Award No. 7600
Docket No. MW-7328

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it assigned the construction of a passenger depot at Pacific Junction, Iowa, to a contractor whose employes hold no seniority under the effective Agreement.

(2) All employes holding seniority on the Creston Division and in Groups 1, 2, 3, and 4 of the B&B sub-department and in Group 1 of the Water Service sub-department 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 the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: A new passenger depot at Pacific Junction, Iowa, was constructed by forces of a contractor whose employes hold no seniority rights under the effective Agreement. This work was assigned to outside forces without benefit of negotiations or agreement with the duly authorized and designated representatives of the Carrier's Maintenance of Way Employes.

The building is of simple wood-frame construction, 30' wide and 50' long, with a concrete foundation, concrete floor and asbestos siding. Lockers, cabinets, counters, water and sanitary facilities were also installed. All windows, window frames, doors, door casings and other mill work installed in this building were purchased and delivered to the work location in prefabricated and preassembled form and required only installation. Approximately 85% of the lumber used in this building was similarly purchased and delivered as precut to the desired and necessary lengths and sizes.

The contractor hired local labor to erect this new passenger depot, most of whom had no carpentry experience but who were reasonably able to drive nails straight so as to permit their assembling and fastening the precut and/or prefabricated and preassembled building material. Work on this building was started on April 27, 1953. On January 1, 1954, one entire Bridge and Building gang was laid off on the Division on which the disputed work was performed.

named employes for specified dates and locations. See Third Division Awards 549, 906, 1566, 2125, 3103, 4304, 4372, 4576. First Division Awards 11293, 11642, 12345, Fourth Division Award 206.

The Third Division has gone one step further by consistently holding that the organization must, not only name the individual, but must also show that the individual named suffered a loss. See Third Division Awards 906, 1566, 4177, 4305, 6285, 6288, 6391, 6417, 6455, 6528, 6529. In this case, the organization has refused even to name the individuals. How, then, can the organization show that anyone suffered a loss? There are two very good reasons why the Petitioner cannot show that any employe suffered a loss, namely: (1) No employe of this Carrier has, or ever had, the right to perform the construction work involved in this dispute. Carrier's Exhibit No. 1 is proof of this statement. Obviously, an individual cannot lose something that he never owned or ever had a right to in the first place. Thus, the employes represented by the Petitioner had nothing to lose and they lost nothing when the passenger station at Pacific Junction was constructed by a contractor.

(2) All of the Carrier's employes in the classes referred to in the statement of claim were employed full time in their highest classifications during the period of construction involved in this claim, and they suffered no loss.

In conclusion, the Carrier asserts that:

(1) Work of the nature involved in this dispute has never been performed by Carrier forces in the history of the contractual relationship between the parties.

(2) Both parties, by their conduct for more than thirty years, during which five separate agreements were negotiated, have recognized that the work herein under discussion is excluded from the scope of the agreement.

(3) Awards cited herein clearly sustain Carrier's position that the claim is totally without merit.

(4) No consideration can be given to the claim because no claimants are named and no dates specified in the statement of claim.

In the light of the record, there can be no decision other than denial of the claim in its entirety.

* * * * *

The Carrier affirmatively states that all data herein and herewith submitted has been previously submitted to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: This is another in a long line of cases which have been brought to this Division involving the question of whether, under the rules of agreements between various Carriers and the Brotherhood of Maintenance of Way Employes—particularly the scope rules thereof, a Carrier may have work performed by a private contractor or is required to have the work done by its own maintenance of way employes. In deciding these cases, the Board has developed a number of principles applicable to this particular problem and has stated and re-stated them many times. These principles have been collected and commented upon in a number of Awards, including 4920, 5457, 5563 and 5840, and have been studied at length in our consideration of this case, although we have not attempted to set forth in this opinion any but those which we consider most pertinent to the issues before us. Although numerous nearly similar cases have reached divergent conclusions, it appears that this has been due not so much to disagreement over

these principles as to differences over their proper application to a given set of facts or to subtle differences in the facts themselves. The difficulty in these cases is not in deciding upon the governing principles, but in applying them to the many varying factual situations which come before us.

In this case, the Carrier contracted out the construction of a new combination passenger station and yard office at Pacific Junction, Iowa. The contract was for the complete construction including materials of a building 30′ x 50′ with an office bay 3′ x 11½′, and included guarantees that applicable state and local laws would be complied with. The building was of frame construction on a concrete foundation, and included among other things plastered interior walls, toilet and shower facilities and a certain amount of cabinet work such as built-in cabinets and counters. The cost was $26,822.00. It is contended by Claimant that all of the work involved in the construction of this building except the electrical work belongs to maintenance of way employes under the scope rule and other rules of the Agreement; and claim is made on behalf of certain of these employes for pay in an amount equal to the total man-hours consumed by the contractor's forces in performing the disputed work. Carrier argues that construction of the type involved here has always been contracted out on its property and has never been regarded as falling under the Agreement.

It is a basic principle, long settled by Awards of this Division, that a Carrier may not contract out work which is covered by an agreement with its employes. The question then is whether the construction of a passenger station-yard office of the type involved in this case is work covered by the Agreement between the parties to this dispute. A reading of Rules 1, 2 and 50 of the Agreement, which are set out above in the submissions, clearly indicates that some construction work is included within the Agreement; Rule 2(b) refers specifically to "Employes assigned to constructing . . . buildings . . ." However, there is no further definition of the extent to which the "construction of buildings" is reserved to these employes. In Award 757, which first stated the principle set forth above, it was recognized that certain construction work has generally been considered as excluded from maintenance of way agreements. Later awards, dealing with scope rules similar in content if not in form with the one in this case, have held that to interpret them as including all construction would be absurd. See Awards 4158 and 6299. We think it obvious that the rules here, as in the cases cited, intended to cover some construction work but not all construction work; and that the rules are not sufficiently definite to enable us to determine this dispute by mere reference to them.

In such a situation, as many Awards have stated, it is necessary and proper to look to usage, custom and tradition and the past practice of the parties in order to determine what was intended to be covered by the rules. In this case, the record shows without contradiction that over the thirty years from 1922 to 1953, some 600 jobs involving construction, additions, remodeling, alteration and rebuilding of structures, each involving a cost of $1500.00 or more, were contracted out by Carrier. Some 76 of these were for the construction of new station and yard office buildings. During this period, Claimant's employes were represented by the Claimant Organization except for the eleven years between 1927 and 1938. Since 1938, Claimant Organization has represented the employes without interruption and agreements were negotiated in 1938, 1946 and 1949. The Scope Rules have undergone several changes over the years, but Rules 1 and 2 insofar as they relate to the problem at hand have remained the same since 1946. Between 1946 and 1953, under these rules, some 22 new station and yard office buildings were constructed by private contractors. Carrier asserts that no station similar to the one at Pacific Junction has ever been built by its forces; Claimant offers examples to prove that Carrier's employes have built such stations. Carrier offers facts to distinguish each example. Whatever the merit of these conflicting contentions as to specific buildings, it is clear from the record that an overwhelming majority of passenger stations and yard offices constructed on Carrier's property while agreements with the Claimant Organization were in force, were constructed by private contractors.

Claimant asserts that prior to the letting of each of the contracts cited by Carrier other than the one in question, the verbal approval of representatives of the Organization was obtained, during the periods when it represented the employes. Carrier flatly denies that such approval was ever sought for new construction of any kind. There is no independent evidence by which these opposing assertions can be tested or reconciled.

On the record before us, in view of the evidence of an unbroken history of contracting out new construction of the type of passenger station and yard office here involved, during the pendency of five agreements between the parties, four of which contained scope or other rules referring specifically to employes assigned to construction work, including a substantial number of such contracts under the present rules, we must conclude that the parties, by this practice, have treated such work as being outside the scope of the Agreement. See Award 6299. We hold that the work involved in the construction of the passenger station-yard-office at Pacific Junction was not covered by the Agreement between the parties, and therefore that the contracting out of that work was not a violation of the Agreement. As we indicated earlier, each case of this kind must rest upon its own facts; we have established no new principles, but have applied well-established rules to the particular facts in this case in reaching our result. Other cases involving the contracting-out of construction, with other facts, may lead to differing results.

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 16th day of January, 1957.