Award No. 10300
Docket No. MW-9396

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

George D. Bonebrake, 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 dismantling and removing Pier 13, the construction of a protective bulkhead along Shore Road, and other work incidental thereto, at Fort Richmond to a general contractor whose employes held no seniority rights under the provisions of the Agreement;

(2) The employes holding seniority as Machine Operators, Chauffeurs, Wharfbuilders, Carpenters, Wharfbuilder Helpers and Carpenter Helpers on the territory where the work was performed each be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours consumed by Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Commencing on or about January 6, 1956, the work of dismantling and removing Pier 13, the construction of a protective shore line bulkhead, and other work incidental thereto, at Port Richmond, was assigned to and performed by a general contractor without concurrence or negotiations with the employes' authorized Representatives.

The contractor utilized cranes, trucks, and a bulldozer, operated by its employes in the performance of the dismantling and removing work. The work involved the dismantling of the pier, the loading of the materials, dirt, and debris, by the cranes into trucks, which were then moved to and unloaded at Pier 6. A bulldozer was then used to spread the materials, thereby keeping Pier 6 at the desired grade.

After the completion of the dismantling and removing work, the contractor utilized a pile driver, with operator, to drive piling adjacent to the shore line where Pier 13 was joined thereto, to form a protective shore line bulkhead. The contractor also used a scow in connection with the performance of the above referred to work.

Similar equipment to that utilized by the contractor was either owned by or available to the Carrier.

"Bridge and Building Foremen, Assistant Foremen, Inspectors, Gang Leaders, Mechanics, and their helpers, viz; Carpenters, Painters, Masons, Blacksmiths, Plumbers, and Tinsmiths.

"District, Section, Track, Work Train, Extra Gang Foremen, Assistant Foremen, and Sub-Foremen.

"Fence Repairmen and all laborers, including Laborer-Truck Drivers in the Maintenance of Way Department.

"Fire Equipment Inspector, Port Richmond.

"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. No where 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.

The Organization also alleged violation of Rules 6 — Roster, 7 — Promotions, and 28 — Bulletin, of the schedule agreement. Carrier submits that these rules apply and pertain to work covered by scope rules of the schedule agreement and Carrier maintains that work in the instant claim is not covered by scope rule of the applicable agreement. Therefore, it is the position of Carrier that these three rules are not relevant or material to the instant claim.

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, and the Brotherhood has known of the long past practice of contracting work in connection with work at Port Richmond. However, when these agreements were negotiated, existing practices were not abrogated or changed by the terms of the negotiated agreements and Carrier maintains it has not in any fashion restricted itself by agreement with the Brotherhood from contracting out work such as is before the Board in this docket.

Under the facts and evidence, Carrier submits that the removal of Pier 13 was an unusual project of great magnitude and is work which has not in the past been reserved for or performed by employes holding seniority at Port Richmond under the Maintenance of Way Agreement. 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 parctice, 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: Petitioner charges that the Carrier, by contracting out the dismantling and removal of one of its pier's — Pier 13 — at its Port Richmond Terminal in Philadelphia, Pennsylvania, violated the effective Agreement between them. Petitioner claims that the work which was involved belongs to its Maintenance of Way forces and that the Carrier in permitting others to perform the work, breached the Agreement. Carrier contends that its acts did not constitute a violation.

We shall not attempt here to set out all the facts involved, but the details from which we draw our conclusions are contained in the record. Generally, the undisputed facts are as hereinafter set forth. The terminal, which fronts on the Delaware River, consists of float slips, piers and storage yards. Carrier undertook a program to rehabilitate and modernize its facilities at this terminal, one project of which consisted of the complete physical removal of Pier 13 in order that large, modern ore-carrying vessels could be berthed on the north side of Pier 14.

Pier 13 — the one in question — was constructed in 1838 of timber cribbing. The structure was 504 feet long and 83 feet wide. The cribs were built of heavy timbers, about 24" by 24" cross section, and were filled with stone and earth until they submerged and rested on the river bottom. Depth of water at the inshore portion of the pier was 20 feet, and at the outshore' portion 28 feet. At low tide, depth of water between Piers 13 and 14 was approximately 28 feet; after removal of Pier 13, this was dredged to 35 feet.

The demolition of the pier entailed the removal of approximately 36,000 cubic yards of earth and stone, plus pulling of timber piling and cribbing. A temporary timber bulkhead was installed, due to the late delivery of sheet steel piling, which entailed the driving of piling along the shore line plus necessary fill behind the piling.

Carrier entered into a contract with contracting engineers for the complete project, and a sub-contract was entered into for the removal of the pier with a concern experienced and equipped for such work. The pier was removed in about 120 days' time.

Although the Agreement does not expressly prohibit or limit the contracting out of work, previous awards have held that under the circumstances therein involved, such action constituted a violation of the effective Agreement. Such awards are to the effect that the Scope and analagous Rules cover the normal work — or as sometimes expressed, work "usually and traditionally performed" — which is necessary to the operations of the Carrier and its facilities.

It would be impossible — if not impracticable — to categorically define or describe each and every instance where work is contemplated as being covered by the instant Agreement. No such attempt will be made. All that can or should be done is to apply the Agreement to the facts presented.

The ultimate conclusion to the argument that the work, such as herein involved, being maintenance work and therefore covered by the Agreement, which if done must be done by employes covered by the Agreement or in the absence of a consent thereto suffer the work not to be done at all, is not tenable. The Agreement does not so provide, and the absence of a provision or provisions expressing that result is significant in arriving at its application to the facts involved.

There is no doubt that many of the operations performed by employes of the contractor were the same or similar to those performed elsewhere or capable of being performed by employes of Carrier, but this fact alone does not establish a violation. As we have stated heretofore, the work need not be fragmentized. The work as a whole is the importnt thing. Each case, of course, must stand or fall on its own set of facts, and after studying the matter from all angles — pro and con — we are of the opinion and accordingly hold that the work here permitted its being contracted out without violating the Agreement. As stated in Award No. 4158:

"Looking to the Scope Rule of the Agreement, we find that its very broad language would indicate that all maintenance and construction work is covered thereby and that the Carrier could not hire such work to be done by other than Maintenance of Way employes. Obviously such a conclusion is absurd. It would require the Carrier to use only Maintenance of Way employes to build a huge new bridge, an elaborate station or large buildings, and numerous other kinds of capital improvements. No reasonable people would contract with such a result in mind for it is clear that for such large construction work the Carrier would not have the supply of men of different skills required nor the special equipment. Obviously, then, there must be some exceptions to the rule. What are those exceptions? Here again we run into a stone wall in attempting to settle upon a principle which would be a hard and fast guide. The difficulty is that it is not a matter of principle but a matter of degree which determines the exception. A clear exception would appear to be the building of a large structure from the ground up or the construction of any type of improvement requiring large capital outlay. On the other hand, the building of a small station, or tool houses and small annexes to existing structures may not be excepted. Ordinary maintenance work such as painting of existing structures, plumbing repairs, repairs to existing tracks, buildings and bridges necessary to the operation of the railroad are clearly not excepted from the Scope Rule."

The fact that the work done was not new construction of great magnitude, but rather demolition and dismantling a large pier, but which did involve a large capital outlay, does not distinguish the principle as above stated. The important thing, as heretofore stated, is the nature and extent of the work involved. Here, we find that the nature and extent of the work was such, that contracting it out was not a violation of the Agreement.

In view of our decision herein, it is not necessary to discuss or rule upon other questions raised herein. No inference as to any such matter — one way or the other — is intended or should be drawn.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of January, 1962.