewis
David J. Murdock

be compensated each 266 hours, pro rata rate, at their respective rates of pay because of the Carrier's violation of the Agreement.

EMPLOYES' STATEMENT OF FACTS: On or about March 29, 1948 the Carrier contracted with the Packard Pipe and Pump Company the performance of work in connection with the construction of concrete blocks in the Carrier's Yards at Vancouver, and the construction of forms and the filling of these forms with concrete mix at the Bridge site at Camas, Washington. The concrete blocks which were constructed by the contractor in the Carrier's Yards at Vancouver, Washington were installed by the Carrier's B&B forces at the Bridge site at Camas, on or about June 2, 1948. The entire project was completed on or about August 2, 1948. The making of these concrete blocks and other work performed by the Packard Pipe and Pump Company at the Bridge site was not work requiring any special skills beyond the capacity of the B&B Gang No. 6 at Vancouver, Washington.

These employes have made claim that the Carrier violated the agreement by not assigning to them this work performed by the contractor.

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 EMPLOYES: Under date of September 7, 1948, Mr. E. B. Stanton, Vice President and General Manager of the Carrier, addressed

work was actually being performed during the periods of negotiation. The present Scope Rule of the agreement does not exclude contract work under the conditions such work has been contracted in the past.

For the above reasons, you were advised in conference Sept. 3rd that payment of claims is declined.

Very truly yours,

/s/ E. B. Stanton
Vice President & General Manager."

All claimants in the instant claim worked regularly and were fully employed during period involved, with exception of claimant Harvey Soderlund, who was out of service due to personal illness from April 3, 1948 to April 26, 1948 during which period he would not be eligible for a claim.

The basis on which claim for 266 hours at pro rata rate is made was not made known to the Carrier and there appears to be no way in which such a figure can be arrived at if based on hours actually worked by Contractor Carpenters. No claim was made for a Foreman or carpenter helpers to offset time worked by Contractor employes.

The Carrier submits that claim must be denied, primarily for the following reasons:

1. Work involved has not heretofore been recognized as belonging exclusively to employes of the Maintenance of Way and Structures Department.

2. Most of the work was new construction, and required skills in the handling of reinforcing and structural steel not possessed by claimants and such skills are not ordinarily possessed by employes in this department.

3. Claimants were regularly and fully employed in accordance with schedule requirements during the period involved in claims, except as heretofore noted.

(Exhibit not reproduced)

OPINION OF BOARD: The Carrier employed the services of a contractor to construct a number of large cement slabs (which were subsequently transported and used by Maintenance of Way crews in replacing timbers in a bridge), and in constructing a retaining wall, repairing parapet walls and replacing a portion of abutment at bridge sites. The Employes claim this work was within the terms of their Agreement (see Article I set forth in their submission) while the Carrier contends the claimants lacked the skill required in using reinforcing steel used in the cement deck slabs, and that it has been the practice to contract such work as could not be taken care of by Maintenance of Way and Structure forces involving new construction, heavy maintenance work as well as work requiring skills not covered by the Agreement. All of the claimants were employed by the Carrier on other projects during the time the contractor performed the work.

The general rule applicable was set forth in the Opinion of the Board, Referee Swacker assisting, in Award 757. The Board said in that Award:

"It is well settled by many decisions of this and the First Division of this Board and predecessor Boards, that as an abstract principle a carrier may not let out to others the performance of work of a type embraced within one of its collective agreements with its employes. (Citing Awards.) This conclusion is reached not because

> of anything stated in the schedule but as a basic legal principle that the contract with the employes covers all the work of the kind involved, except such as may be specifically excepted; ordinarily such exception appears in the Scope Rule, but the decisions likewise recognized that there may be other exceptions, very definite proof of which, however, is necessary to establish their status as a limitation upon the agreement. Mere practice alone is not sufficient, for as often held, repeated violations of a contract do not modify it."

These principles have not been set aside by subsequent awards.

By implication, the Carrier admits the work described as the basis of the claim, is within the Scope of the Maintenance of Way Agreement, but seeks to avoid the operation of the rule because of (a) lack of sufficiently skilled employes, and (b) acquiescence on the part of the employes in the practice of contracting work when crews were not available or the work was new or beyond their skill to perform it. The burden is on the Carrier to demonstrate one or more of these assertions. (Opinion of the Board in Award 757, supra; and also see Awards 4701 and 4671.)

The work described here was not construction of a "new" structure as is commonly understood as "new" work. Replacing old timber by new cement slabs, or enlarging an existing abutment or parapet, may not be classified as "new" work. We believe the work was more nearly like repairing and remodeling, strengthening the Carrier's right-of-way, and is the kind of work contemplated by the parties to be performed by Maintenance of Way crews.

The Carrier makes the assertion, and it is denied by the claimant, that their employes lacked skill to perform the work. The submission contains no particulars as to what respect the employes were incapable of using reinforcing steel in the construction of cement slabs. There is nothing to show in what degree or particular its crews lacked skill to use reinforcing steel. But attention should be called to Award 4671 where the question of skill was the decisive factor; and there the Board, with the assistance of Referee Stone, pointed out that before the claim of lack of skill on the part of employes could be made available to it in justification of contracting the work, it was incumbent on the Carrier to follow the provisions of the Agreement and attempt to recruit adequate help and to confer with the Organization.

The Carrier also asserts that it has been the practice for it to contract work "particularly new construction, as well as maintenance work, when regular Maintenance of Way forces have not been available." Practice does not alter the terms of an Agreement so as to establish exceptions to work embraced in the Scope Rule (see Awards 757 and 4701). It was the duty of the Carrier to comply with the terms of the Agreement and bulletin the work. Had the Carrier followed such procedure without success, the situation would have been altered.

Nor does the non-availability of employes justify the Carrier in ignoring Rule 22 of the Agreement. This contention was made by the Carrier in Docket MW-4899 (Award 4896). There the Board, with the assistance of Referee Shake, used the following language:

> "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 4158, even though these employes were so engaged, they have just cause for complaint, because of the possibility of being deprived of promotion and other pertinent factors there mentioned."

It follows, therefore, that the Carrier violated the Agreement; and the claims are valid for the named members of the B&B Gang No. 6, who were available and working at the time the work was performed by the crew of

the contractor, and for the man hours consumed, exclusive of the contractor's supervisory 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 the Carrier violated the Agreement.

AWARD

Claim (1) sustained.

Calim (2) sustained as 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.