Award No. 7805
Docket No. MW-7418

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

James P. Carey, Jr., 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 that:

(1) Carrier violated the Agreement when it assigned subgrading work between Mile Post 311 and Mile Post 312 on the Coast Division to the Griffith Construction Company whose employes hold no seniority under the effective Agreement;

(2) The Equipment Operators holding seniority as such on the Coast Division 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 during the time they were engaged in the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: In 1953 the Carrier decided to relocate its tracks between Mile Post 311 and 312 on its Coast Division. The work required sub-grading to various depths to a maximum of approximately twenty feet, to obtain the required grade for the line change.

Beginning on or about June 2, 1953, the work of sub-grading, including blasting operations between the afore-designated Mile Posts was assigned to and performed by the Griffith Construction Company whose employes hold no seniority rights under this Agreement. In the performance of this work, the Griffith Construction Company utilized three tractor bulldozers and three carry-alls.

In 1945 the Carrier assigned its employes, using its equipment to perform identical sub-grading work, including blasting operations in relocating its tracks between Mile Posts 310 and 311 on this very same division.

During the period involved in the instant claim, the Carrier had approximately forty-two tractor-bulldozers and fifteen carry-alls of various capacities up to thirty-six yards, located at various places on its property which were available for assignment to the instant project and which could have been utilized just as efficiently as was the equipment furnished by the contractor.

The Carrier made no attempt to negotiate with the employes' authorized representatives prior to assigning the work here involved to contract.

"(a) Foremen and assistant foremen of bridges, buildings, tunnel, painter, construction, concrete, mason, water supply, plumbing, paving, fence gang, pile driver, and all employes coming under the supervision of such foremen.

"(b) Pile driver, ditching, hoisting engineers, steam crane operators (other than those employed in the Mechanical Department), steam shovel engineers, cranemen, firemen, and miscellaneous equipment operators.

"(c) Drawbridge tenders, drawbridge deckmen, drawbridge helpers and drawbridge sweepers.

"(d) Pumping engineers and pumpers (fuel oil and water).

"(e) Truck drivers.

"(f) Foremen and assistant foremen of terminal, section, extra gang, yard construction, work train, gravel pit, quarry and powder gangs, and all employes coming under the supervision of such foremen.

"(g) Crossing watchmen, crossing flagmen, tunnel watchmen, bridge watchmen, miscellaneous watchmen, and lamptenders.

"(h) Track welders, grinder operators, and their helpers.

"(i) Employes in Timber and Tie Treating Plants except stationary engineers and stationary firemen."

As will be noted, that rule merely names the classes of employes whose rates of pay, hours of service and working conditions are governed by the rules of the current agreement. It does not make any reference to work or to the specific duties that may be required by those classes of employes, nor does it set forth fully the duties that will be reserved to or that will be exclusively performed by the classes of employes named. Furthermore, the Board's attention is again directed to the fact that neither the Scope Rule nor any other rule of the current agreement makes reference to the classification of "equipment operators". Obviously, the Scope Rule does not support the claim presented in this case.

CONCLUSION

Carrier asserts that it has conclusively established that the claim in this docket is entirely lacking in either merit or agreement support; therefore, requests that said claim, if not dissmissed, be denied.

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 has 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 as 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: In 1953, the Carrier contracted with Griffith Construction Company for the work of sub-grading and blasting incident to relocation of its main line track near Arlight, California. The claim is

that this violated the scope rule of the Maintenance of Way Agreement for which reparation is sought.

Claimant contends that the project involved work which is customarily performed by miscellaneous equipment operators and quarry and powder gangs; that it was not a major project beyond the capacity of Carrier's regular forces; that special equipment was not required, and that almost identical work had been performed by Maintenance of Way forces at a nearby site in 1945. Carrier points to the magnitude of the project as well as the time element involved, and asserts that those factors coupled with the need for equipment it did not possess justified its action.

It has been said on many prior occasions that, generally, a Carrier may not contract with others for the performance of work embraced within the scope rule of a collective agreement. See, for example, Awards 3823, 5237, 4158 and 5151. Exceptions to this general rule have been recognized in a number of instances as, for example, where there was need for special equipment not ordinarily used or possessed by the carrier, or where special skills not normally found in the Carrier's forces were needed, or where because of the magnitude of the task, or its essential danger, or where because of time requirements it was not feasible to adequately perform the work with the Carrier's forces and equipment. In those instances, however, it has also been held that the Carrier must establish the necessity for contracting out the work by convincing proof. See Awards 4671, 6109, 3823, 515, 6181 and 6629.

This work involved blasting 8,000 cubic yards of rock and removal of 155,794 cubic yards of material. In performing it the contractor used three 10-yard Tournapulls, one T D push car and 1 motor grader, none of which the Carrier possessed. While the Carrier had other items of equipment similar to that used by the contractor, it states they were used on scheduled maintenance work at other points on its system and not available. The Employes contend that a Tournapull is the same type of equipment as a carryall, and that Carrier owned 15 carryalls of various capacities up to 36 yards which were capable of performing the same functions as a Tournapull. Carrier states it owned 5 carryalls, one with a capacity of 24 yards, two with a capacity of 18 yards, and two with a capacity of 12 yards; that three of them were assigned to operations on other divisions, one was inoperative, and one was idle. The record shows that a Tournapull's motive power is built in as an integral part of the equipment and that it has a speed of 25.1 miles per hour loaded, whereas a carryall is pulled by a crawler type tractor having a speed of 4.8 miles per hour.

Employes also contend that a motor grader was not necessary and that the same work could be performed with equal efficiency by a bulldozer with a blade attachment. They state it is customary to employ bulldozers in grading work as was done in the case of the track change made in 1945 in the adjacent mile post area. On the other hand, Carrier shows that motor graders are used for purposes other than grading road beds; that they are equipped with an adjustable blade which can be placed at extreme angles, and that in this case the motor grader was used by the contractor to cut the sides of the cut to the desired angle which could not have been satisfactorily done with a bulldozer.

As above noted, the Employes insist that in 1945 the Carrier assigned its employes and used its own equipment to perform alleged identical subgrading work, including blasting operations in relocating its tracks between Mile Posts 311 and 310. The Carrier points to the fact that the 1945 project involved blasting of only 20 cubic yards of rock and removal of 70,000 cubic yards of shale, whereas the instant project required blasting 8,000 cubic yards of rock and removal of 155,794 cubic yards of material. Claimant's contention that the need for this large amount of blasting was unknown to the Carrier when the contract was let and therefore not a consideration for making the contract, is categorically denied.

It is apparent form the foregoing that there is a sharp factual dispute at several points. However, in our view of this docket we think those issues are incidental to the basic question on which our determination should be based. The carrier's main line at the point involved is cut into the face of a bluff along the shore line of the Pacific Ocean. It is undisputed that action of the ocean water had so materially endangered the foundation that removal of the main line inland was imperative. Slides and cracks found in the bluff indicated the need for speedy measures. The Carrier's action must therefore be appraised in the light of a situation fraught with serious and dangerous possibilities. In these circumstances we think the Carrier was not only warranted but required to employ means which in its managerial judgment would most quickly correct the situation. Under normal circumstances where time is not a factor, the Carrier's equipment and forces could probably have handled the work. But time was of the essence in these circumstances, and the fact that the contractor's Tournapull was capable of operating five times faster than any equipment the Carrier could have provided was material in view of the magnitude of the job. 80,000 cubic yards of rock were to be blasted as quickly as possible, whereas 20 cubic yards of rock were blasted in the 1945 operation. The substantial difference in the two operations is apparent. The time element does not appear to have been present in the 1945 operation.

In Award 4671 we noted that where time requirements are shown to be a material factor, they constitute an exception to the general rule against contracting out work. The imminently dangerous condition of Carrier's main line track as shown of record, the magnitude of the work required to remove the track to a safer location without delay, and the lack of adequate equipment to quickly perform the task warranted the Carrier's exercise of its managerial judgment in contracting out the work. See Awards 515, 6181 and 2338.

For the foregoing reasons, an affirmative award is not indicated.

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

The Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of March, 1957.