

Award No. 5840

Docket No. MW-5773

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO AND NORTH WESTERN RAILWAY COMPANY**

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

(1) That the Carrier violated the agreement when they assigned General Contractor Henry Danischefsky to remove and replace concrete sidewalks, remove timber on retaining wall and replace with concrete, and perform necessary excavation and backfill work in connection therewith at Bridge No. 435 Pine Street, St. Francis, Wisconsin during the period October 11, 1949 to December 12, 1949;

(2) That the Bridge & Building forces regularly assigned to perform bridge and building work, and who hold seniority on the district where the above listed work was performed, be compensated at their respective straight time rate of pay for an equal proportionate share of the hours consumed by the contractor's forces in the performance of the work.

EMPLOYES' STATEMENT OF FACTS: The City of Milwaukee filed a petition with the Public Service Commission of Wisconsin, requesting that a new bridge be constructed to replace the existing spans carrying five tracks of the St. Francis cut-off over Pine Street, Milwaukee, Wisconsin.

Hearings were held by the Commission, and the Carrier was ordered to replace timber bulk-heads adjacent to the sidewalks to prevent the water and dirt running onto sidewalks and to install drainage system to carry off the water.

During the period, October 11, 1949 to December 6, 1949, the west timber bulk-head, 136 feet long and 3 feet to 5 feet high, was replaced by reinforced concrete retaining wall 155 feet long and 7 feet high.

The east timber bulk-head, 204 feet long and two and one-half to four and one-half feet high, was replaced by 133 feet of reinforced concrete retaining wall, seven feet high and eighty feet of concrete retaining wall, four feet high.

All of the above referred to work was performed on the right-of-way of the Railroad Company, and was assigned to General Contractor Henry Danischefsky.

Claim was filed with the Carrier in behalf of the Bridge and Building employes on the Milwaukee territory, Wisconsin Division, and claim was declined.

The facts and data used herein in support of the carrier's position have heretofore been made known to the authorized representatives of the employees and made a part of the particular question in dispute.

If the Board holds it does have jurisdiction in this case, it is the request of the carrier that an oral hearing be held before the Board in order that the carrier may, if deemed necessary, submit further argument in support of its position.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim here is that the Carrier in violation of the controlling agreement let a contract for the removal and replacement of concrete sidewalks, the removal of timber retaining walls and replacement thereof with concrete and for necessary excavation and backfill work in connection therewith at Bridge No. 435 Pine Street, St. Francis, Wisconsin, and thus deprived the Bridge and Building employees covered by the agreement with the Brotherhood of Maintenance of Way of work to which they were entitled. The Brotherhood claims on behalf of the employees as compensation or penalty an equal and proportionate share of the man-hours consumed by the contractors forces engaged in the work.

The question for determination is that of whether or not this was work encompassed by the Agreement with the Carrier.

Whether or not it was so encompassed depends upon the content of the Scope Rule, its interpretation and application and the facts as disclosed by the docket.

The part of the Scope Rule defining employees of the class or classes involved here is the following:

"Employees (not including supervisory officers above the rank of foreman) engaged in or assigned to building, repairs, reconstruction, and operation in Maintenance of Way work."

It is to be observed that the work of the Department is not defined in the Rule. It, therefore, becomes necessary to ascertain the definition or definitions from usage, custom, tradition and the disclosed facts bearing on the subject. This is the approach which was taken in numerous previous awards cited by the Carrier and the Organization. The concern here, however, is limited to the definition of such work as was performed under the contract.

As has been pointed out in a number of awards there is and can be no hard and fast definition of work which shall be performed under the Maintenance of Way Agreement. Likewise as also pointed out whether work shall be required to be performed under the Agreement or let under contract is dependent at times and under certain circumstances upon surrounding conditions and the character and extent of the work.

Instances of which the following are a few wherein work under contract has been approved are where there was an inadequacy of skill on the part of covered employees; where the parties have pursued a mutual course in allowing it to be done; where proper equipment was not available; where the work involved a unit project involving work which was in part covered by the Agreement and in part not so covered.

Doubtless a part if not all the work involved here could have been performed by the Maintenance of Way employees had sufficient manpower been assigned and if appropriate equipment had or could have been procured. It does not necessarily follow though, either that the work belonged to the employees under the Agreement, or if it did that the Carrier under the conditions and circumstances was not authorized to let it under contract.

The work was the construction of a new bridge to replace existing spans carrying tracks of the railway over a public street in the city of Milwaukee, Wisconsin. It was required by the Wisconsin Public Service Commission. Completion was required prior to January 1, 1950. Some of the work was required on the Carrier's property but most of it was on a public street. It appears reasonable to say that because of its essential character and the imposed terms and conditions under which the work was required to be performed that it was essential that it be done as a whole rather than piecemeal. All of the work could not have been done by Maintenance of Way employees since plumbing was required and the ordinances of Milwaukee required that the plumbing should be done by licensed plumbers. It is not disclosed that there were any licensed plumbers in Maintenance of Way or that the parties intended that there should be.

In the light of all the facts and circumstances as disclosed and previous awards of this Division, the conclusion reached is that the Carrier did not violate the Agreement when it let the work involved to a contractor.

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: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of June, 1952.