Award No. 10230
Docket No. MW-8891

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 Agreement when it assigned the work of gunniting walls and the erection of structural steel in connection with the remodeling of the Thaw House at Port Reading to a General Contractor whose employes hold no seniority rights under the provisions of this Agreement.

(2) Each Carpenter, Carpenter Helper, Mason and Mason Helper at Port Reading 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: In 1955 the Carrier decided to remodel its Thaw House at Port Reading.

The work consisted of dismantling the old walls, installing the necessary false work to support the roof structure, erection of the required structural steel frame work, installing plywood forms along the walls, applying concrete mixture on the walls by the gunnite method, removing and replacing the existing roof with concrete slab roof.

The work of dismantling the old walls, the erection of the false work to support the roof structure and the removal and replacing of the existing roof with a new concrete slab roof was assigned to and performed by the Carrier's Bridge and Building forces.

The work of erecting the required structural steel, erecting the necessary plywood frames, and gunniting the walls was assigned to and performed by a General Contractor whose employes hold no seniority rights under the provisions of this agreement.

Work of a similar character to that performed by the contractor's forces has heretofore been assigned to and performed by employes holding seniority in the Bridge and Building Department.

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 welding, structural steel and gunite work 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 major repair or construction of buildings, welding, structural steel and gunite work has never been considered the exclusive duties of Carrier's employes holding seniority as carpenters, carpenter helpers, masons and mason helpers and such work has on occasion been performed by contractor's 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 the thaw house at Port Reading, as shown in Carrier's Exhibit C-2, the claim as here 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 the thaw house has not in the past been reserved for or performed exclusively by employes holding seniority as carpenters, carpenter helpers, masons and mason helpers at Port Reading. 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.

OPINION OF BOARD: Carrier maintains a Thaw House at its coal dumper facility in Port Reading, New Jersey. Carrier states that upon inspection it was ascertained that the steel framework, roof framing and concrete walls of said house would require repairs and/or replacing, "due to an emergent corroded condition. That the work be done before the advent of freezing weather was imperative."

> "Carrier maintains a large coal dumper and supporting yard and terminal facilities at Port Reading, New Jersey. In order to facilitate the dumping of coal during freezing weather, a large thaw house is maintained at that point. The thaw house is divided into four compartments, each with a track capacity of 11 cars. The compartments, which are equipped with doors at each end, are designed to permit the admission of live steam to thaw cars of frozen coal."

The dismantling of old walls, the erection of false work to support the roof structure and the removal and replacing of the existing roof with a concrete slab roof was performed by Carrier's forces: Carrier claims "that because Carrier's forces were neither skilled in the erection, burning or weld-

ing required in connection with the structural steel work nor qualified to perform the guniting and because Carrier did not possess the necessary equipment for the guniting work, arrangements were made with a contraction expert in this work, to do the same."

Carrier further states the claim is vague and indefinite because it was not presented by or in behalf of "the employes involved," and a further claim that the relief sought herein could not be allowed even if the violations imputed to it were borne out by the record because there is no showing that any of the claimants suffered a time loss on account of the contracting out of said work.

Employes state the Carrier violated the Scope Rule of their effective Agreement, that they are entitled to this work under past practice; that similar and identical work has been assigned and performed by members of the Organization employes and there were not present unusual or compelling circumstances which made it necessary to let out the performance of the work to an independent contractor.

Carrier contends that employes were not entitled to do this work: that inasmuch as it involved a large amount of welding, burning and structural steel work, which particular type of work its employes had never performed. In addition it required gunite work which consists of special process involving special skills and specialized equipment which Carrier forces do not possess and have never performed.

In response to employes assertion that similar and identical work has been assigned to and performed by Carrier's forces in the past, Carrier has submitted in the record, a list of approximately 178 instances in which repairs, additions, new construction, remodelling and other similar projects have been contracted in the period from October 10, 1936, through June, 1955 and it is interesting to note one of these, in 1942, was a contract to repair thawing shed at Port Reading.

The Organization, in effect, admits or at least does not deny that the work required a large amount of welding, burning and structural steel work but asserts and claims that its forces were competent to do this work. Its theory in this connection is stated in its argument, to wit:

> "It also well might be, as the Carrier states above, that Maintenance of Way personnel have never before performed the particular type of welding or structural steel work here involved. However, true this disclosure might be, it does not in itself give rise to a presumption that Maintenance of Way personnel lacked the skills essential to do this work. They being highly skilled craftsmen it would be logical to assume that they possessed the necessary skills to do this work."

With reference to guniting work to be done on the job, Carrier states:

> "The equipment used for the guniting consisted of an air compressor, water pump, a chamber where sand and gravel are mixed under pressure and blown through a hose to a specially designed nozzle which adds water to the dry mixture, breaks mixture into a fine spray directed at high pressure against the surface of the work."

Carrier states its forces were not qualified either by past knowledge or experience to perform the guniting work required and that it did not have the special equipment necessary to perform this work.

Organization admits that the employes involved here had no training in guniting and that Carrier did not have the special guniting equipment needed. It is its claim that Carrier could have rented such equipment and trained its own men to do such work and cites an incident where a crew, which we assume was different from the one involved here, used rental guniting equipment, after instruction from a person assigned by the owner of such equipment.

The question involved here concerns the propriety of "contracting out" certain construction and the question of whether or not the performance of the work outlined herein, inures to the employes covered by the effective Agreement.

This basic question has been before this Board on a considerable number of occasions, with decisions both affirming and denying requests that the work involved in such awards be found in the Maintenance of Way work. While certain broad principles have been enunciated the overall sense of these awards indicates the intention of the Board to apply these broad principles to the then existent facts of record.

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."

Applying the above reasoning to the present facts we must of necessity conclude that the particular work involved here had not been usually and traditionally performed by Maintenance of Way employes. (It is interesting to note that Carrier assigned its forces to do the portion of the work that it felt its forces were capable of and competent to do.)

On the record made in this case, and without intending to preclude a different result in a future case by a different showing, we must find that past practice upon the property, together with the lack of adequate experience, overcomes the prima facie rights to the work in question.

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 has not been violated by the showing made herein.

AWARD

Claim denied.

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.