

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Mortimer Stone, 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 it assigned Contractors Foster-Smetana, Steel Erector Builders of Omaha, Nebraska to build the stock yards at Norfolk, Nebraska during the period November 4, 1950 to November 27, 1950;

(2) That the Bridge and Building employees holding seniority on the Nebraska Division be paid at their respective straight time rates of pay for an equal proportionate share of the total man-hours consumed by the contractor's forces during the time they were engaged in the work referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: In preparation for the construction of stock yards at Norfolk, Nebraska, the Carrier assigned the necessary grading work in connection therewith to an employee covered by the scope of the effective agreement and assigned its engineering forces to make a survey of the site and to set the required ground stakes necessary for the guidance of the employees assigned to the yard construction.

The Carrier furnished all material used in the construction of the instant stock yards but contracted with a contracting company for the labor necessary to build the stock yards including an operator assigned to operate a Fordson tractor which was equipped with a power auger to expedite the digging of the required post holes.

The tractor which was furnished by the Contractor is of the same type owned and operated by the Carrier at other points, except that Carrier did not own a power auger such as was attached thereto.

Power augers which are susceptible to attachment to the Carrier's tractors are available for purchase or rental. Power augers of the type used by the contractor's forces retail for \$265.00 to individuals and are available to railroad companies at a substantial discount because of the volume of their purchases.

In addition to being readily adaptable to a multitude of uses in Bridge and Building work, such power augers could be efficiently utilized in the economical erection of vast mileage of right of way fences installed and maintained by the Carrier.

An additional factor must also be considered in this case in that the Carrier was faced with the problem of having feed and watering facilities for livestock as soon as possible. The Carrier did not have sufficient manpower to carry on its present maintenance work and, in addition, construct the stock yards in question.

The agreement in effect between the Carrier and the Brotherhood, dated January 1, 1947, and subsequent amendments and interpretations, are by reference made a part of this statement.

The facts and data used in support of the Carrier's position have heretofore been made known to the authorized representative 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: This claim stems from the contracting out of a twenty pen stock yards construction. Carrier forces did the grading and surveying, set stakes for location of posts and furnished all materials, including creosoted posts, sawed lumber and prefabricated steel gates and feed racks for the construction, which apparently consisted chiefly of a seven-foot fence with prefabricated feed racks and gates. The post holes were dug with a power auger powered by a Fordson tractor, such as used elsewhere by Carrier.

The Scope Rule includes employees "engaged in or assigned to building, repairs, reconstructions, and operation in the Maintenance of Way Department." Thereunder, it would appear that work customarily performed within the skills of Maintenance of Way employees and within the area of the rule should be performed by them. The word "building" would seem to make the Scope Rule include new construction as well as repair and maintenance.

On Carrier's line such stock yard facilities are necessary equipment for feeding cattle in transit and we think their construction is work normally belonging to employees. The burden is on Carrier to justify contracting it out by definite proof. Award 4671. The total cost of the construction here involved was \$26,650.00. The auger furnished by the contractor was of a type retailing for less than one percent of that amount, which would not have been an excessive expense. Such stock pens are not works of magnitude from the railroad viewpoint, nor is the construction here involved shown to require peculiar skill.

The fact that employees were fully employed at other work is no defense to the claim. See Award 4869. Carrier asserts that it was unable to procure the number of employees necessary for the work. The record shows that the largest number employed by the contractor was nine; that the work required only a little over one month's time, and that the contractor was able to obtain sufficient laborers locally at a lower rate of pay than Carrier paid. So far as appears, Carrier did not bulletin the job, nor did it confer with employees. Therefore its contention fails. Awards 4671, 4760.

Carrier says it was faced with an emergency, but it knew in July 1949 that its contract for use of the old yard would end September 1, 1949, yet did not provide for contractor to start construction until November 4, 1950. That does not show emergency.

Carrier also relies on past practice and points to construction of various stock yard paving jobs by contract, but none are shown to have been like or analogous to the work here involved.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 12th day of June, 1953.

DISSENT TO AWARD 6234, DOCKET MW-6181

This Award and its accompanying Order trespass on the face of justice if only for the reason that the majority say this: "The fact that employees (the claimants here) were **fully** employed at other work is **no defense** to the claim." Our office, conferred by statute, does not go beyond the interpretation of rules, rates of pay and working conditions. As to the rules, it cannot be shown by the majority that their violation calls for payment of "an equal proportionate share of the total man-hours consumed by the contractor's forces during the time they were engaged in the work referred to". If the majority could show that such a payment is provided for in the rules, it would amount to a penalty. A contract provision for a penalty disproportionate to the damage experienced is wrong per se (Williston on Contracts, par. 777, p. 2184). Therefore in the so-called interpretation of the rules here, the Award not only injects a penalty that is wholly absent from the rules, but if that very penalty provision were present in the rules, it would be unenforceable. This Board, in the experience of its First Division, has adhered in a long line of Awards, all cited in this proceeding, to the proposition that the claimant must have lost work in order to make out a case for recovery. The majority found here that the fact the claimants were **fully employed** at the same time is no defense!

As to the working conditions: The majority found that the undisputed past practice of constructing "various stock yard paving jobs by contract" was not controlling. Must the Carrier have shown that it had built, by contract, two or more identical stock yards at the exact contract cost of \$26,650 in order to avail itself of a controlling practice? The majority do not say that the showing of any practice was without effect because the rule involved is unequivocal—they merely say that the construction of various stock yard paving jobs by contract is not analogous to the work of constructing a stock yard. Therefore, the rule or rules permit the contracting of "various stock yard paving jobs" but forbid the construction of a stock yard.

Here the Carrier is ordered to pay a bonus amounting to a penalty grossly disproportionate to damage which the claimants did not experience because they were fully employed. In **Republic Steel Corp. v. Labor Board**,

311 U. S. 7, the Supreme Court said, speaking of a labor statute directed to the same general purpose as our Railway Labor Act, "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.'"

Limited as we are here to the adjudication of disputes growing out of the interpretation or application of Agreements, we have no discretion, at all, to "devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act."

This Award and those few with which it apparently seeks to conform are beyond the realm of interpretation and show the need for a response to lawful jurisdiction.

/s/ E. T. Horsley

/s/ W. H. Castle

/s/ R. M. Butler

/s/ C. P. Dugan

/s/ J. E. Kemp