Award No. 11150
Docket No. MW-10768

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Martin I. Rose, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

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

(1) The Carrier violated the Agreement when it assigned the Manderback Construction Company, whose employes hold no seniority rights under the effective agreement, to construct what is generally called the Acme Fast Freight Building at Los Angeles Yard.

(2) Each employe holding seniority rights in the B&B Department on the territory 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 B&B Sub-department work on the building referred to in Part (1) of this claim.

(3) Each employe holding seniority rights in the Water Service Sub-department on the territory 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 Water Service Sub-department work on the building referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Carrier assumed responsibility for the construction and erection of a building at its Los Angeles Shop Yards which was leased to the Acme Fast Freight, Inc., a freight expediting concern.

The contract for this building was let by this carrier; the entire cost of which accrued to and was paid by this carrier.

The building is approximately 80 feet wide by 500 feet long, is of prefabricated metal construction, and is erected on a concrete foundation. Offices and washrooms are located in the north end of the building, the remainder being used as a freight transfer point or warehouse.

that said agreement is between "Southern Pacific Company (Pacific Lines) and Its Employes in the Maintenance of Way and Structures Department represented by Brotherhood of Maintenance of Way Employes." In this connection the limitation of the agreement to "Southern Pacific Company (Pacific Lines)" is not only obvious in view of the limitations on representation under the Railway Labor Act and the cover page of the agreement, but is clearly recognized by both parties to the extent that when new construction of railroad facilities is undertaken, the agreement does not apply until after the newly constructed railroad has by appropriate notice been designated as part of the Southern Pacific Company (Pacific Lines), as clearly reflected by attached Exhibit "C" which covers an agreed upon exception from recognized practice.

The construction of a building for the exclusive use of Acme Fast Freight, which company is a shipper wholly distinct from this railroad on which petitioner represents certain employes under the Railway Labor Act, cannot conceivably be considered the exclusive work of "Southern Pacific Company (Pacific Lines)" to which employes represented by the petitioner have a right. Furthermore, the agreement covers employes in the "Maintenance of Way and Structures Department" of Southern Pacific Company (Pacific Lines), and it is equally obvious that the construction of a building for the exclusive use of Acme Fast Freight is totally unrelated to the "Maintenance of Way and Structures Department" of Southern Pacific Company (Pacific Lines).

Not only is the work here involved outside of these clear limitations of the agreement, but the agreement is totally lacking in any provision allocating work of the character here involved to employes represented by petitioner even if such building were constructed for railroad purposes, because the current agreement was entered into with the specific knowledge and understanding that carrier was entitled to do such work by independent contractors. The consistent procedure followed for the past forty years (as evidenced by the facts in paragraph 4 of Carrier's Statement of Facts) is incontrovertible evidence of such knowledge and understanding.

In view of the foregoing it is obvious that petitioner is attempting to have the Board, through the medium of a sustaining award, expand the Scope Rule to include coverage that has not been agreed to by the parties to the agreement. This Board has stated on occasions too numerous to require citation that it does not have the authority to amend existing rules or to write new rules.

CONCLUSION

Carrier respectfully requests that the claim be either dismissed or denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The Employes state that "The Carrier assumed responsibility for the construction and erection of a building at its Los Angeles Shop Yards which was leased to the Acme Fast Freight, Inc., a freight expediting concern." Carrier admits such responsibility

under a lease arrangement with the concern mentioned, and that accordingly it "engaged by contract the Manderback Construction Company to construct a warehouse approximately 80 feet wide by 500 feet long of prefabricated metal erected on a concrete foundation." The building was constructed and erected for the lessee company by the contractor's forces. There is no claim or evidence in the record that the Carrier used this leased out building in the operation or maintenance of its railroad.

The Employes refer to the Scope Rule of the applicable Agreement and contend with respect to the work of constructing and erecting the leased out building, that the Carrier violated the Agreement by contracting out to an outside contractor such work which has been historically and traditionally assigned to and performed by B&B and Water Service Sub-Department employes. In defense, Carrier asserts three contentions: first, that the claim failed to meet the requirements of the August 21, 1954 Agreement; second, that the rules Agreement does not cover any work on any structure which is not used by Carrier in its railroad operations; and, third, that the Employes do not have the right to the work involved by reason of the established past practice on the property of contracting out such work.

This Division has recently answered the question posed by the Employes' contention and Carrier's second contention in the negative in denial Award 10722, dated August 3, 1962, and in denial Award 10986, dated December 19, 1962. Both of these awards involved the same kind of dispute and issue as presented here and the same parties who are also the parties in this case. Neither of these awards treated the problem raised as one of first impression; and these determinations were made on the merits.

Careful consideration of the confronting record and of the earlier awards cited in support of the Employes' position does not disclose any reason for departure from recent Awards 10722 and 10986 disposing of similar disputes on the same property. Accordingly, the claim must be denied. See Award 10911 quoted in Award 10986.

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 14th day of February 1963.