Award No. 7837
Docket No. MW-7731

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE BALTIMORE AND OHIO RAILROAD COMPANY

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

(1) That the Carrier violated the effective agreement when they furloughed the following employes from their positions as Carpenters and required them to take employment as Carpenter Helpers while a general contractor's employes were engaged in Bridge and Building work at Bridge No. 752:

Walter L. Allen	Charles W. Dean
Clarence W. Riffle	Paul Villers
Robert K. Griffin	Perry H. Spour
W. R. Lemon	

(2) That the above listed employes be paid the difference between the amount received at the Carpenter Helpers' rate of pay and what they should have received at the Carpenters' rate of pay during the period the contractor's employes were assigned to perform Bridge and Building work at Bridge No. 752.

EMPLOYES' STATEMENT OF FACTS: Bridge number 752 is of pile and timber construction, 88 feet in length, located at Cogar, West Virginia on the Carrier's Monongah Division.

Commencing on September 25, 1951, the work of replacing the aforementioned bridge with three steel spans on concrete piers and abutments was assigned to and performed by a General Contractor whose employes hold no seniority rights under the provisions of this agreement.

The work consisted of the construction of the required concrete piers and abutments; the placing of the three steel spans thereon; dismantling of the old bridge; and other work incidental thereto.

During the period of reconstruction, the claimants named in Part (1) of the Statement of Claim were furloughed from their positions as Carpenters, thereby necessitating each claimant to accept employment as a Carpenter Helper at a reduced rate of pay.

thereof having been reached between the parties, it is hereby submitted to the National Railroad Adjustment Board for decision.

OPINION OF BOARD: Bridge No. 752 was a timber pile trestle, 88 feet long, which was in poor condition. In the spring of 1951 the Carrier decided to replace this trestle with three spans of wide flange beams on concrete piers and abutments. Management states that because of the size of the project, involving a total estimated cost of $63,000, and the fact that all B&B employes on the Monongah Division were fully employed at the time, it was determined that this work would be performed by an outside contractor. A contract covering the substructure of the bridge was entered into with a contractor on May 7, 1951, the work under this contract being performed between September 25 and November 17, 1951. Late in October, 1951, a reduction of force began in the B&B Department on the Monongah Division, with the result that the claimant Carpenters were furloughed on various dates from October 26 through November 26, although each of them continued working as a helper.

The Scope Rule provides in pertinent part that "these rules govern the hours of service and working conditions of all employes in the Maintenance of Way and Structures Department . . . subject, however, to the exceptions provided in paragraph b of this rule:

". . .

"(b) 5(a) Work which is to be performed under contracts let by the Company under any one or more of the following circumstances:

1. By reason of the magnitude of the project.

2. Because of the requirements of special skills necessary in connection with performance of the work.

3. Where equipment or facilities to be used in connection with the work are not possessed by the Company and available, consistent with requirements for a particular project.

4. Where the work with Company forces would limit the extent of the supplier's guarantee.

5. The time within which the work must be completed as related to other projects.

6. Employes covered by the agreement on the seniority district involved cannot be assigned to the work without impeding the progress of other projects.

"5(b) Should the employes question the judgment of the Company in contracting work, under the circumstances set out above, the General Chairman may handle such protest in accordance with the provisions of Rule 49 of this Agreement."

Rule 1, subsection (c) of the Agreement reads as follows:

"(c) Bridge, Building and Structural Work.

Carpentry, painting, glazing, tinning, roofing, plastering, bricklaying, paving, masonry and concreting required in the construction and maintenance of railroad structures, other than tunnels, shall be performed by B&B forces. Such work in tunnels and all concreting by the gunite method shall be performed by tunnel forces."

The Organization contends the work in dispute falls within the scope of the Agreement and belongs to the Carrier's Bridge and Building forces. It asserts the claimants were improperly furloughed from their positions as carpenters while such work was being performed by employes not covered by the Agreement.

The Carrier contends that all of the specified exceptions in Scope Rule (b) 5(a) above, save for item 4 (reference to supplier's guarantee), apply to the facts of this case, but that the existence of any one of these exceptions is sufficient to justify assigning the work to an independent contractor. The Organization asserts the quoted provisions in (b) 5(b) requires the Carrier to confer beforehand with the Employes concerning its intention to contract out work, which admittedly was not done, and that none of the above-listed exceptions did in fact apply here.

It is clear that the construction and reconstruction of bridges is reserved by the Agreement to the Carrier's Bridge and Building forces, unless one or more of the cited exceptions applies in a given instance. Our task in the present case is to determine whether the evidence establishes that any of these exceptions covered the disputed work. Having reviewed the entire record, we are of the opinion that the weight of the evidence does not show that the contracted work came within the purview of any of the contractually specified exceptions.

Other than Carrier assertion, there is no proof that the magnitude of the project was beyond the capacity of its own B&B forces. It has not been shown to our satisfaction that the project required special skills not possessed by employes covered by the Agreement. Nor does the evidence establish that the equipment or facilities used for the project were not possessed by the Carrier. The Carrier contends that certain of this equipment was not available, but the record contains no more than assertions to this effect. Finally, there is no evidence of probative value that either exceptions 5 or 6 of (b) 5(a) of the Scope Rule applied in this instance.

In summary, we are of the opinion and find that the Carrier violated the Agreement by contracting out work reserved under the Agreement to its Bridge and Building forces, and that the claim must be sustained. It should be noted that the requested remedy is confined to the period during which the contractor's forces performed the disputed work. According to the record, one of the claimants—Robert K. Griffin—was not reduced to helper until after this period had ended.

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 NO. 7837, DOCKET MW-7731

The Agreement involved in the instant dispute specifies six conditions under which work otherwise subject to the Maintenance of Way Scope may be contracted. The applicability of any one of these conditions authorizes the Carrier to contract the work. In the instant dispute the Carrier showed that at least five of the conditions were present. How then, did the Majority sustain this claim?

Careful analysis of the Record and Award made thereon demonstrates that the Majority reached its conclusion by exceeding the statutory limitations which preclude us from making rules for the parties. In effect, the Majority has extended Scope Rule exception 5 (a) 6 by interpreting it to mean that if the Carrier contracts work on the grounds that employes covered by the Agreement cannot be assigned to the work without impeding the progress of other projects, that such employes must be retained in service, in their highest classification, until the contractor finishes his project.

The Majority's unwarranted and erroneous conclusion is obviously based upon hindsight—which the Carrier could not foresee on May 7, 1951, when the work was contracted. The Record shows that the Carrier was not equipped to manufacture twenty pre-cast 25 foot long 16 inch octagon shaped concrete piles. However, whether the Carrier or the contractor made these piles, it is obvious to anyone with the slightest knowledge of concrete, that green concrete piles could not be driven until they had hardened or cured for a considerable time, therefore the contractor did not actually begin work on the bridge until during September. Once the contractor commenced the work he was obligated to finish the job within seventy (70) calendar days. It is absurd to hold that as of the date Carrier forces were furloughed, the Carrier should have breached its contract with the contractor.

The Carrier's right to contract this work under the Agreement was based upon conditions as they existed May 7, 1951, on which date every employe on the seniority district was assigned to projects which would have been impeded by the Carrier attempting to perform this disputed work with its own forces. Instead, the Majority finds the Agreement violated when certain Carrier projects were completed and a few of the employes who had previously worked thereon became furloughed. However, no provision of the Agreement requires the Carrier to institute an uneconomical "make-work" program merely to avoid claims pending contractor's completion of the project under a legal contract.

The Carrier is not required to be clairvoyant to the extent that it must make certain that all of its work projects will end at one time. The Agreement was not violated on May 7, 1951, when Carrier entered into the contract to have this work performed by a contractor. The Majority has no authority to find an **ex post facto** violation subsequent to October 26, 1951, because Carrier employes were furloughed.

This Award is obviously in error and we, therefore, dissent.

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

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 7837
Docket No. MW-7731

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employes.

NAME OF CARRIER: The Baltimore and Ohio Railroad Company.

Upon application of the representatives of the employes involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The question submitted by the Organization is stated below in pertinent part:

> "Should the following procedure govern the computation of the payment to be made to each of the Claimant employes:
>
> > Investigation should be made to determine exactly how many hours between **September 25, 1951** and November 17, 1951 were worked by each and every one of the seven (7) named claimants as carpenter helpers. When determination is made of the number of hours so worked by each and every one of the seven (7) named claimants, then those hours should be multiplied by the difference between the Carpenter's rate of pay and the Carpenter Helper's rate of pay which will give the amount due each of the seven (7) named claimants under the Award of the Third Division."

The statements of the parties with respect to the question of the interpretation of the award have been carefully examined. The record indicates that on various dates following the commencement of the subject bridge construction work by employes of the outside contractor, the Claimants were furloughed as Carpenters but continued working as Carpenter Helpers. The construction work was completed on November 17, 1951.

The monetary remedy required by the award is to be computed as follows: The number of hours worked by each Claimant as a Carpenter's Helper during the period in which the subject construction work was performed shall be determined. The total number of hours so calculated for each Claimant shall be multiplied by the difference between the Carpenter's and the Carpenter Helper's hourly rate of pay. The resulting amount represents the compensation due each Claimant.

Referee Lloyd H. Bailer, who sat with the Division as a member when Award No. 7837 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 4th day of March, 1959.