Award No. 7836
Docket No. MW-7726

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

READING COMPANY

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

(1) That Carrier violated the Agreement when it assigned repair work on piers "G" and "H", Port Richmond Terminal to other than Maintenance of Way Employes;

(2) That each employe holding seniority as a Wharf-builder on the Port Richmond Terminal seniority roster to 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 the claim.

EMPLOYES' STATEMENT OF FACTS: On or about October 9, 1953, the work of making repairs to Pier "G" and "H" at Port Richmond Terminal was assigned to and performed by a General Contractor without negotiations with or approval of the employes' authorized representatives.

The work consisted of driving piling on the north side of Pier "G" and the replacing of the entire sheathing on the north side of Pier "H" and other work incidental to both projects. The contractor utilized from four to eight employes daily in the performance of the above referred to work. This work was completed on or about January 22, 1954.

The employes holding seniority as Wharf builders on the Port Richmond Terminal seniority roster were available, and have heretofore performed repair work of similar character to that here involved at Port Richmond.

The Agreement violation was protested and the instant claim was filed in behalf of the claimants.

Claim was handled in the usual manner on the property and was declined at all stages of the appeals procedure.

The Agreement in effect between the two parties to this dispute dated January 1, 1944, corrected October 1, 1951, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

The Brotherhood of Maintenance of Way Employes have negotiated agreements with the Carrier effective January 15, 1936 and January 1, 1944, corrected October 1, 1951. The Brotherhood has known of the long past practice of contracting work in connection with pier repairs as set out in Carrier's Exhibit C-3. However, when these agreements were negotiated, existing practices were not abrogated or changed by their terms and Carrier maintains that such practices are enforceable to the same extent as the provisions of the contract itself.

Carrier has shown that work on this property in connection with repairs and changes to Piers and Marine facilities has never been considered the exclusive duties of Carrier's employes holding seniority as wharfbuilders on the Port Richmond Terminal seniority roster, and such work has on occasion been performed by contractors' forces. Carrier further submits that this practice was not abrogated by agreements subsequently negotiated. Since Carrier's forces were fully employed at the time contractor's forces were working on Piers "G" and "H" as shown in Carrier's Exhibit C-2, the claim as submitted is for penalty only and Carrier submits that it is a well established principle that penalties cannot be awarded under a contract unless specifically provided for therein.

Under the facts and evidence, Carrier submits that the work performed by contract at Piers "G" and "H" has not in the past been reserved for or performed exclusively by employes holding seniority as wharfbuilders on the Port Richmond seniority roster. Furthermore, Carrier's forces lost no time or earnings by reason thereof and were not adversely affected thereby. For the reasons set forth hereinbefore, the Carrier maintains that the claim as here presented is not supported by the rules of the effective agreement, understandings or past practice, is without merit and requests the Board to so find and deny the claim.

This claim has been discussed in conference and handled by correspondence with representatives of the Brotherhood of Maintenance of Way Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: At Philadelphia, Pa., the Carrier maintains a large tidewater marine terminal known as Port Richmond. During the fall of 1953 the Carrier undertook an extensive program of repair and rehabilitation of the various piers and marine facilities there, which included piling work, replacing and renewing decking and sheathing, dredging, excavating and concrete work, replacing and renewing bulkheads, painting and modernization of certain facilities at seven piers and one float slip. The Carrier states the entire program represented an expenditure of nearly one million dollars. All of the Carrier's employes holding seniority as wharfbuilders on the Port Richmond seniority roster were engaged in this work. The subject dispute arises because Carrier contracted to an outside firm a portion of this work. The claim concerns the work contracted out at Piers "G" and "H", which consisted of the removal and replacing of piling, and related work. The contractor used from four to eight employes daily in the performance of this work from September 28, 1953 to about December 24, 1953.

The Organization contends this is work which is embraced within the scope of the effective Agreement, that said work should have been performed by employes holding seniority as wharfbuilders on the Port Richmond seniority roster, that wharfbuilders have performed similar work in the past, and that the Carrier therefore violated the Agreement.

The Carrier responds that the claim should be dismissed on the ground that it is vague and indefinite since it does not identify the individuals for whom the claim is made, or the specific dates involved. On the merits, the Carrier contends that due to the magnitude of the entire repair and rehabilitation program its own available forces could not complete all of the work involved without deferring or delaying much of the necessary work; that the

Carrier's own forces in the wharfbuilder classification were fully employed during the period in question; that it was not possible to secure additional help with the requisite skill and experience for the work in dispute; and that special equipment was needed to properly progress such work, particularly a steam derrick scow and a pile driver. Finally, the Carrier asserts that while its forces have performed work similar to that in dispute, such work also has been contracted out on numerous occasions; and that wharfbuilders at Port Richmond do not have exclusive jurisdiction over such work.

The general rule followed by this Board is that work embraced within the scope of an agreement cannot be assigned to employes not subject to its terms. Exceptions to this rule are permitted under certain specified conditions which often have been enumerated in prior awards. The Carrier pleads some of these exceptions in the present instance.

The effective Agreement does not specify the class or character of work to be done by the employes on the wharfbuilder seniority roster. Nevertheless the very title "Wharfbuilder" implies the construction and maintenance of piers. Where there is any ambiguity in the terms of an agreement in this respect, the rule is that the work reserved to a class of employes is that which customarily and traditionally they have performed.

The evidence indicates that the wharfbuilders, who are part of the Carrier's Maintenance of Way forces, have traditionally performed work of the character here involved. The Carrier's contention that they do not have exclusive jurisdiction over such work is based on the fact that on rather frequent occasions in the past some of this work has been performed by outside contractors. The Organization contends that in all such instances it either agreed to such action or filed a claim. The Carrier responds that on only a few occasions were claims filed and that in the majority of such instances the work was sub-contracted without protest by the Employes and without prior discussion or negotiation.

In the light of all the evidence, we conclude that the disputed work is embraced within the scope of the Agreement, that the Organization has not concurred in removing same from the Agreement's jurisdiction, and that the Carrier's employes on the wharfbuilder roster were entitled to perform this work unless one or more of the permissible exceptions can be established. If we were to hold that past instances of contracting out pier repair and rehabilitation work meant that wharfbuilders in the Carrier's employ no longer had exclusive jurisdiction in this respect, the result would be that Management could contract out all such work. In that event the seniority status of wharfbuilders would be virtually meaningless, for there would be no work for them to perform.

Since the work in question is embraced within the scope of the Agreement, the Carrier has the burden of proof that the prevailing circumstances justified its action in contracting out this work. Awards 4920, 5470, 6109. Its contentions in this respect boil down to considerations of availability of qualified manpower and of the proper equipment.

The fact that the Carrier's forces were fully employed at the time is not in itself a valid defense. While certain of the wharfbuilders worked some overtime during the period in question, there was available additional overtime which they could have been assigned to work. Although the Carrier asserts it was not possible to augment its forces with qualified individuals, no proof is offered that it made an effort to do so without success.

This brings us to the question of equipment. A pile driver was needed for the disputed work. The Carrier possessed a pile driver which was in poor condition and inoperative. It states it would have been uneconomical to restore the unit to operating condition. The Organization points out the Carrier could have rented a pile driver. Management does not deny this but states the amount of pile driving work on this property does not warrant the rental of such equipment. The other cited piece of equipment which the Car-

rier lacked was a steam derrick scow. The Carrier possesses a hand derrick scow which is used by its own forces for the purpose of handling heavy timber. The Carrier states the steam powered crane on the scow owned by the contractor also can be and was used as a pile driver.

On the record of this case, we do not think the Carrier has established that it exercised all reasonable effort either to augment its force with personnel qualified to perform the work in question or to utilize its then existing force to the fullest extent. Nor do we find the Carrier's contention regarding lack of equipment to be persuasive under the circumstances that prevailed. In sum, we are of the opinion and find that the Carrier has not sustained the burden of proof in justifying the contracting out of work which is embraced within the scope of the Agreement.

We are further of the opinion that Part (2) of the claim is not so vague or indefinite as warrant dismissal.

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 violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April, 1957.

DISSENT TO AWARD 7836, DOCKET NO. MW-7726

This Award is based upon erroneous premises, and is in conflict with well-established principles followed by this Division since its inception.

The majority herein correctly holds that "the effective Agreement does not specify the class or character of work to be done by the employes on the wharfbuilder seniority roster". As a matter of fact, the effective agreement does not specify the class or character of work to be done by employes covered thereby. The Scope Rule thereof simply lists the specific classes of employes covered thereby.

Throughout its entire submissions, Carrier contended as follows:

> "Carrier maintains that there is no provision in the Scope Rule or any other rule of the agreement indicating that Carrier has agreed with the Brotherhood that they have any contractual right whatsoever to perform the work here claimed."

Neither the Award nor the record shows any such provision. The burden was on the Employes to show such a provision if there were one, but they failed to sustain their burden in this respect as there is none.

In the face of this record, the majority herein erred in concluding "that the disputed work is embraced within the scope of the Agreement" and in holding that "the Carrier has the burden of proof that the prevailing circumstances justified its action in contracting out this work."

This Division has consistently followed the principle stated in Award 4011:

> "The burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance."

Since the Carrier contended that it had not contracted away any of its rights for the performance of the disputed work, and since the Employes did not and could not show otherwise, there was no requirement on Carrier to justify its action in contracting out this work.

This Division has also consistently followed the principle stated in Award 5331:

> "Except as it has restricted itself by the Collective Bargaining Agreement or as it may be limited by law, the assignment of work necessary for its operation lies within the Carrier's discretion."

The fact that the Employes have performed some work on Piers "G" and "H" in the past does not enlarge the scope of the agreement.

The majority erred in holding that "The evidence indicates that the wharfbuilders, who are part of the Carrier's Maintenance of Way forces, have traditionally performed work of the character here involved". The Carrier showed that the contracting of work on Piers "G" and "H" was not new or unusual but was in accordance with a well-established practice in effecting completion of heavy repairs to piers of the magnitude here involved, requiring special skills and equipment, and in support of the practice cited fifty-one jobs contracted out in the Marine Department from May 18, 1950 to June 15, 1955, without negotiation with Petitioner, and similarly had let out fifty-nine contracts at that point in the ten years prior to 1950.

During the pendency of this practice, agreements were negotiated on January 15, 1936, January 1, 1944, and October 1, 1951, without abrogating or changing this practice, and without even listing the classification "Wharfbuilder" among the classes included in the Scope of the Agreement.

Another principle which this Division has consistently followed is stated in Award 4493:

> "The Board has repeatedly held that where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself."

This Award is in further error in stating that the Carrier offered no proof that it made an effort to augment its forces with qualified individuals. The Carrier showed that it was able to hire but one laborer and a carpenter helper, one of whom resigned ten days later, but that it was unable to hire any skilled or experienced employes. The Employes did not and the record does not show that any qualified individuals were available.

The record also does not show that the Carrier possessed the equipment needed to perform this work, or that there was any agreement rule requiring the purchase or rental thereof.

The majority overlooked entirely Carrier's contentions with respect to the time within which it was necessary to complete the work at the time of

the year involved. The determination of the time within which this work had to be completed was clearly a proper exercise of managerial judgment (Award 5152).

For the above reasons we dissent.

/s/ W. H. Castle
/s/ R. M. Butler
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ J. F. Mullen