# Award No. 10310
# Docket No. MW-8825

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Charles W. Webster, Referee

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## 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 repairing Bridge No. 88/23 west of New Ringgold 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 on the Division where the work was performed 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 or about September 1, 1955 the work of repairing the east abutment, wing walls and the first pier from the east in Bridge 88/23, supporting track No. 2, was assigned to and performed by a General Contractor, without negotiations with or the concurrence of the employes' authorized representatives.

The work consisted of driving steel sheeting around the abutment, wing walls and pier and the rebuilding of the abutment and pier and other work incidental thereto. The contractor utilized an average of approximately eight men in the performance of the above referred to work.

Similar work has heretofore been assigned to and performed by the Carrier's Bridge and Building employes, using equipment either owned or rented by the Carrier.

The employes holding seniority in the Bridge and Building Department were available, consequently the agreement violation was protested, and a claim filed in behalf of the claimants.

Claim was declined as well as all subsequent appeals.

"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. Carrier's forces have not on previous occasions performed work of the magnitude here involved.

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 bridge repairs 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 repairs and changes to bridges has never been considered the exclusive duties of Carrier's employes holding seniority as Carpenters, Carpenter Helpers, Masons and Mason Helpers on the Shamokin Division seniority roster, and such work has, when deemed necessary, been performed by contractors' 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 Bridge No. 88/23, as shown in Carrier's Exhibit C-2, 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 such as performed by contract at Bridge No. 88/23 has not in the past been reserved for or performed exclusively by employes holding seniority as Carpenters, Carpenter Helpers, Masons and Mason Helpers on the Shamokin Division 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:** This is a case arising out of heavy damage done to the Carrier's Bridge No. 88/23 due to the hurricanes "Connie and Diane" on August 18, 19, 1955. The Carrier, in order to repair the bridge contracted out the work. The Organization claims that this was work covered by its Collective Bargaining Agreement. The Carrier on the other hand

contended that this was an emergency situation, that time was of the essence and that there were skills required which its employes did not have and in addition it did not have the necessary equipment.

A careful analysis of the record discloses that the maintenance and repair of bridges falls within the scope rule of the agreement between the parties. However, in light of the extreme circumstances facing the Carrier plus the fact that it did not possess the equipment nor employes skilled in the particular work needed to be done immediately, this Division feels that the agreement was not violated. It might be pointed that this identical issue arising out of the same hurricanes has been before a Special Adjustment Board involving these parties. In that case the Board held:

> "Carrier's B & B forces on the Shamokin Division have never driven sheet steel piling such as was involved in the present case. The only equipment possessed by the Carrier which could have been used for this driving work consisted of heavy locomotive cranes, but if these had been used the employees having jurisdiction over the operation of such equipment are covered by a different labor contract. Moreover, B & B forces on this Division have not previously performed the type of underwater inspection that was done by the outside contractor. The only part of this entire construction project which the B & B forces could have done was the pouring of the concrete. Under the confronting circumstances, however, we are of the opinion that the Carrier was not required to fragmentize the work in order to assign the concrete portion to its own forces. A denial award is warranted."

This reasoning seems sound to this Division.

**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 26th day of January 1962.