

Award No. 5304
Docket No. MW-5212

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

SOUTHERN RAILWAY COMPANY

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

(1) That the Carrier violated the effective agreement during December, 1948 when it assigned individuals employed by the Universal Engineering and Waterproofing Company to apply water-proofing paint to the subway station at Danville, Virginia;

(2) That Bridge and Building Foreman J. L. Wood and the following members of his Crew

R. L. Elder

C. D. Perry

J. G. Kidd

N. W. Yeatts

E. V. Vodem

B. C. Wills

H. R. Wills

R. E. Barbour

be paid at their regular straight time rate of pay a proportionate amount equivalent to the time consumed by the contractor's forces in performing the work referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: During the month of December, 1948, the Carrier assigned the work of painting the subway station at Danville, Virginia to the Universal Engineering and Waterproofing Company.

The employees of the contractor that were assigned to the above referred to work are not covered by the effective agreement between the Carrier and the Maintenance of Way Employees.

Approximately one hundred hours were consumed by the contractor's forces in completing the work in dispute.

Claim was filed with the Carrier in behalf of Foreman J. L. Wood and 8 members of his Crew and claim was declined.

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

POSITION OF EMPLOYEES: The Scope Rule of the agreement reads in part:

(11) The Board is empowered **only** to decide the dispute in accordance with the specific provisions of the effective agreement here in evidence. The work here claimed not coming within the scope of the effective agreement the Board is without authority to award the payment claimed.

(12) Former awards of the Third Division, dealing with disputes in analogous situations where work is performed by outside contractors, have held that claims which alleged that certain portions of such contract work come within the maintenance of way scope rule were not valid. (See Awards 4753 and 2819.)

(13) The Brotherhood is here attempting to cause the carrier to pay or deliver or agree to pay or deliver money in the nature of an exaction for services which were not performed by the claimants. Under the Labor Management Relations Act of 1947 and the Communications Act of 1934, as amended, demands such as this are unlawful.

For all of the reasons given the claim should in all things be denied and respondent respectfully requests that the Board so decide.

All relevant facts and arguments involved in this dispute have heretofore been made known to the employees' representative.

Obviously the employees fail to realize that they as well as their employers, are engaged in a highly competitive business. The more expensive they make railroad operations, the less work there will be for them and other railroad workers to perform.

OPINION OF BOARD: In December, 1948 the Carrier made a contract with the Universal Engineering and Waterproofing Company for the performance of repair and rehabilitation work in the waiting room, the stairwells leading to the waiting room and the underpass at its passenger station at Danville, Virginia.

In general, the work consisted of concrete chipping, cleaning concrete and reinforcing rods, reinforcing with wire mesh, application of gunite concrete, installation of copper expansion joints in stairwell cracks, removal of paint and application of "Perm-O-Seal" sealer followed by a coat of "Perm-O-Morotex" coating.

The contractor performed the work during the period from December 9 to and including December 23 and furnished all labor, materials and equipment. The contractor apparently specializes in waterproofing service of this sort and uses patented materials which it refuses to sell unless applied by its own forces trained to mix two different products on the job.

The Carrier's submission shows the performance of about 86 similar jobs by the same contractor at various localities over the Carrier's system during 1942 to date, mostly on passenger stations and office buildings. Of these 86 jobs, 39 were on the Southern Railway proper and 9 of the 39 were performed between 1943 and 1949 at stations adjacent to Greensboro, North Carolina. The Organization does not challenge the existence of the practice, but denies knowledge of it and asserts that the prevalence and regularity of the practice suggests the need for a regular water-proofing crew in the Maintenance of Way Department.

There is no showing of any emergency or labor shortage; and no Maintenance of Way forces were used, although the contractor did employ some local men.

The claim is limited to the right to apply waterproofing paint to the underpass and does not include any of the other work above described.

FIRST: It is well settled by numerous awards that, as a general rule, a Carrier may not contract out work covered by its collective bargaining agreements.

It is equally well settled that work may be contracted out when special skills (Awards 3206 and 4712; compare Awards 4158, 4701 and 4920), special equipment (Award 5151; compare Awards 4671 and 5227) or special materials (Awards 757, 3839 and 5044; compare 4921) are required; or when the work is novel (Awards 2465 and 3206; compare Award 4671) or of great magnitude (Award 5151; compare Award 4760); or when emergency time requirements exist (Award 5152; compare Award 4888), which present undertakings not contemplated by the agreement and beyond the capacity of the Carrier's forces.

The work contracted out is to be considered as a whole and may not be subdivided for the purpose of determining whether some parts were within the capacity of the Carrier's forces (Awards 3206, 4776 and 4954).

The question is one of managerial judgment which is entitled to weight, but the burden of proof is on the Carrier to establish by factual evidence that the work was justifiably contracted out in all the circumstances (Awards 2338 and 4671).

SECOND: The work contracted out here was maintenance and repair work on property devoted to the Carrier's business. It therefore falls within the broad contours of the Scope Rule which is general in terms and contains no exceptions.

The work claimed is confined: first, to the underpass only, which excludes the passenger station; and second, to the application of paint, as distinguished from a general waterproofing job.

When the claim involves subdividing the job, as this one does, both as to the locality and extent of the work, a denial seems clearly in order (Awards 3206, 4776 and 4954).

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 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 5th day of April, 1951.