Award No. 8151
Docket No. MW-7767

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE BELT RAILWAY COMPANY OF CHICAGO

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

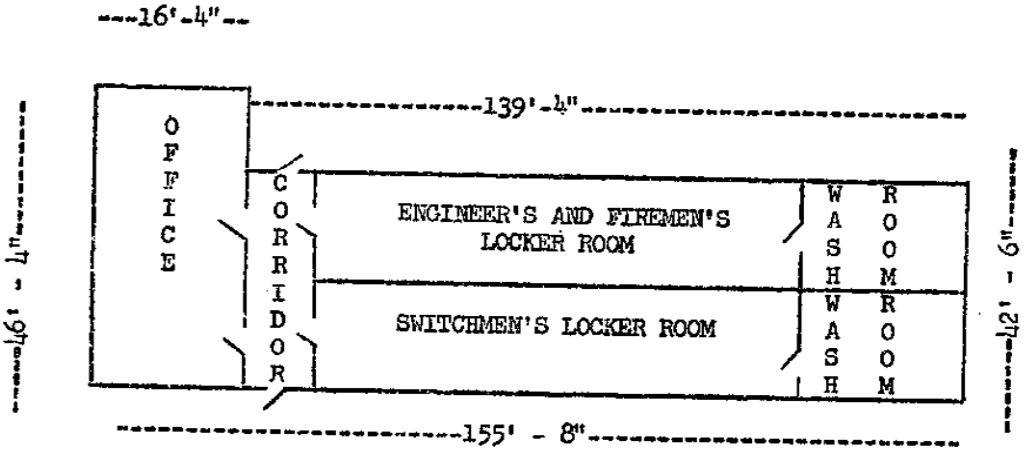
(1) The Carrier violated the Agreement when it assigned the construction of a brick welfare building in its Clearing Yard to a general contractor whose employes hold no seniority under the effective Agreement.

(2) The Carrier's Bridge and Building Department employes each be allowed pay at their own respective straight time rates of pay for an equal proportionate share of the man-hours consumed by the contractor's forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: In 1952, the work of constructing a small one-story office and locker building (identified as "the Welfare building") was assigned to General Contractor Ellington Miller, without seeking or securing approval of or concurrence by representatives of the Brotherhood of Maintenance of Way Employes.

The building is of brick construction, constructed on concrete foundation, with floors similarly constructed of concrete. Both the inner and outer walls are of brick construction with the ceiling extending ten feet from the floor.

The following sketch roughly illustrates the dimensions and the room arrangement of the building:



outlay and skilled workmen not contractually represented. Below are listed the classifications of workers used by the contractor in erecting the "Welfare Building".

Laborers	Painters
Carpenters	Roofers
Iron Workers	Electricians
Cement Finishers	Glaziers
Steamfitters	Pipe Coverers
Plumbers	Masons
Operating Engineer	

It will be noted that in most all of the instances, the Organization's Scope Rule does not cover crafts that were necessary to the contractor in this work. Such lack of skilled classifications would, if it were possible to do so, have definitely necessitated piecemealing the work in dispute. As the Board pointed out in Award 5485, "We have frequently ruled that Carrier was not required to divide a project into its component parts so that certain work be retained for its own forces". Also, in Award 5304, the Board said,

> "The work contracted out is to be considered as a whole and may not be subdivided for the purpose of determining whether some parts were within the capacity of the Carrier's forces."

Again, in Award 4954, the Board with Referee Carter noted that,

> "The job should be treated as a single unit in determining whether the Carrier could properly let the work to an independent contractor."

See also Awards 2819, 5840 and 6112.

It is evident from the foregoing that this claim is without merit and should be denied. See Awards 5487, 5563, 6299, 6300, 6549 and 6706.

All data in support of Carrier's submission have been submitted to the Organization and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: During the time that the building here in question was being erected a number of employes covered by the agreement involved in this case were working on an assignment from this Carrier in the immediate vicinity on what is referred to as the "Old Wood Mill." When certain employes of the Contractor on the Welfare Building threatened to tie up that work unless the employes of the Carrier on the "Old Wood Mill" were taken off, the Carrier yielded and took them off. When the employes' organization protested, the Carrier paid the claim.

In attempting to distinguish that claim from the instant one, the Carrier in its oral argument states **that its Employes were performing certain repairs and should have continued to do so,** if contractor's forces had not threatened to strike the job and others in various stages of completion. Our instant case involves new construction but work of the same nature.

This referee is committed to the proposition that new construction alone is not enough to constitute an exception to the scope rule. Award 6645.

We have been favored with photographs of both the exterior and interior of the "Old Wood Mill" building during its remodeling, and also the same for the new Welfare building. The cost of the repairing or remodeling of the "Old Wood Mill" is not given and it probably would fall far short of the $97,970 cost of this Welfare building. The difference in cost could in any

event be nothing more than one of degree, and the Carrier is not contending nor could it contend, that the type of work being done on the Old Wood Mill, carpentry, masonry, painting, etc., was any different than that being done on the Welfare Building, with the possible exception that the work on the new construction took greater skill with which exception we are not impressed.

Carrier seeks to stress the fact that the work on the "Old Wood Mill" was assigned to these employes, and since they had started the work they were entitled to be paid for it, but the claim for that job was similar in form to the instant claim.

Whatever the "past practice" may have been we say that the payment of this claim on the "Old Wood Mill" was a recognition of the fact that the work involved was covered by the Scope Rule in this agreement.

We are not overlooking the point sought to be made by the Carrier under (5) in its Ex Parte submission viz., that it would be in trouble with the Building Trades Council of Chicago if it (the Carrier) permitted any of its Maintenance of Way employes to work on this job relying on a provision in the agreement between the Maintenance of Way Organization and the Building and Construction Trades Department (A.F. of L.) which reads:

> "Where **legitimate** contracts are awarded by railroad companies for any building and construction work employes performing such work shall not be solicited or organized by the Brotherhood of Maintenance of Way Employes." (Emphasis supplied.)

It is obvious that the Carrier assumes that such a contract as it had with the contractor here is "legitimate". That is the very point that the employes challenge viz., that the contract made was legitimate. There is no suggestion in this record that any of the employes here involved "solicited or organized" any of the contractor's employes.

This brings us to a consideration of Award 4954 in which a very similar claim was denied, but it will be observed that the claim was not denied on its merits but on the basis of estoppel. Award 4954 states inter alia "Without deciding the correctness of the Carrier's conclusion, the Carrier was justified in assuming, under a literal interpretation of the Agreement, that property adjoining the railroad right-of-way was on the line of the railroad and not on the right of way even though the parties as between themselves intended a different construction of the language used."

In our case of course the Carrier can make no such assumption because the building here involved was unquestionably on the Carrier's right of way.

The only language in Award 4954 which would support a denial of the claim on its merits is "The job should be treated as a single unit in determining whether the Carrier could properly let the work to an independent contractor", but as already noted the Award was not based on that ground, and as appears in Award 6645 this referee is not committed to the "package doctrine".

We cannot agree with Carrier's contention in its brief that "The local tradesmen were given jurisdiction over * * * (2) any contracted building or construction work, **either on or off the right-of-way.**" (Emphasis supplied.) This statement is belied by its own argument in Docket MW-4870 (Award 4954) supra.

We conclude therefore that the Carrier violated the agreement and that this claim should be sustained.

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 November, 1957.

DISSENT TO AWARD NO. 8151, DOCKET NO. MW-7767

The majority chose to sustain this claim, stating, "Whatever the 'past practice' may have been we say that the payment of this claim on the 'Old Wood Mill' was a recognition of the fact that the work involved was covered by the Scope Rule in this Agreement." The majority indicate this conclusion was reached after viewing photographs of the Old Wood Mill and the new Welfare Building and deciding that the magnitude of the latter as compared with the cost of repairing the former could be nothing more than one of degree; that the Carrier did not and could not contend that the type of work being done on the Old Wood Mill was any different than that being done on the Welfare Building, except that the new construction of the latter building took greater skill and with this exception the majority was not impressed.

The fallacy of the conclusions thus expressed is quite apparent. According to information supplied in "Employes' Position", the Carrier paid the employes in the "Old Wood Mill" case (including Claim 2 settled at the same time) the sum of $962.89. This is less than 1% of the cost of the Welfare Building. The magnitude of the Welfare Building project was repeatedly given as to cost as well as size and type of construction. The skill required and used, given in "Carrier's Statement of Facts", included workmen of trades not even in the employ of the Carrier and not within the scope of the Agreement involved.

Award 6645 is cited by the majority herein as showing that this Referee IS committed to the proposition that new construction alone is not enough to constitute an exception to the scope rule, and as allegedly showing that he IS NOT committed to the "package doctrine". The majority seem to have lost sight of the fact that this Referee was named to sit with the Division AS A MEMBER THEREOF to make Awards in certain cases. In such capacity, the premise on which an Award turns may not properly hinge upon the propositions or doctrines to which he commits himself. Rather, the parties at issue are entitled to Awards premised upon the terms of agreement to which they have committed themselves as determined from the language of the Agreement and the tradition, custom and practice of the parties thereunder in evidence. In evidence in this case was the unprotested practice of contracting such projects as here involved to the extent of 121 such contracts from 1939 to 1952.

In Award 6645 the majority stated that the tests to be applied in determining the validity of a claim like this seemed to be fairly well stabilized and that Award 6199 fairly illustrates the conditions which have to be met by the Carrier before it may contract with an outsider for such work. The tests illustrated were:

1. Claims involving a small integral part of the work contracted out are not sustainable if the entire project, considered as a whole, was properly subject to be contracted out; or if the contracted work requires—

(a) special skills;

(b) special equipment;

(c) special materials;

2. Work of great magnitude or emergency.

Application of these tests to which the majority there committed itself in Award 6645, in which the same Referee participated, and which it must be assumed were not capriciously stated to be fairly well stabilized, required denial of this claim as did, also, the Agreement rules, tradition, custom and practice in evidence. The Award is seriously defective in sustaining an ambiguous claim for unwarranted penalty payments in the light of the evidence produced.

For these reasons, we dissent.

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