Award No. 6199
Docket No. MW-6122

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Thomas C. Begley, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SEABOARD AIR LINE RAILROAD COMPANY

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

(1) That the Carrier violated the agreement when it contracted construction, remodeling and repair work on structures at West Jacksonville, Florida, to the Lawrence C. Pearce Co.;

(2) That all employes holding seniority on the Carpenter Gangs of the Carrier's North Florida Division be allowed pay at the applicable straight time rate of pay for an equal proportionate share of the total man hours consumed by the employes of the Lawrence C. Pearce Co. while engaged in the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Carrier contracted with the Lawrence C. Pearce Company, general contractors, Jacksonville, Florida, for the construction of an addition to the machine shop; renewal of the concrete floor in the Main Machine Shop; remodeling of a boiler shed together with construction of an addition thereto and for the construction of concrete runways, all work performed at the Carrier's shops at West Jacksonville, Florida.

All of the above listed work was assigned to an outside contractor without any prior negotiation or agreement with the duly designated representative of the Brotherhood of Maintenance of Way Employes, with whom the Carrier had previously contracted for the performance of such work.

The Carrier declined claim and all subsequent appeals.

The agreement in effect between the two parties to this dispute dated July 1, 1941, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The pertinent portion of the Scope Rule reads as follows:

"Rule 1

SCOPE:

These rules cover the working conditions of employes of the classes in the Maintenance of Way Department, represented by the

cover. This claim involves only that part of the project which comes within the scope of the Maintenance of Way Agreement, i.e., the construction of the building itself."

Whereas the instant claim covers all items of work performed by Lawrence C. Pearce Company, which included plumbing, ventilation and electrical work, steel work, etc. This is an inconsistent position but is understandable when viewed in the light of the Organization's campaign to file various types of claims with the Board and hope to therefrom secure a new Scope Rule.

It does not require much study of the items of work listed in Carrier's Statement of Facts to conclude that this was not work that would be or could be performed by Carrier's carpenter forces.

The claim of the Organization, which was initially filed with Division Engineer on May 4, 1951, in behalf of employes of Carpenter Gangs under certain named Foremen, changed in appeal to Superintendent to cover employes of all Carpenter Gangs on the North Florida Division, and changed in filing with the Third Division to include all employes holding seniority on the Carpenter Gangs on the North Florida Division, is now very unusual in that it would include both employes working on all Carpenter Gangs and those who are off on leave of absence. There are several such men in military service who retain their seniority. Carrier does not see how these men could have any claim for any work on the property because they certainly could not be classed as being available for work. None of the other unnamed claimants on the North Florida Division were adversely affected on account of the project being contracted. They were all fully and regularly employed on MW&S work during period of this project.

In addition to full employment of such regular building or carpenter forces, including the regularly assigned gang at West Jacksonville, an extra Carpenter Gang was put on at West Jacksonville on February 5, 1951, (which is still employed) to take care of additional maintenance work that arose in connection with the new shop facilities.

As pointed out by Carrier there has been no violation of the agreement with Organization, there is no merit to the claim and Carrier respectfully requests that it be denied.

Carrier affirmatively states that all data contained herein has been made known to or discussed with representatives of the Organization.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier contracted with Lawrence C. Pearce to construct, repair and remodel certain buildings at the West Jacksonville, Florida, yard. The work was started on November 20, 1950, and completed in August, 1951. The Employes claim that this work was contracted to an outside contractor without negotiation, approval or consent. The Employes claim that Rules 1 (Scope) and 3(a) (Seniority) were violated. The Employes' claim involves the work performed in making the addition to the Machine Shop; repairing the floor in the Machine Shop; remodeling the Boiler Shed and addition thereto; and concrete runways.

The Carrier states that due to the expansion of the diesel-electric locomotives and application of accelerated program of complete system-wide dieselization of locomotive operation, it was necessary to provide comparable diesel shopping facilities at West Jacksonville, Florida, its major shop. The Carrier states it would have been simple to have had this work performed under one contract but to save time and expedite completion of the several units, it was split up and handled by several contractors. The Carrier states that its own forces, had they been available, were not qualified to perform the whole or a major part of this work.

The Carrier does not state that it attempted to enter into an agreement with the employes to farm out the work outlined in the claim. The Carrier has not shown by any proof that the employes involved in the claim could not have performed this work. As was stated in Award 4888 "the Carrier has contracted with these employes involved for the performance of all the work that is historically and customarily performed by this class of employes. To enter into a second contract with persons not within the collective agreement without first negotiating with the Organization has been many times condemned by this Board." The explanation of the Carrier as to the need of the work, the necessity of using its employes on other work, or the employes' inability to perform the work without proof thereof, does not excuse the failure of the Carrier to negotiate with the party with which it first contracted for the performance of the work. Even though the Carrier states that this was a major project and charged to its capital account, it did see fit to contract the work out to several contractors rather than one contractor. This would indicate that the project did lend itself to a division of the work into component parts and that part of the work which fell under this agreement could have been performed by its maintenance of way employes. Therefore, it would not fall under awards of this Board that state claims involving a small integral part of the work contracted out are not sustainable if the entire project, considered as a whole, was properly subject to be contracted out (Awards 2819, 3206, 4753, 4776, 5304, 5521). Furthermore the nature of the work farmed out is not such as to bring it within any of the exceptions to the general rule announced by this Board on numerous occasions. These exceptions refer to special skills, special equipment, special materials or work of great magnitude or emergency. None of these exceptions is present to the extent that it should be considered in this claim.

The Carrier violated the contract when it farmed out the work above mentioned in this Opinion which should have been performed by its maintenance of way employes and part (1) of the claim is sustained to that extent.

The monetary claim will be sustained for an equal proportionate share of the total man-hours consumed by the employes of the Lawrence C. Pearce Company, at the pro-rata rate, while engaged in the work referred to in this opinion.

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, 1943;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier violated the agreement.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 30th day of April, 1953.

DISSENT TO DOCKET MW-6122, AWARD 6199

The undersigned dissent from this award principally, but not exclusively, because the collective bargaining agreement involved cannot and should not be construed as giving any such exclusive and sweeping right to the performance of work as the award seeks to establish and recognize; and the claims for money payment are too generally presented and too nebulously limited to permit of definite application, and the award, in effect, creates penalties in favor of the employes who are not shown as having suffered any hurt or damage, even though it might be assumed, but it is not conceded, that there was a violation of such collective bargaining agreement.

The docket discloses that all B&B employes were gainfully employed in accordance with the Agreement; in fact, the record discloses that the force at West Jacksonville was augmented by the establishment of an additional B&B gang, made necessary by reason of this major construction project involving an expenditure of several hundred thousand dollars.

There is no provision in the Agreement for penalty payments where no proof of loss is shown.

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ W. H. Castle

/s/ R. M. Butler

/s/ E. T. Horsley