Award No. 7442
Docket No. MW-7361

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dwyer W. Shugrue, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

UNION PACIFIC RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it assigned the work of constructing a warehouse building, steel tanks, and retort and other work incidental thereto at The Dalles Timber Treating Plant to a contractor whose employes hold no seniority rights under this Agreement;

(2) B. & B. Foremen C. F. Nearman and R. L. Willingham; B. & B. Carpenters Julius Swelba, Earl D. Bangs, F. F. Foster, Fred Holmquist, J. Rissi, William Berry, Edwin Hill, A. W. Toney, C. A. Elkinton; B. & B. Helpers V. M. Calavan, D. H. O'Connell, C. M. Dragne, and W. L. Spangler each be allowed pay at their respective straight-line rates for an equal proportionate share of the total man-hours consumed by the contractor's forces in performing all carpenter work referred to in part (1) of this claim;

(3) Painter Foreman W. E. Stitt and the members of his gang as reflected by the payroll for the last half of August, 1953, each be allowed pay at their respective straight-time rates for an equal proportionate share of the total man-hours consumed by the contractor's forces in performing all painting work referred to in part (1) of this claim;

(4) The senior steel Erection Foremen and the three senior steel bridgmen holding seniority on the seniority roster in which The Dalles, Oregon is located each be allowed pay for an equal proportionate share of the total man-hours consumed by the contractor's forces in erecting the steel tanks referred to in part (1) of this claim;

(5) Water Service Foreman M. G. Berry be allowed pay at his straight-time rate of pay for an equal number of hours as was consumed by the contractor's forces in performing all pipe work in connection with the steel tanks and retort referred to in part (1) of this claim.

members, who shortly thereafter, however, would have had to be furloughed for a lack of permanent employment.

Even on that basis, however, it would have been those unhired non-employes who would have suffered any loss occasioned by this method of handling the situation—not the present Claimants. Those unhired non-employes, who conceivably might have suffered some loss of earnings, were not within the scope of the Agreement nor protected by its terms. Since the present Claimants, themselves, have suffered no loss, whatsoever, they would, in any case, not be entitled to the unearned payments claimed herein.

The Board is requested to deny the claim.

All information and data contained in this Response to Notice of Ex Parte Submission are a matter of record or are known by the Organization.

(Exhibits not reproduced).

OPINION OF BOARD: The carrier owns a timber treating plant at The Dalles, Oregon, an independent industrial property, which as far back as December 31, 1933, has been leased to, and operated by various independent industrial firms. The incumbent lessee when the dispute here involved arose was the Baxco Corporation which was obligated to perform the maintenance work necessary to the plant and facilities. It had possession of the property and complete control and supervision of the industrial operations. Baxco is not limited in its operations to performing service exclusively for this carrier, but is permitted to provide timber treating service to any other customer, subject only to giving preference to the preparation and treatment of timber for the carrier according to the standards of the carrier's specifications.

With respect to additions, improvements, betterments or alterations, Section 9 of the lease reads as follows:

> "Section 9. No alteration, improvement, addition or betterment to the treating plant or any part thereof shall be made by the Contractor without the written approval of the Union Company. In the event the Contractor, for purposes other than the preparation and treatment of timber for the Union Company, desires any alteration, addition to or betterment of or other improvements to said plant or additional land for storage or other purposes and the making or acquisition of the same be approved by the Union Company, then all expense shall be borne by the Contractor and the making of such improvements and/or the acquisition (by lease or otherwise) of such additional land shall be covered by supplement to this agreement.
>
> "If any additions, betterments or improvements of or to the treating plant shall be desired by the Union Company, then the expense for such improvements shall be borne by the Union Company. Interest on investment and depreciation with respect to such improvements as may be made within the area shown shaded in yellow on Exhibit A shall be figured in the amount of the rental basis as provided in Section 13 hereof."

The employes contend that the carrier violated the effective agreement when it assigned the work of constructing a warehouse building, steel tanks, retort and other work incidental thereto at The Dalles Timber Treating Plant to a contractor whose employes hold no seniority rights under the agreement. The employes rely on Article I, the Scope Rule; Article 2, Rules 2 and 3 which set up positions and rates of pay; pertinent portions of Rule 28 of Article 4, having to do with seniority and Rule 29 of Article 4 listing Seniority Groups and Classes all of which are fully set forth in their submission. Employes have submitted as Exhibit "D" a list of 22 jobs done by B. & B. Gang No. 712 at the timber treating plant from July of

1949 to July of 1953 which are concerned by the carrier. The submission also quotes instructions to B. & B. and Water Service foremen as follows:

> "In connection with installation of tanks, retorts, etc., Work Order 6568 at treating plant;"
>
> "The Baxco Company are acting as contractors on this work, but will call upon us to perform certain work. Any such work must be clearly shown on Form 203, to above work order."
>
> "The Baxco Company have a code number for all phases of the work and this number must also be shown on 203. Contact Mr. Napier each time we do any work and secure the code number."

Employes contend they have exclusive right to any work performed at the timber treating plant that falls within the limitations of their Scope Rule. They contend here that they were competent to perform the services and that position is not seriously disputed.

The carrier contends that the facilities involved were not connected in any manner with railroad operations or the carrier's function as a common carrier; that the betterments or improvements were initiated and carried out for the benefit and use of the industrial firm at its specific request; that previous work accruing to the benefit of carrier's maintenance of way employes was enjoyed by them because the carrier acted as agent or contractor for Baxco and not because the Agreement required such work performance in the first instance.

The employes cited numerous awards of this Division and we have carefully examined them. Insofar as they support the principle that any work necessary in performing the functions of a common carrier belongs to such classes of employes as are protected by its collective agreements with them we are strongly in accord. The majority of them, however, with one exception to which we will refer later are not applicable to the situation confronting us here.

We read the operative section of the lease quoted above to permit the lessee, with the approval of the carrier, to construct additions or betterments with its own work force or in any other way it chose. It chose in this case to utilize for the most part its own work force, although it could have contracted for the job. The carrier, as we see it, did not assign or contract out the work nor was it responsible for it, it merely approved the design and character of the work for the lessee to perform. The right of approval in the lease is one for which a property owner may legitimately contract.

We find that the operation of the timber treating plant was not connected with railroad operations and that the scope of the agreement did not confer upon maintenance of way employes the exclusive right to perform new construction work of this nature and under the circumstances of this docket on property leased by the carrier in an industry not directly involved in railroad operations.

We believe the holding in Award 4945, cited as authority by the employes as well as the carrier, is controlling. There the carrier leased certain real property from a steamship company and upon which were located buildings, sheds, docks and other railroad facilities. The lease provided that the carrier would maintain the property described and such work would seem to fall properly with the maintenance of way agreement. But with respect to repairs and alterations, the lease provided that the steamship company would perform such work and the Board held that the right of maintenance of way employes of the carrier was wholly dependent upon the nature of the contract between the carrier and the steamship company and denied the claim. In citing this award we are mindful that there the carrier was lessee.

We cannot find that the work performed was work the carrier had to offer in the conduct of its business in performing the functions of a common carrier. We do not mean by this determination to in any way undermine the sound principle that the scope rule of the maintenance of way agreement provides that employes within that agreement shall perform all such work that the carrier has available. We say here that the carrier did not have work available which would bring the scope rule into operation.

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 was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of November, 1956.