Award No. 5151

Docket No. MW-4899

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA

(Texas and New Orleans Railroad Company)

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

(1) That the Carrier violated the Agreement on or about January 18, 1949, by assigning to the Allhand and Briley Construction Co. of Dallas, Texas, the work of raising the Devil's River bridge, building the approach, and making the necessary line changes;

(2) That all the classes of Maintenance of Way forces of the type and class employed by the contractor, holding seniority on this Division and District be paid at their pro rata rates for a number of hours equal to the number of hours consumed by the contractor's forces in performing the work referred to in Part (1) of this claim; such number of hours to be divided proportionately among those employes involved.

EMPLOYES' STATEMENT OF FACTS: On or about January 18, 1949, the Carrier assigned employes of the Allhand and Briley Construction Company, general contractors, to perform work necessary in connection with the raising of the Devil's River bridge and rebuilding the approaches, and making the necessary line changes connected therewith.

During the period the contractor's forces were engaged in this work, the Carrier had in its employment a large number of Maintenance of Way forces who were regularly assigned to perform work of the type performed by the contractor's employes. The Carrier's own Maintenance of Way forces have prior and subsequent to January 18, 1949 performed work of a type and nature similar to that which the Carrier allocated to the employes of the Allhand and Briley Construction Company.

The agreement in effect, dated December 1, 1937, between the two parties to this dispute, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

spondence in Exhibit 4. A claim was handled on the San Antonio Division, but that was not appealed. Exhibit 4 includes a statement showing what each of these claimants was doing. However, it will readily be apparent that the claimants are men who could not have done anything that the contractor was doing. It includes crane men, adzer operators, tractor operators, bolt tightener operators and others who would have no part in a job involving blasting and moving 80,000 yards of solid rock.

During the entire life of this Agreement the Carrier has contracted the construction of line changes and similar large projects. The reason is simple. We do not have the men or machinery or the going organization to do work of this nature; it is beyond the normal maintenance work we do. We have no rule in our Agreement requiring us to build up temporary organizations to do occasional jobs of this kind, and it would be wholly unreasonable to expect us to do so. This claim should be denied because it is not supported by any rule in the Agreement. It is an attempt to get a rule requiring us to do something we have not agreed to.

The Carrier has shown that the claim here presented has not been properly progressed on the property, and that the claim now before the Board is not one that has ever been handled on the property. The Carrier has shown that the claim is completely erroneous in material facts and that it should be denied. The Carrier has also shown that the work of building a new railroad line is not maintenance work, and is work that may properly be done by contract.

The Carrier prays that this claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: On or about January 18, 1949, the Carrier contracted certain work in connection with the raising of the Devil's River bridge and rebuilding the approaches, and making the necessary line changes in connection therewith, to the Allhand & Briley Construction Company who will hereafter be referred to as the contractor. The claim now before us is much broader than the contract actually entered into with the contractor. The record establishes that the only work performed by this contractor was the blasting out and removing of 80,000 cubic yards of rock and preparing a subgrade on the new line that had to be constructed. The opinion will necessarily be limited to this item.

The Carrier urges that the claim here made was not the claim handled by the parties on the property. It is true that the claim before us is broader then the dispute on the property as shown by the correspondence between the parties. The claim handled on the property was for time for all work performed at Devil's River bridge by the contractor. To the extent that the claim has been expanded on appeal from the claim as handled with the highest operating officer charged with handling such disputes, it is invalid as being an improper variance from the issues made up on the property. This leaves within the scope of the appeal the right of the Carrier to contract the blasting out and removing of 80,000 cubic yards of rock and the preparation of the sub-grade for the new track. The claim as filed is broad enough to include this issue and to this extent is not a variance from the issues handled on the property.

The general rule is that a carrier may not contract with others for the performance of work embraced within the scope rule of a collective agreement made with its employes. There are, however, certain exceptions to this general rule which necessarily exist and which have been recognized by this Board. Generally stated, the exceptions referred to permit the contracting of work where, in performing the work, there is need for special equipment not ordinarily used or possessed by the Carrier, or special skills not normally found in the B&B forces. The Carrier asserts in the present case that the rebuilding of the track in a different location is work not within the scope

of the Maintenance of Way Agreement. We do not concur with this view. The building of new grade and the construction of new track under ordinary conditions is within the scope of the Maintenance of Way Agreement. It is only when such new construction comes within recognized exceptions heretofore alluded to, that it can be said to be outside its scope. An examination of the facts in each case is ordinarily necessary to make the determination.

The work performed by the contractor involved a cut through solid rock. It involved blasting and the use of power shovels, large bulldozers and heavy dump trucks. It is the contention of the Organization that employes were available who could have operated these machines. We do not agree with the Organization that machine operators primarily engaged in operating bolt tighteners, tie adzers and other small machines are qualified to operate the machinery used by the contractor on this job. We do think that there were some employes shown by the record who could have performed the work. The skills involved were not such as would of itself warrant the Carrier in contracting the work.

The Carrier points out that the construction of new lines of railroad is no longer common on most railroads. In fact, it appears that more lines are being abandoned than are being constructed. The result is that ordinarily carriers no longer maintain equipment for this purpose or employes particularly qualified to perform this work, especially where unusual conditions are met in getting the work done. A carrier is obliged, of course, to maintain adequate forces that appear reasonably necessary to perform the work included within the scope of the agreement. It is not required to maintain forces to perform work that is not anticipated or out of the ordinary.

With reference to tools and equipment, the rule is somewhat similar. The Carrier is expected to provide the tools and equipment necessary to the usual and ordinary operation of the railroad. It is not required to have expensive equipment whose use is only occasionally needed. It is the function of the management, in the first instance, to determine the kind and amount of equipment needed. Its failure to provide tools and equipment common to the operation of the railroad is not ordinarily a justification for contracting out work that is within the scope of the agreement. On the other hand, the need for expensive equipment for which it has only occasional use may justify a farming out of the work to persons having the equipment to perform it.

The record in the present case shows that the contractor used a 2-yard power shovel, a 1½-yard power shovel, three large size bulldozers and a number of dump trucks with a capacity as high as five tons. The Carrier's officers state that the Carrier does not have any such equipment and that it would have no general use for this heavy machinery. There is evidence that the two power shovels used would cost $95,000 and that their use would be required not to exceed once in each five to ten years. The width of these power shovels and bulldozers exceeds that which can be used in ordinary railroad work. We think the evidence shows that the equipment required was special and costly, and such that the Carrier could not be expected to buy in view of the very limited use to which it could be put.

Under such circumstances, it was not contemplated by the parties when the agreement was made that the work of blasting and moving the 80,000 cubic yards of rock would come within the scope of the agreement. The removal of such a quantity of solid rock was so unusual and the equipment used to accomplish it was so large, special and costly that we cannot reasonably say that it was included within the scope of the agreement. Under such circumstances, it cannot be said that the Carrier failed in its obligations to its B&B forces in contracting the work as it here did.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of December, 1950.