Award No. 5485

Docket No. MW-5412

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Glenn Donaldson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO GREAT WESTERN RAILWAY COMPANY

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

(1) The Carrier violated the effective agreement by assigning to Stolz Construction Company the work of building an extension to a culvert near Mile Post 278-12, New Hampton, Iowa, during October, 1949;

(2) All Bridge and Building employes holding seniority in Group 5 on the Minnesota Division—Main Line be compensated at their pro rata rate of pay an equal proportionate share of the total man hours consumed by the contractor's forces in the performance of the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On or about October 19, 1949, the R. A. Stolz Construction Company, New Hampton, Iowa, was assigned to build an extension to an existing concrete culvert located at or near Mile Post 278-12, New Hampton, Iowa.

The extension built by the General Contractor is 18 feet in length, 10 feet, 8 inches in width and 9 feet, 4 inches in height. The apron or floor of the culvert was also extended for a distance of 14 feet.

The walls, ceiling and floor of the extension are 16 inches thick, steel reinforced.

On October 29th, protest and claim was filed in behalf of the Bridge and Building employes on the Minnesota Main Line Division.

Claim was declined.

The agreement in effect between the two parties to this dispute, dated April 15, 1940, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Scope Rule of the effective agreement dated April 15, 1940, reads as follows:

> "Rule 1. The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employes in the Maintenance of Way and Structures Department but not including:

7. Carrier's B&B employes on the Minnesota Division-Main Line were otherwise engaged during the period work in dispute was performed by Contractor's force and hence were not available to perform the work in dispute.

8. Claim is for duplicate compensation not specifically provided by the rules.

9. Failure of Petitioner to present and to support by facts any consistent theory which might entitle him to prevail.

Exhibits "A" to "F", inclusive, attached hereto and made a part hereof as if fully set forth herein.

OPINION OF BOARD: It is charged that the Carrier violated the effective Agreement by assigning work to a private contractor. The work in question was part of a larger project, that of extending a passing track. The consequent widening of the right of way necessitated likewise the widening or extension of an existing, steel-reinforced, concrete box culvert involved herein. The major project was assigned to a second private contractor. Because of the size and extent of the major project, the diversion of that work was not objected to by the Organization.

The Carrier defends its action upon the grounds that it did not have the equipment and employes available capable of doing this work. It contends that this was essentially a masonry and steel job and such work does not all within the scope of this Agreement. Carrier also relies upon past practice and calls special attention to the phrase we have underlined in the quotation below from the Memorandum of Agreement of April 16, 1940, reading:

> "It is agreed that in conformance with past practices the Carrier will not contract any work in the Maintenance of Way and Structures Departments that it is fully equipped to perform with its own forces and has available employes who are capable of doing the work."

In respect to the equipment, the Organization supplies a snapshot of a common type, portable cement mixer, which, with picks, shovels, hammers, saws, etc., tools customarily used by claimants, constituted the equipment used on the culvert extension project, it contends. It asserts that Carrier possesses two such mixers, one approximately thirty miles away, or that it could have readily rented one. The Carrier denies that it has had any cement mixers since ready-mix concrete became available.

In answer to Carrier's contention that it did not have available employes, the Organization says that while its ranks have been drastically reduced in recent years, the instant need was known for more than a year and the rules made provision for prompt recruiting of needed help. The Organization maintains that Carrier's Bridge and Building carpenters or mechanics could have placed the steel-reinforcing rods and customarily do. Carrier challenges the Organization to produce evidence that the Bridge and Building employes had ever constructed a steel-reinforced, concrete box culvert on this property, stating that is the work of masons and steelworkers which crafts it has never employed for reason that the volume of work of this character is so insignificant on this small railroad that it does not justify the maintenance of such a staff. This, the Carrier maintains, is the reason why masonry, concrete, iron and steel work is not embraced by the Agreement and accounts for the reference to past practice in the Memorandum of Agreement, previously quoted. The Organization meets the challenge in part. While failing to show that B&B employes had constructed culverts, evidence is submitted of what it contends is comparable work, namely fuel stations, turntable pits and coal loading pits, which work has been done by the Carrier's own forces.

The rules to be applied to the above facts are succinctly and accurately stated in recent Award 5304, reading as follows:

> "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.
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> 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.
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> 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)".

In view of the facts of this case, which are set forth at some length, supra, the only factor of those listed above which merits consideration here is that the work involved special skills and Carrier's forces were incapable of doing the work for such reason. Carrier's contention that the construction was essentially work of masons and steel workers of which it had none is met by the Organizations's claim that its Bridge and Building carpenters or mechanics customarily do similar, if not identical, work, naming several projects wherein reinforced concrete was required. The job description of this classification appears in Rule 51 (c) reading:

> "An employe assigned to **construction,** repair, maintenance or dismantling **of buildings, bridges or other structures** (except the iron or steel work), **including the building of concrete forms, erecting false work,** etc., or who is assigned to miscellaneous mechanic's work of this nature, shall constitute a Bridge and Building carpenter and/or mechanic." (Emphasis supplied.)

The record reveals that Carrier had in its employ 26 members of this classification during October, 1949. The project was comparatively small; the iron or steel work involved was incidental and on the ground, as distinguished from steel structural framing above ground. The necessity for the work was allegedly known over a year in advance of construction so opportunity existed for recruiting an experienced lead man, or instructing Carrier's forces if need existed, and, finally, work of comparable kind is shown to have been done by Carrier's own forces.

Carpenters often work with blueprints and we must assume that at least a rough design of this work was made available to whoever did the work. To a greater extent than with most crafts, a carpenter is a composite of the building trade skills (Award 5227). Steel-reinforced concrete work is not new or novel. Lest the occupants of this classification be reduced to screen-door repairers and the Agreement be deprived of any force, some respect for the craft abilities must be recognized. After consideration of all the facts and circumstances of this case, we find that it is work which Carrier's forces were capable of performing and was work within the scope of the Maintenance of Way Agreement.

Equipment lack is clearly not an issue. It is disposed of by the statement of facts.

We have frequently ruled that Carrier was not required to divide a project into its component parts so that certain work be retained for its own forces. Award No. 4776 is an example of time breakdown; Award No. 5304 is an example of job breakdown. Carrier attempts to avail itself of such line of rulings by arguing that the culvert job was a component part of the overall project of extending the running tracks, and not divisible. We find that the two jobs were separable and bore no relationship one to the other within the meaning of our past awards. Carrier recognized their separability by assigning the major project to one contractor and the incidental culvert work to another. Such is often done in connection with highway construction which is somewhat similar.

Concerning availability, the record shows that while the culvert project was under way, the Carrier's Bridge and Building crews were engaged in routine, deferrable work, hence we must find that they were available within the contemplation of the Agreement of April 16, 1940. Further, Carrier is obligated to maintain adequate forces to perform the work included in the Agreement which can be anticipated and is not out of the ordinary (Award 5151). Claim (1) is sustained.

As to part (2) of the claim, whereby compensation is asserted for certain Bridge and Building employes because of the violation of the Agreement, past practice merits consideration.

Agreement was first had between the parties on April 15, 1940. Both before and after such date, Carrier's Exhibit "F" shows that a multitude of small jobs have been contracted for with outsiders, notably sidewalks and concrete flooring. Since 1940, the Organization has seemingly acquiesced in such Scope Rule violations and no notice was given of a changed policy prior to the filing of this claim. Under the circumstances of this case, we believe that part (2) of the claim should be denied.

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 has been violated.

AWARD

Claim (1) sustained.

Claim (2) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of September, 1951.