Award No. 6628
Docket No. MW-6638

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY (Pacific Lines)

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

(1) That the Carrier violated the current working agreement between the Southern Pacific Company (Pacific Lines) and the Brotherhood of Maintenance of Way Employes, when they let out to contract or otherwise the construction of certain steel frame and corrugated buildings in the Retarder Yards at Roseville, California, on or about June 18, 1951;

(2) That the employes holding seniority in the Bridge and Building Sub-department on the Sacramento Division be paid at their respective straight time rates of pay for an equal proportionate share of the total number of man-hours consumed by the contractor's forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Coincidental with the construction of a Retarder Yard at Roseville, California, thirteen corrugated iron buildings were constructed, eleven of which were constructed in their entirety by the Carrier's forces.

Two of the thirteen buildings were constructed in part by the Carrier's forces and in part by forces of a contractor. The Carrier's forces constructed the concrete floors and concrete foundations and performed all necessary plumbing work. The contractor's forces erected the steel framework and applied the necessary walls, roof, doors, and windows.

The Employes protested the assignment of the work to a contractor and filed claim as herein involved.

The Carrier declined claim and all subsequent appeals.

The Agreement in effect between the two parties to this dispute dated September 1, 1926, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Carrier's declination of the claim is based on the allegation that the two buildings on which a portion of the

CONCLUSION

The carrier asserts that it has conclusively shown that its decision to contract out the work involved was fully justified and did not contravene any provision of the current agreement.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

The carrier reserves the right if and when it is furnished with the submission which may have been or will be filed ex parte by the petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims that may be advanced by the petitioner in such submission, which cannot be forecast by the carrier at this time and have not been answered in this, the carrier's initial submission.

(Exhibits not reproduced.)

OPINION OF BOARD: On March 1, 1951, the Carrier was issued a certificate of necessity by the Office of the President of the United States, reciting that the construction of an integrated car receiving and departure classification yard at Roseville, California, was essential to the national defense. This certificate authorized the Carrier to amortize the cost of this improvement, with resulting tax savings, providing the project was gotten under way within 120 days.

A part of this improvment involved the erection of 13 corrugated iron buildings of various sizes. The two largest of these structures were the compression house and the storage building, which the Carrier planned to use for storing signal and electrical materials while the improvement was under way.

On April 18, 1952, the Carrier placed an order for materials for 6 of the 13 proposed buildings with the American Rolling Mill Co., but that Company advised that it could not perform in time to enable the Carrier to protect its starting deadline. Carrier says that it then made an effort to find the materials for the two buildings here involved elsewhere, but that the only timely source of supply that it could find was the Michel & Pfeffer Iron Works, and that it would only accept the order on the condition that it furnish the labor necessary for erection. Carrier therefore used its maintenance of way employes to construct the foundations and floors and install the plumbing in these two buildings and contracted with Michel & Pfeffer to furnish the materials and erect these buildings. Work on the two buildings was started within 120 days from March 1, and completed on July 13, 1951. The amount paid this contracting firm for materials and labor was $11,014. All labor on the 11 other structures was performed by Carrier's maintenance of way employes, and the aggregate cost of the entire project, of which the 13 buildings was a comparatively small part, was $4,591,500.

The Organization has correctly said that when a carrier contracts out work covered by the rules of the agreement it must be able to establish facts showing the impracticability of performance by the employes by very definite proof, citing Award 4671 and others. Measured by this test, we think this Carrier has discharged that burden. We are here confronted with a problem involving public policy directly related to the national defense. That is to say, when the Government gave the Carrier an opportunity for a tax advantage growing out of a capital expenditure of more than $4,500,000, on condition that the work commence within 120 days, it must be assumed that the public welfare required that the project be started within that time. The evidence convinces us that the Carrier acted with reasonable diligence and in good faith in its effort to purchase outright the necessary materials, and having failed in that regard it was justified in entering into the contract of which the Organization complains. We do not know how much of the $11,000 paid Michel & Pfeffer was for materials and how much went for labor that

would have been performed by the employes under normal conditions; but the amount involved could not be so large as to suggest a selfish motive on the part of the Carrier. After the Carrier met the deadline imposed by the Government, it recognized the right of the employes to the labor involved in the erection of the other 11 buildings.

The Employes also assert that if the Carrier felt that it was justified in contracting out the work in question it should have first negotiated that matter with the Organization. We agree that when a carrier relies upon such things as, for example, the unavailability of manpower or a lack of skill or capacity on the part of the employes with whom it has contracted, it should confer with their representatives with a view of ascertaining whether its needs may be met, before contracting with outsiders. We would not want to go so far, however, as to hold that there is a positive obligation on a carrier to negotiate with the organization respecting the matter of where or upon what conditions essential materials may be procured to meet the time requirements of a governmental directive.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 14th day of May, 1954.