

Award No. 10592

Docket No. MW-9794

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(Supplemental)**

Levi M. Hall, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC
RAILWAY COMPANY**

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

(1) The Carrier violated the effective Agreement when, on or about May 15, 1956, it assigned the work of making general repairs, painting and renewing the roofs on two buildings formerly called the freight depots located at Vine and Commerce Street and at Vine and Front Streets at Cincinnati, Ohio, to a general contractor whose employees hold no seniority rights under the provisions of this Agreement.

(2) The employees holding seniority in the Bridge and Building Department on the territory where the work was performed each be allowed pay at his respective straight time rate 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.

EMPLOYEES' STATEMENT OF FACTS: The Carrier owns two buildings, formerly called the Freight Depots, one located at Vine and Commerce Street, the other at Vine and Front Street at Cincinnati, Ohio, which it has leased to outside concerns for the past twenty-five years.

Throughout that twenty-five year period, all of the maintenance and repair work on these buildings has been assigned to and performed by the Carrier's Maintenance of Way and Structures Department employees.

Nonetheless, on or about May 15, 1956, the Carrier assigned the work of making general repairs, painting and renewing the roofs on the aforementioned buildings to a General Contractor whose employees hold no seniority rights under the provisions of this Agreement.

The employees holding seniority in the Bridge and Building Sub-department were available, fully qualified, and could have efficiently and expediently performed the above referred to work, had the Carrier so desired.

Aside from the fact that the old freight depot here involved is outside the purview of the effective Maintenance of Way Agreement, work on it has not been exclusively performed under an established practice by Maintenance of Way employees. In fact, most of the work on the building throughout the approximately twenty-five years it has been leased, and therefore not operated as a part of Carrier's railroad operations, has been performed by contract. Then, too, to perform some of the work here involved required special skills, special tools and equipment. Moreover, emergency time requirements existed which presented an undertaking not contemplated by the Agreement and which was beyond the capacity of Carrier's forces. A force of sufficient size had to be placed on the job to insure all the exposed area being covered each day in order to protect the equipment and merchandise of the tenants.

Under the circumstances, therefore, the conclusion is inescapable that prior Board awards support the Carrier's action in contracting out the involved work.

CONCLUSION

Carrier has shown that —

(a) The Brotherhood has not effected compliance with the specific terms of the Agreement in presenting the claim, which is vague and indefinite and is nothing more than a demand on behalf of unnamed persons for unspecified amounts on unidentified dates.

(b) The effective Maintenance of Way Agreement has not been violated as alleged. To the contrary, it has been complied with. The old freight depot building having been leased to outsiders, and not utilized as a part of Carrier's railroad operations for approximately twenty-five years, is property outside the purview of the effective Agreement (Award 4783).

(c) Prior Board awards fully support the Carrier's action in contracting out the involved work. Aside from the fact that the work was done on leased property not used for railroad purposes, work on the old depot building has not been exclusively performed under an established practice. Furthermore, special skills and special equipment were required to perform a portion of the job. Emergency time requirements existed which presented an undertaking not contemplated by the Agreement and which was beyond the capacity of the Carrier's forces.

Claim being without any merit whatsoever and unsupported by the Agreement, the Board cannot do other than make a denial award.

All evidence here submitted in support of Carrier's position is known to employe representatives.

Carrier not having seen the Brotherhood's submission reserves the right, after doing so, to reply thereto.

OPINION OF BOARD: Certain facts involved in the instant claim are not in dispute; the Carrier owned a building on Front, Vine and Commerce Streets in Cincinnati, Ohio, which had formerly been used by the Carrier for a freight depot but for a period of twenty-five years had not been used by the Carrier in conducting its railroad operation; it had been leased to outsiders by the Carrier during that time and had been used by them as a warehouse. On May 17, 1956, the Carrier entered into a contract with George E. Detzel

Company in which the contractor agreed to furnish certain materials and perform certain work including repair work on the building. Work commenced on May 21, 1956 and was completed on August 24, 1956.

It is conceded by the Petitioner that on May 21, 1956, the building was not used in railroad operation. The only indication of any connection between the use to which the building was being put and railroad operation was a mere statement by the General Chairman — "These buildings adjoin C.N.O.&T.P. railroad tracks and are served by the C.N.O.&T.P. Railroad." — nothing more.

The Claimant contends that throughout the twenty-five year period, all of the maintenance and repair work on the building has been assigned to and performed by Maintenance of Way employees; that, nevertheless Carrier assigned the work of making general repairs, painting and renewing roofs on this building to a General Contractor whose employees had no seniority rights under the Agreement; that employees holding seniority in Bridge and Building Sub-department were available and fully qualified to perform the above referred to work.

Carrier, to the contrary, contends that the building is occupied by three tenants under leases from the Carrier and used as a warehouse, not being used by the Carrier as a part of its railroad operation, thus making work on the property outside the purview of the effective Maintenance of Way Agreement; further, that some of the operation commenced on May 21 required special equipment and skilled application but the railroad employees had neither the equipment nor the necessary skills to use if the work was to be performed by the Bridge and Building force; that the work that had previously been performed by that force on the building was not of a nature nor quality requiring any special skill or ability; that whenever there was any work requiring major construction or special skill, that work was let out to outside contractors without any protest from the Brotherhood.

The leases of the three tenants, herein referred to, are not before us, so we are in ignorance as to whether or not there were covenants in the leases on the part of the lessees to keep the premises in repair. Nor do we think it necessary to a determination of the matter in issue that we possess such knowledge. We must rely on the facts and circumstances disclosed by the Record.

It is clear, from a reading of the Record, that this building has been used as a warehouse by outside tenants for twenty-five years. There is nothing in the Record which discloses that during any of this time the Carrier received any benefit from the building other than the rental which was incidental to Carrier's ownership of the building. There is nothing in the Record to indicate that in its principal business of operating a railroad the Carrier received any benefit whatever, either directly or indirectly from the rental of this property. Mere ownership of property, without a showing by the Petitioner in renting the property the Carrier received some special benefit other than that of rent alone, is not enough to bring it within the purview of the Agreement.

Other issues have been raised by the Claimant and the Carrier but because of the conclusion reached, herein, that there has been no violation of the Agreement, it is unnecessary to discuss them here.

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 Employees involved in this dispute are respectively Carrier and Employees 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 there has been no violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of May 1962.