

Award No. 10751

Docket No. MW-8817

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Arthur Stark, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ELGIN, JOLIET AND EASTERN RAILWAY 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 constructing a new office building at Kirk Yard to a General Contractor, whose employees hold no seniority rights under the provisions of this Agreement;

(2) The Bridge and Building employees who are entitled and/or permitted to perform work on the territory where the work was performed each be allowed pay at their respective straight time rates of pay 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: Commencing on or about October 28, 1953, the work of constructing a new office building, approximately 44 feet in width by 65 feet in length at Kirk Yard, Gary, Indiana, was assigned to and performed by a general contractor whose employees hold no seniority rights under the provisions of this Agreement.

The building has a concrete foundation; the exterior walls were of brick construction and the interior walls supporting the steel roof beams were of concrete block construction; the several partitions separating the building into various rooms were constructed of concrete blocks, glass blocks, and glazed tile. The building has the usual water, sanitation and heating facilities and the doors, windows, and etc., were painted.

The work was of the character that has heretofore been assigned to and performed by the Carrier's Bridge and Building employees, a few examples being the construction of a new Yard Office building at Joliet, Illinois; a new addition to the Diesel Engine House in the Gary Mill Yard; a new Carpenter Shop, Locker and Wash Room in Kirk Yard at Gary, Indiana; a new Car Department building at South Chicago; and a new Motor Car and Carpenter Shop at Joliet, Illinois.

claim must be denied because Rule 62 of the schedule agreement confines time claims to the actual pecuniary loss resulting from the alleged violation, and the Claimants sustained no such loss.

In view of the foregoing, the Carrier respectfully submits that a denial award should be made.

Material included herein has been discussed with the Organization either by correspondence or in conference.

(Exhibits not reproduced.)

OPINION OF BOARD: During the period 1950 through 1952 the Carrier was engaged in an extensive program designed to modernize its Kirk Yard at Gary, Indiana. Without interfering with operations, a new automatic retarder type classification yard was superimposed upon the old flat switching type yard. During the period Carrier's Gary Division B&B forces were occupied almost exclusively with this program which included construction of several new buildings. As a result, other construction projects were deferred, as was a considerable amount of maintenance work.

In late 1952 and early 1953 the Carrier discussed with the Organization its need for manpower to augment B&B forces. In a May 15, 1953 letter to Maintenance of Way's General Chairman, Assistant Chief Engineer S. H. Shepley noted that, unless additional employees were obtained very shortly, "it will be necessary, in order to complete the maintenance and building program now scheduled, to contract a certain portion of this work in order to properly meet the acknowledged needs of the Carrier for new facilities as indicated by approved AFEs or the maintenance of its existing facilities . . ." Specifically mentioned in this letter was a new building for the Kirk Yard Car Department which, Shepley estimated, would require 1,285 man-days of carpenter forces.

In October 1953, after additional correspondence with the Organization and fruitless recruitment efforts, the Carrier concluded that (1) the employment picture was not likely to change, (2) skilled employees could not be obtained in sufficient numbers to permit erection of a new building by Gary B&B forces. Accordingly, on October 15, 1953 General Contractor Fred C. Rawley & Sons, Inc., was retained to construct the new Car Department building. Work commenced on about October 24 and was completed by May 15, 1954. The building is a one story office building with a concrete slab foundation, steel frame shell paneled with concrete block and brick veneered walls. The foundation is about 62 x 44 feet; it is divided into six principal offices, plus rest rooms and store rooms.

Petitioner claims that the Carrier violated the Agreement by sub-contracting the construction of this new building. It argues, in substance:

1. Construction work of this type is pre-empted to B&B employees by the provisions of Rule 56 I.

2. B&B men had the necessary ability and experience to accomplish the work.

3. While some immediate manpower shortage existed, this was primarily Management's fault. Moreover, it could have been overcome had the Carrier taken full advantage of Agreement provisions such as Rules 5, 6, and 7.

4. Since the labor shortage was of Management's own making, it is not free to plead such shortage as justifying its subcontracting decision. (Awards 4158, 5151, 5485, 4869, 7836 and others.) In this regard Petitioner also notes that (1) local contractors were successful in procuring necessary help; (2) Carrier laid off B&B employees on another division at this time.

The Carrier, in denying any Agreement violation, contends:

1. Rule 56 I is no more than a classification rule. It does not obligate the Carrier to maintain a force adequate to build a large office building. Rather, the broad language of this provision embraces any building work such as that contemplated when the Agreement was made. (Awards 4158, 5914, 7913, 8125 and others.)

2. This Carrier does not have enough building construction work to afford reasonable, regular employment to workers in all of the building trades. (Awards 5839, 5840, 6299 and 6300.)

3. In a side-letter Agreement of September 28, 1945 work of this character was excluded from the contract coverage. In this letter, the Organization's then General Chairman wrote to Carrier's Vice President:

"Referring to the new agreement covering hours of service, working conditions, and rates of pay of employees represented by the Brotherhood of Maintenance of Way Employees.

"It is agreed that any construction project of such magnitude or intricacy that cannot be performed by employees covered by the agreement, or when city or other ordinances do not permit the work to be done by railroad employees, may be performed by outside contractors."

This letter, Management contends, was a condition precedent to final execution of the 1955 basic Agreement. (Petitioner strongly maintains that it is no Agreement at all since it was not signed by any Management representative.)

4. Had Petitioner obtained exclusive right to all construction work in Rule 56 I it would not have sought to amend this rule in 1957 to provide:

"Any construction . . . which would be within the scope of the agreement if it were performed by the railroad company with its own employees shall not be let to contract by the railroad company except by agreement . . ."

5. Even assuming that the September 1945 letter is not binding, the Carrier had the right to subcontract construction of this building since it had made every reasonable effort to supplement its forces, including consultation with the Organization. However, no help was forthcoming and, additionally, many of the Organization's suggestions were frivolous and unreasonable. In view of the existing labor shortage, therefore, the Carrier was justified in its actions. (Awards 4833, 3251, 2465, 2338 and others.)

6. Projects as large as the Car Department building had not been constructed by B&B forces. Customarily work of that magnitude was contracted out (including several projects subsequent to 1945).

7. Even if the claim is sustained, employees are not entitled to any

remuneration since, under Rule 62's second paragraph "Time claims shall be confined to actual pecuniary loss resulting from the alleged violation."

The record in this case is too long (well over 300 pages) and complicated to justify an attempt to discuss every contention and argument. Petitioner, in five separate submissions, and Carrier, in four, have pursued a host of questions, many in great detail. We shall consider only those necessary for disposition of the claim.

Rule 56 I, in our judgment, does cover the type of work performed here. Paragraph (a) provides in relevant part:

"All work of construction . . . of buildings . . . shall be bridge and building work."

Paragraph (c) states in part:

"An employe skilled in and assigned to the construction . . . of buildings . . . shall constitute a bridge and building carpenter."

Paragraph (j) reads:

"All work described under Rule 56 (I) shall be performed by employes of the B&B sub-department, except as provided in Memorandum of Understanding dated November 8, 1939, and agreement with shop crafts effective April 3, 1922."

Since the exception in Paragraph (j) is inapplicable here, it must be concluded that, absent considerations discussed below, construction of the new Car Department building fell within the purview of B&B sub-department forces.

The Carrier contends that under the so-called side-letter Agreement of September 28, 1945 it is permitted to subcontract certain types of construction jobs. It is not necessary, however, to determine whether or not such an Agreement exists since there are other grounds upon which the matter at hand can be decided.

This Board has held in a persuasive line of decisions that there exists, in effect, an implicit exception to the all-inclusive scope rule when circumstances are such as to make virtually impossible the completion of work by available Carrier forces. These decisions, correctly in our opinion, have emphasized the difficulty of establishing principles to guide the parties in this area since questions of available manpower with required skills, special equipment and the like, are largely matters of degree. (Award 4158) However, some guide lines have been set forth in Board decisions. Thus in Award 3251, after finding that certain work could not be farmed out "with impunity," the Board held:

"Where unusual conditions intervene, such as a labor shortage, so that the work cannot be performed in the manner contemplated by the agreement, the carrier is required to negotiate the matter with the organization before it can justifiably assert that a contracting of the work constitutes only a technical violation of the agreement."

Another guide line is set forth in Award 3251 as follows:

"If negotiations be attempted, and either party assumes an unreasonable attitude, this Board may give primary consideration to such fact in determining, if the Carrier elects to contract the work, whether the violation was technical only, . . . Neither party can be required to do the impossible, nor will they be permitted to assume an unreasonable position in such matters with impunity."

These guide lines were followed by the Board in deciding Award 4833 and other cited cases.

In the case at hand, the Carrier's decision to subcontract was based primarily on the shortage of skilled masons required for construction work. We may inquire, then, (1) whether a shortage actually existed, (2) if so, was it caused by Management, (3) did Management consult (i.e. negotiate) with the Organization, (4) did Management fail or refuse to take reasonable steps to correct the situation.

To answer these questions a brief chronological resume will be helpful:

November 24, 1952. Management advised the Organization's General Chairman of a "critical situation which has developed due to shortage of employes in the Bridge and Building Sub-department." Specifically mentioned, among others, were 3 carpenters and 2 water service mechanics on the Joliet Division; 2 carpenters in Gary Division; 4 carpenters positions (and 2 others) authorized but not bulletined. This letter from Engineer Hoyt concluded: "I will greatly appreciate anything either of you may be able to accomplish in the way of attracting qualified new employes to our service . . ."

February 12, 1953. Engineer Hoyt advised Carrier's Superintendent of Employment (and the Organization) that the "present situation is almost desperate with the present forces even if we could stop all new construction work, which we cannot do." Hoyt stated he needed at least 12 more carpenters on the Joliet Division and 10 on the Gary Division, in addition to mechanical helpers and others. He suggested using local advertising and "any other means which you consider feasible" to obtain additional men. (Hoyt, also noted that B&B forces had been seriously depleted as a result of (1) failure of a considerable number of men to return from lay-off after the steel strike, (2) retirements, (3) transfers to other departments, (4) inductions into the armed forces.)

April 30, 1953. Maintenance of Way General Chairman D. L. Woods, in a lengthy letter to Engineer Hoyt, stated that the labor shortage was of the Carrier's own making since many employes had been unnecessarily laid off at the time of the steel strike, some had been unnecessarily suspended for disciplinary reasons, and others had quit in protest. Woods also referred to a pending claim at East Joliet concerning contracting construction of a new office building. (This was later withdrawn without prejudice.) The General Chairman castigated Management for its "contemptuous" treatment of Maintenance of Way forces and its "highly strained and hypertechanical interpretations of the agreement." He offered assistance in persuading individuals to accept employment. But, he added, "if the Carrier persists in its efforts to make employment or continued employment as unfavorable as possible, any effort on our part to overcome such effort must necessarily fail."

May 15, 1953. Carrier's Assistant Chief Engineer S. H. Shepley wrote the Organization's General Chairman that unless the Carrier (with the Organization's assistance) could increase its B&B forces "very shortly" it would be necessary to contract some work. He noted the following facts:

(1) 5,296 man-days of carpenter maintenance or AFE work remained to be done at Gary before year's end.

(2) The current carpenter force of 20 men could handle a maximum of 1,976 man-days, leaving a need for 12 more men.

(3) No carpenters were available for construction of the Car Department building at Kirk Yard which would soon be approved.

(4) Management had taken numerous steps to secure additional labor (the best solution to the problem, he acknowledged) including bulletining vacant positions (no bids were received), placing help-wanted ads in newspapers, and using the services of Carrier's Superintendent of Employment.

Shepley attributed the Carrier's (and Organization's) failure to obtain men to "the present scarcity of labor in the craft lines."

May 27, 1953. General Chairman Woods, in a letter to Assistant Chief Engineer Shepley, suggested that, in order to obtain additional personnel, Management take these actions:

(1) Negotiate an upward adjustment in wage scales to place the Carrier in "a better competitive position."

(2) Adhere more closely to the collective bargaining Agreement.

(3) Advertise in the Gary Newspapers.

(4) Utilize the services of local and state employment services as well as the Railroad Retirement Board.

September 9, 1953. Shepley advised Woods that since all efforts to increase Gary carpenter forces had failed, and since construction of the new Car Department Building had been approved, the Carrier planned to solicit bids in 10 to 15 days unless the Organization was able to "provide some real assistance in securing additional B&B help for us, principally in the form of experienced carpenters capable of doing masonry work." In reviewing the Organization's May 27 suggestions and subsequent Carrier actions, the Assistant Chief Engineer noted:

(1) The Organization's proposal to increase wages was untimely and unwarranted. Carrier's Maintenance of Way department scales were at least comparable to those of other railroads.

(2) Carrier does live up to the Agreement.

(3) Local and state employment offices had been contacted (as well as railroad retirement offices) without any success.

(4) Ads had been placed in the Gary Post Tribune and other papers in the Gary-Calumet district. The results: Thirteen men applied for work, of whom ten had no carpenter experience; of the three who were hired, one never appeared for work and the other two quit after 10 days.

September 23, 1953. Woods wrote Shepley that the Organization would "permit" the Carrier to contract for construction of the Car Department building subject to Carrier's acceptance of seven conditions:

- (1) This approval to be confined to the Car Department building.
- (2) The Organization to be provided a copy of the successful bidder's contract.
- (3) No B&B forces to be reduced for at least one year from date construction is performed.
- (4) Grant a leave of absence to any B&B employe who desires to work for the Contractor.
- (5) The Carrier to require the Contractor (a) to employ any B&B employe who wants to work on the project, (b) to pay these men the craftsman rate paid to his regular employes.
- (6) Advise all B&B men of the opportunity to work for the Contractor.
- (7) Carrier to reimburse any B&B man who works for the Contractor for all expenses incurred in connection with joining a building trades union (if that was required).

September 26, 1953. Shepley (now Chief Engineer) advised Woods that (1) the Organization's "seven conditions" were not acceptable, (2) the Organization's "permission" had not been requested, (3) Carrier had proceeded with soliciting bids since it was impossible to obtain additional men.

October 8, 1953. General Chairman Woods advised Shepley that he would file claims concerning Management's action since the Carrier had exhibited "bad faith" and its "alleged effort to correct the unfavorable situation has been a mere subterfuge to gain some semblance of justification for contracting out the work." The General Chairman also (1) repeated his suggestion that the Carrier raise B&B wages, (2) challenged the Carrier to show why present B&B forces could not perform the construction job, (3) renewed his offer to "permit" contracting provided the Carrier accepted the seven listed conditions.

October 15, 1953. Replying to Woods' letter, Shepley stated that the manpower situation described in his May 15 letter had become even more acute, demonstrating the complete inadequacy of B&B forces to accomplish both required, long deferred maintenance and new construction work. He suggested that the Organization, if it was serious, pursue the question of a wage increase in the manner prescribed by contract (although he considered that request only a "ruse" designed to "garble" the real issue). Shepley again rejected the Organization's "seven conditions," pointing out that the effect would be to diminish B&B forces even further. The Chief Engineer also referred to the letter Agreement of September 28, 1945 as controlling in the situation.

Consideration of the above facts and other evidence in the docket convinces us that Management was faced with an actual shortage of carpenters who could perform needed masonry work in 1953. Was this shortage primarily due to the Carrier's shortsighted and inefficient planning? We think not.

True, a considerable number of men were furloughed because of the national steel strike, and many failed to return when called. But the Carrier cannot reasonably be expected to retain a full staff of employes—even with a pending backlog of work orders—when (1) operations are almost at a standstill, (2) income is greatly reduced, and (3) the duration of this aggravated condition is unpredictable. As for the Organization's other "lay-off" charges, the record does not substantiate its broad assertion that every single B&B

employee at Joliet was laid off for the better part of a year. (It appears, on the contrary, that a minimum of 53 men were employed). Other furloughs were insufficient in number or kind to warrant a finding that Management was actually terminating the very men it needed.

There can be little doubt, based on a review of the correspondence between the parties, that Management did consult (renegotiate) with the Organization in regard to filling vacant B&B positions so that construction of the new building could be performed by Carrier employees. Between November 1952 and October 1953 the Organization's advice and assistance were solicited on several occasions. The only question, really, is whether Management failed to take reasonable steps to correct the situation. In our opinion this question must be answered in the negative. The following considerations, among others are significant:

1. The Carrier waited many months before proceeding with a contractor.
2. The Carrier advertised in newspapers in several cities over a considerable period of time. It utilized local and state employment services, as well as offices of the Railroad Retirement Board. It hired all applicants who possessed the required skills.
3. Management, realistically, could not be expected to raise the wages of B&B employees to cope with this labor shortage if for no other reason than that such action would upset the relationship between Maintenance of Way wages and those of men in other crafts. Such action would undoubtedly have led to a host of similar requests from other Organizations.
4. The Organization's "seven conditions," also, were unrealistic. The primary one would have crippled existing B&B forces (which were already insufficient) by encouraging men to work for the Contractor; another would have required Management to commit an act of doubtful legality (reimbursing employees for union dues).
5. While Rule 17 permits transfer of employees between seniority districts, the Organization's suggestion that Joliet B&B men could have been transferred to Gary was belated (it was not made until April 1955). Moreover, there is evidence that all available masons on the Joliet Division were already fully occupied.

In sum, it is fair to conclude that the shortage of masons in 1953 was principally due to the general tight labor market for skilled craftsmen which, in turn, was influenced by the demand for such men caused by this Nation's participation in the Korean War. It does not appear likely that any reasonable steps taken by Management could have altered this picture at the time. As a consequence we hold, in line with the reasoning and precedents cited above, that the contracting in question fell within the implied exception to the Scope Rule and, therefore, that the claims herein should be denied.

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 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 3rd day of August, 1962.