Award No. 11027
Docket No. MW-9804

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

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

(1) The Carrier violated the effective Agreement when, on June 25, 1956, it assigned the work of repairing the roof on the Diesel Shop at Elizabethport, New Jersey to a General Contractor whose employes hold no seniority rights under the provisions of this agreement.

(2) Each of the employes holding seniority as Roofers, Tinsmiths and Tinsmith Helpers in the Bridge and Building Department on the Central Division 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 June 25, 1956, the work of repairing the roof on the Diesel Shop at Elizabethport, New Jersey was assigned to and performed by Chris Andersen Roofing Company without negotiations with or concurrence by the employes' authorized representatives.

The work consisted of installing a layer of felt on the roof, then applying a coat of hot tar, then installing a layer of three ply tar paper, with a finishing coat of hot tar applied to the roof. The work was completed on July 13, 1956.

The work was of the nature and character that has heretofore been assigned to and performed by the Carrier's Maintenance of Way and Structures Department employes, having repaired the roof on No. 1 Storeroom at Elizabethport about 1946, installed a new roof on a building at Yard C, Communipau, in August of 1951, installed a new roof on the Checkers House as well as the Brakeman's House in the Jersey City Terminal in 1952, and installed a new roof on the Dormitory Building at Bethlehem Engine Terminal during the year 1953, using Carrier-owned equipment.

The agreement violation was protested and a suitable claim filed in behalf of the claimants. The claim was declined, as well as all subsequent appeals.

Therefore, for the following reasons; namely,

1. The magnitude of the area covered (approximately 28,000 sq. feet),

2. The unavailability of necessary skilled help and equipment, and

3. A guarantee bond for 15 years,

this claim lacks merit and should be denied in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: The following facts are undisputed: Commencing on June 25, 1956, the work of repairing the roof on the Diesel Shop at Elizabethport, New Jersey, was performed by the employes of the Chris Anderson Roofing Company, the work having been assigned to Anderson Roofing Company by the Carrier. The work consisted of installing a layer of felt on the roof, then applying a coat of hot tar, then installing a layer of three ply tar paper with a finishing coat of hot tar applied to the roof. The work was completed on July 13, 1956. No conferences nor negotiations were held with the Organization toward securing the concurrence of the employes of the Carrier in the contracting of the project.

It is the contention of the Petitioners that the work was of such a nature and character as had theretofore been assigned to and performed by the Maintenance of Way and Structures Department employes using Carrier owned equipment; that, in assigning this work to the Chris Anderson Roofing Company whose employes had no seniority in the Maintenance of Way and Structures Department, the Carrier violated the Agreement.

In denying the claim, the Carrier maintains that the work involved was of such magnitude, character and scope that they had no men capable and available to do the work since their roofing gang consisted of one roofer, the only other roofer being one who was on furlough and had been working in the carpenter gang since January, 1955; that a built-up roof, such as provided, required equipment which the Carrier did not possess; that the built-up roof, as provided, is a 15 year bonded roof, which bond Carrier could not have acquired had it used its own Roofers.

An objection has been raised to a consideration of this claim for the reason that the Claimants are unnamed; this issue not having been raised on the property cannot be considered here; furthermore during the discussion of this claim, the Claimants affected have been definitely identified as two Roofers, one of whom was on furlough.

The Scope Rule of the Agreement provides, as follows:

"Rule 1

"The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employes in any and all subdepartments of the M. of W. and Structures Dept. represented by the Brotherhood of Maintenance of Way Employes, **and such employes shall perform all work in the M. of W. & Structures Dept.** This agreement shall not apply to the following.

1. Track, Bridge and Building Supervisors, or other comparable Supervisory officers and those of higher rank.

2. Clerical and civil engineering forces.

3. Employes in signal, telegraph, and telephone maintenance departments." (Emphasis ours.)

Rule 48 provides that:

"The rate of pay of employes covered by this agreement shall become a part of and be included in this Agreement. . . ."

The classification of employes and positions and the rate of pay attached are listed on pages 31 and 32 of the Agreement, as follows:

"Rates
Bridge and Building Dept.
Central Division

* * * * *

Roofer Foreman	$168.20

* * * * *

Roofers	0.75¾

* * * * *"

It cannot be disputed that the work of installing and repairing roofs on Carrier's buildings is work of a character that has been reserved to the Maintenance of Way and Structures Department employes and is definitely embraced within the Scope of the Agreement; nor has it been disputed in the instant case that work of a similar nature had been performed by Carrier's Roofers prior to June 25, 1956.

It is well settled by many decisions that a Carrier may not let out to others the performance of work of a type embraced within one of its collective agreements with its employes except as may be spcifically excepted; there may be other exceptions, one of which recognized exception is had where the Carrier can show it did not have the needed equipment or trained employes to perform a specialized job, however, positive proof of this is necessary and required to establish this exception, the burden of justifying the contracting out of work being definitely on the Carrier.

Though it is a managerial prerogative to control the size and ability of its working force, it does not have the right to set aside the conditions of its Agreement and assign the work to employes not covered by the Agreement. (See Awards 4760, 4765—Connell). No showing is made that the Carrier attempted without success to augment its own working forces nor that additional skilled help was unavailable except for a mere assertion of such a fact by the Carrier; furthermore it doesn't appear that Carrier made any effort to negotiate with the Organization concerning the handling of this work before assigning it out though it had done so on a prior occasion. Likewise, there is nothing more than an assertion by the Carrier that it did not have sufficient equipment to perform the work which is denied by the Petitioner.

The fact that this was a 15 year bonded roof is not a valid reason for the Carrier having contracted out the work. It was not the roofing

contractor who guaranteed the roof but the Company who furnished the roofing material. Beyond Carrier's bare assertion, there is no competent proof in the Record that would indicate that this bond would not have been available to the Carrier if the work had been done by its own employes.

After this claim had been submitted to this Board, the Carrier raised for the first time the question of past custom and practice. The Petitioner promptly objected to a consideration of this issue. Even though this defense, if timely presented, might have defeated the allowance of this claim we cannot consider it here as it was not discussed on the property.

On the basis of this Record, this Board has no other alternative than to sustain this claim.

The two Roofers in the employ of Carrier are entitled to a pro rata allowance of pay from June 25, 1956, to July 13, 1956, for the work denied them by the Carrier in assigning the contract to the Anderson Roofing Company.

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 been violated.

AWARD

Claim sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of January 1963.