Award No. 11103
Docket No. MW-9823

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Raymond E. McGrath, 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, on or about November 4, 1955, it assigned the work of tuck-pointing, sandblasting, and cleaning the exterior of its Main Office and Annex buildings at Kirk Yard, Gary, Indiana, to a General Contractor whose employes hold no seniority rights under the provisions of this Agreement.

(2) Each Bridge and Building Carpenter Foreman and Bridge and Building Carpenter on the Gary Division 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.

EMPLOYES' STATEMENT OF FACTS: On or about November 4, 1955, the work of tuck-pointing, sandblasting and cleaning the exterior of the Carrier's Main Office and Annex Building at Kirk Yard, Gary, Indiana was assigned to and performed by a General Contractor whose employes hold no seniority rights under the provisions of this Agreement.

The aforementioned buildings are of brick construction and the work consisted of erecting the necessary scaffolding, tuckpointing, sandblasting and cleaning the exterior thereof, and other work incidental thereto.

The work is of the nature and character that has heretofore been performed by the Carrier's Bridge and Building employes, using Carrier-owned equipment. The employes holding seniority in Group 1 of the Bridge and Building Sub-department were available and could have efficiently and expeditiously performed the work described above, had the Carrier so desired.

The Agreement violation was protested and a suitable claim filed in behalf of the Claimants. The claim was handled in the usual manner on the property and declined at all stages of the appeals procedure.

the Claimants were fully compensated during the period in question, there was no pecuniary loss suffered by the Claimants and they are prohibited, therefore, from collecting any additional monies.

The position of the Carrier relative to Rule 62 has been supported by this Board in Award 7585 involving the same parties:

> ". . . Rule 62 of the agreement provides that 'time claims shall be confined to the actual pecuniary loss resulting from the alleged violation.' This provision could hardly be stated in a clearer fashion, and we therefore hold that payments to the two senior track laborers named in the claim are limited under this award to any actual pecuniary loss which they suffered as a result of the violation found herein."

IV. CONCLUSION

Historically the Carrier always has had an undisputed right to contract out work. This principle long has been recognized as an unchallenged right of management. If such a right is to be denied, then the denial must be based on the provisions of an existing agreement. If a denial of this right is not contracted away, or if the right is specifically reserved to management within an agreement which otherwise might be construed to have such effect, then there can be no question but that the Carrier retained such a right.

The Carrier's position in this case is clear and simple. Rule 56 I (a) is restricted by Rule 56 I (j) which in turn limits the entire scope rule by those conditions contained in the Memorandum of Understanding dated November 8, 1939. The last paragraph of this memorandum specifically reserves the right of the Carrier to contract out work. Such being the case, the Carrier did not violate the effective agreement in this claim, as the Organization alleges.

In addition, the second paragraph of Rule 62 of the effective agreement prohibits payment to the Claimants and necessitates dismissal of the claim since the Claimants suffered no pecuniary loss. This position is fully supported by Award 7585 of this Division.

In view of the foregoing, the Carrier asks that this claim be denied in its entirety.

All material data included herein have been discussed with the Organization either in conference or correspondence.

OPINION OF BOARD: The Claimants state that the work is of the nature and character that has heretofore been performed by the Carrier's Bridge and Building Employes, using Carrier-owned equipment, and that the Employes holding seniority in Group 1 of the Bridge and Building sub-department were available and could have efficiently and expeditiously performed the work described above, had the Carrier so desired.

Since the pertinent sections of both the Agreement and the Memorandum of Understanding of November 8, 1939 have been quoted verbatim in the submissions by the parties they will be referred to only in part in this opinion.

It is the position of the Carrier that the controlling Agreement expressly reserves to Carrier its right to contract out repair work and that the Organization admits in the record that the work here involved was repair work.

While the Carrier relies essentially on the Memorandum of Understanding as supporting denial of this claim it also cites a need for special equipment and skill.

It is also claimed by the Carrier that the Claimants were fully employed at the time of the alleged violations and therefore suffered no pecuniary loss. The Carrier claims that Rule 62 of the Agreement applies and that under this rule the Claimant recovery is limited to "actual pecuniary loss".

The Employes rely that this latter argument was never raised on the property while this dispute was still confined thereto and that hence its validity is not available as defense to the allowance of the claim stated herein.

In further rebuttal of this last proposition submitted by the Carrier the Claimants maintain that the parties to this dispute wrote Rule 62 out of their Agreement when they became signatories to Article V of the August 21, 1954 National Agreement, and that Rule 62 in its entirety no longer applies.

Employes further maintain that the claim here involved was not a "time claim" and therefore outside the purview of the second paragraph of Rule 62 and that the present claim was filed primarily for the purpose of protesting the Carrier's unilateral decision to contract out the work.

There is no question that if we read Rule 56 I, sub-paragraph (a) to sub-paragraph (i), it would appear that the work involved herein was exclusively reserved to the Claimants, but sub-paragraph (j) of this same Rule reads as follows:

> "(j) 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."

The Memorandum of Understanding above referred to reads in part as follows:

"GENERAL

> "It is understood where reference is made in this Understanding to fabrication of parts of iron, tin, sheet metal or other material or materials, that no such reference shall in any way prohibit the railroad company from purchasing such parts from outside manufacturers, and that the right of the company to have repair work performed by outside contractors, agencies, etc. is not disturbed."

From the above it is clear that we must now determine whether or not the work herein involved can properly be classified as "repair work" within the meaning of the above Memorandum.

In the Claimants' first submission of this case we find the following statement:

> "The work here involved, namely, tuckpointing, sandblasting and cleaning the exterior of the Carrier's main office and annex buildings is maintenance or repair work of the character definitely reserved to Carrier's Bridge and Building employes * * *"

The Board agrees with the above quoted part of this statement and finds that the work involved here was "repair work" within the meaning of the Memorandum. A distinction is made in one of the arguments by the Claimants as to whether or not the work was repair work or maintenance work but the Board fails to see the distinction as applied to the facts in this case.

The Board finds that the Memorandum of Understanding is valid and is in effect; that the wording of the Agreement and the wording of the Memorandum are both clear and that they are not indefinite or ambiguous and under such circumstances the plain meaning controls. There is a statement in the record that this is the first time the Carrier has asserted this defense but the record does not support this statement. Even if there had been a different mutual interpretation in the past either party to the Agreement could proceed to enforce the Agreement as made at any time. This latter statement follows the reasoning of this Board as set out in Award No. 7294 (Edward F. Carter, Referee).

Both sides have thoroughly presented awards favoring their position as to the application of Rule 62, but in view of the decision on the merits of the case it is not necessary to discuss this question in this opinion.

The Board, therefore, finds that the work involved herein is repair work within the meaning of the Memorandum of Understanding; that the Carrier has specifically reserved its right to contract out repair work; and that it was within its rights in doing so in this case, and that, therefore, the Agreement has not been violated.

The claim will therefore 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 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 not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 1st day of February 1963.