Award No. 10229

Docket No. MW-8855

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

READING COMPANY

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

(1) The Carrier violated the effective Agreement when it assigned the work of renewing two pile clusters at Pier "J", Port Richmond Terminal, to a General Contractor whose employes hold no seniority rights under the provisions of this Agreement;

(2) Each Carpenter Foreman, Wharfbuilder Foreman, Carpenter, Wharfbuilder, Carpenter Helper and Wharfbuilder Helper on the Port Richmond Terminal seniority district 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: Commencing on December 14, 1955, the work of renewing two pile clusters at Pier "J", 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 removing the old pile clusters and driving new piling and other work incidental thereto.

The employes hold seniority in the Bridge and Building sub-department on the Port Richmond Terminal were available and have heretofore performed work of a similar character to that described above.

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

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

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

"Crossing and other Watchmen, Drawbridge Tenders, Pumpmen, Lampmen, Frog, Switch and Rail Repairmen, Crane and other machine operators, including Chauffeurs."

It will be noted by the Board that this rule merely provides that the rules of the Agreement govern the hours of service, working conditions and rates of pay of employes specified therein. Nowhere in the Scope Rule is there set forth the class or character of work employes are to perform. 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. While Carrier's forces have on previous occasions performed work of the character here involved, such work has also been contracted in the past.

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-1. 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 Carpenter Foremen, Wharfbuilder Foremen, Carpenters, Wharfbuilders, Carpenter Helpers and Wharfbuilder Helpers 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 and maintains 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 Pier "J" has not in the past been reserved for or performed exclusively by employes holding seniority as Carpenter Foremen, Wharfbuilder Foremen, Carpenters, Wharfbuilders, Carpenter Helpers and Wharfbuilder Helpers 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: Carrier has marine facilities at Philadelphia, Pennsylvania, which include Port Richmond Terminal, which has four float slips and ten piers extending for more than a mile along the riverfront, three piers at Willow and Noble Streets and float slips at Linden Street and

Bulson Street, in Camden, New Jersey. In December, 1955, it was necessary for Carrier to remove and replace two pile clusters at Piers "J", Port Richmond Terminal. The present dispute and claim arises because the Carrier contracted to an outsider, whose employes held no seniority under the current Agreement between Carrier and the Organization.

The Organization contends that the work involved, the removal and replacement of the two pile clusters, was of the kind and character to which the applicable Agreement was made even though a specific provision was not included therein and that said work should have been performed by employes holding seniority on the Port Richmond seniority list: that Wharfbuilders have performed similar work in the past and that the Carrier has violated the Agreement.

Carrier contends that the claim should be dismissed on the ground it is vague and indefinite since it does not identify the individuals for whom the claim was made.

On the merits, Carrier claims, among other things, that it did not possess the necessary machines and equipment needed for this project: in particular, a pile driver and a steam derrick scow and further that special skills were not possessed by Carrier's forces.

A further claim made by the Carrier, as stated in the record was:

> "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 Carpenter Foreman. Wharfbuilder Foreman, Carpenter Helpers and Wharfbuilder Helpers on the Port Richmond Terminal seniority roster, and such work has on occasion been performed by contractors' forces."

Carrier further states that Carrier's forces lost no time or earnings thereof and were not adversely affected thereby. Finally, Carrier claims 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 do not have exclusive jurisdiction over such work.

The evidence indicates that the Wharfbuilders, who are a part of the Carrier's Maintenance of Way forces, have traditionally performed work of the character here involved. While the effective Agreement does not specify the character of the work to be done by Wharfbuilders on the seniority roster, the very title "Wharfbuilder" implies the construction and maintenance of piers. One of the accepted definitions of a wharf is "any structure, as a pier or dock alongside which a vessel may lie." The rule is that the work reserved to a class of employes is that which is customarily and traditionally performed by them.

The Carrier's contention that they do not have exclusive jurisdiction over such work is based on the fact that on number of occasions in the past some of the work has been done by outside contractors.

The Organization contends in all such instances it either agreed to such action or filed a claim: the Carrier has responded that on only a few occasions were claims filed and that in the majority of such instances the work was subcontracted without protest from the employes and without prior discussion or negotiation. There is not sufficient evidence in our opinion upon which to make a finding relative to these claims.

Award No. 7836 of this Division involved repair work on piers "G" and "H", Port Richmond Terminal and the claims and facts are practically identical to the instant claim.

Our attention has been directed to Award No. 1, SBA 285, by Carrier, which is an Award made by the same referee as in Award No. 7836, Carrier citing this Award to sustain its position here. It is our opinion that it does not: while there was no statement that an emergency existed in that case, we feel that the Opinion of the Board therein stated facts which made it quite evident: the Board in that Award found that the particular forces who made the claim had never driven sheet piling of the type involved in that job and that the only work B & B forces could have done was pouring of the concrete: in that Award the claim was denied.

Relative to the claim of Carrier that Part two (2) of the claim is vague and indefinite: we do not so find: the individuals involved in this claim are easily identifiable and are readily ascertained.

Carrier contends that the claim should be disallowed because none of the Claimants involved lost any time as a result of the contractor doing the work. This claim is primarily to enforce the scope of the Agreement and not for work performed. If the scope has been violated then a penalty is imposed to the extent of the work lost. This is done to maintain the integrity of the Agreement. As to who gets the penalty, that is but an incident to the claim itself and not a matter in which the Carrier is concerned for if the Agreement is violated, it must pay the penalty therefor in any event.

As to Carrier's lack of a pile driver and steam derrick scow: this is not denied by the Organization, which, however claims the Carrier could have leased such equipment. There is no showing on the part of the Carrier that it made any attempt so to do, or that it could not be done.

As stated in Award No. 6905:

> "It is to be remembered that the subject of the Carrier's contract with its employes is work and not equipment. If the Carrier has equipment and no work and its equipment stands idle, no rights accrue to the Employes under the contract. If the Carrier has work and not equipment, and under those circumstances alone, could contract out its work a second time with impunity in every case, the last vestige of rights which the Employes have under the collective bargaining Agreement would disappear."

The burden of establishing an exception to the rule is on the Carrier and we do not believe that it has met that burden. In Award No. 757 this Board held that mere practice alone is not enough to establish exceptions to work clearly embraced in Scope Rule.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 8th day of December, 1961.

DISSENT TO AWARD NO. 10229, DOCKET NO. MW-8855

Carrier Members, by this reference, make the Dissent to Award No. 7836 a part of the dissent to Award No. 10229 — the instant case.

This Award No. 10229 should have denied the claim for the very reasons expressed by this same Referee in his next Award concerning the same parties and Agreement, Award No. 10230, wherein, among other things pertinent hereto, he said:

"The Board in finding that a Scope Rule, similar to the one involved here was ambiguous stated in Award 7216:

'The question is whether the work performed by the outside contractor belongs exclusively to the Maintenance of Way employes under the Scope rule of their agreement. The scope rule in question is very broad and does not contain any description of the kind of work intended to be covered. This type of question has been before the Board on numerous occasions and the applicable principles have been stated in numerous awards. In short, where, as here, the scope rule is completely ambiguous as to the kind of work covered, it is interpreted to reserve all work usually and

traditionally performed by the class of employes who are parties to the Agreement. There then remains to be decided in each case whether the particular type of work involved has been "usually and traditionally performed" by the Claimants.' "

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ J. F. Mullen