Award No. 11371
Docket No. MW-9883

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it assigned or otherwise permitted Steel Bridge Worker Byron Flint to perform crane operator's work on July 23, 1956 and on August 2, 3, 8, 9 and 10, 1956.

(2) Crane Operator Russell W. Marr now be allowed 56½ hours' pay at the crane operator's rate account of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Claimant, Mr. Russell W. Marr, has established and holds seniority as a Crane Operator in Group 1 of the Roadway Equipment & Machine Sub-department.

On July 23, 1956, Steel Bridge Worker Byron Flint, who holds no seniority in Group 1 of the Roadway Equipment and Machine Sub-department, was assigned to and did operate Crane X 105 in performing the work of cleaning bridge channels at Bridges Nos. 1102 and 1108, consuming eleven and one-half (11½) hours in the performance of such work.

Similarly, on August 2, 3, 8, 9 and 10, 1956, this very same Steel Bridge Worker was assigned to and did operate Crane X 105 in the unloading of crushed rock at Council Bluffs, Iowa, consuming nine (9) hours' time on each date or a total of forty-five (45) hours in the performance of that work.

The claim was handled in the usual manner on the property and declined at all stages of the appeals procedure.

The Agreement in effect between the two parties to this dispute dated September 1, 1949, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

not have been possible, first of all because the cranes they were operating were not of the type required for the granite unloading operation and secondly because of the Carrier's unloading operation tying up Carrier's lead tracks, Carrier's switching operations at Council Bluffs yard which required use of the switching leads at both the top and bottom ends of the yard had to be given preference as of approximately 4:00 P. M. each date because of the heavy run of transfer movements from connecting lines beginning at that time and continuing through the night hours which could not be deferred or delayed. In other words, Carrier in addition to being confronted with problems of getting its new yard at Council Bluffs in service by the deadline set, although failing to meet the deadline by ten days, also was faced with an operating problem which had to be given consideration. Consequently, the Employes' suggestion in that regard was neither feasible nor practical.

Although this dispute does not involve contracting of work, it is well-settled by numerous awards of this Division that work may be contracted out when special skills, special equipment or special materials are required; or when the work is novel or of great magnitude or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Carrier's forces. Here, the Carrier contracted for a portion of the work done in connection with enlarging its train yard at Council Bluffs, Iowa by construction of six miles of new yard track and other facilities which involved contractor forces and equipment for which no claim has been made, but, in its undertaking to perform such work by its own employes and equipment to the greatest extent possible, has, through the use of one of its own employes operating Carrier owned equipment (Maintenance of Way Steel Bridge Operator Byron Flint with Crane X-105) been presented with a claim for such use by Group 1 Crane Operator R. W. Marr. Under the circumstances here involved it is the position of the Carrier that its action did not contravene any provision of the current agreement between the parties herein dispute. We, therefore, respectfully request that the claim be denied in its entirety.

All data containd herein has been made known to the Employes.

OPINION OF BOARD: On the dates of the alleged violations enumerated in the claim, Claimant Marr was the operator of a crawler crane, having a one-half yard clam bucket, on Carrier's project of enlarging its train yard at Council Bluffs, Iowa. This project, along with projects at other points on Carrier's system, simultaneously underway, were of considerable magnitude. To meet the service date line, at Council Bluffs, Carrier recruited an extra gang and contracted for part of the work.

Steel Bridge Worker Byron Flint, since 1943, has been the operator of Crane X-105—a 50 ton 8 wheel locomotive diesel type crane having a one and one-half yard clam bucket. This crane was assigned to Steel Bridge Crews.

Claimant Marr is regularly employed by Carrier in its Roadway Equipment & Machine Sub-department and Flint in Carrier's Bridge and Building Sub-Department. The employes in both Sub-Departments are, by the terms of the Agreement, represented by Petitioner as their collective bargaining agent.

On July 23, 1956 Carrier had Flint operate Crane X-105 to clear out waterways at two bridges on its "Clinton Line." The bridges are approximately 350 miles east of Council Bluffs. Carrier avers that: (1) this assignment was required "to prevent possible washing out of track as a result of heavy rains in that area;" (2) Flint and Crane X-105 were the only operator and crane available; and, (3) this was an emergency service which it was free

to have performed without regard to seniority (citing Rule 8(c) of the Agreement). Petitioner contends that this work, by right of contract, belongs to the employes in the Roadway Equipment & Machine Sub-department and to Claimant Marr in particular.

On August 2, 3, 8, 9 and 10, 1956, Flint operated crane X-105 at the Council Bluffs project unloading disintegrated granite and gravel for the purpose of "dressing down" the new yard track addition in preparation for placing such tracks in service. This work, too, Petitioner claims should have been done by an employe of The Roadway Equipment & Machine Sub-department, Claimant Marr in particular.

Claimant Marr worked on the Council Bluffs project on each day designated in the claim; and, on each of those days he worked eight hours of straight time and one hour of overtime.

Petitioner contends that its Agreement with Carrier vests the work, performed by Flint, in The Roadway Equipment & Machine Sub-department, in which Claimant Marr was a crane operator employe; and, that for Carrier to assign the work to Flint, an employe in The Bridge & Building Sub-department, violated the Agreement. There is no evidence as to why Claimant Marr, in particular, should have been assigned to do the work.

Petitioner points to the following Rules, **inter alia**, of the Agreement:

"RULE 3.

"CONSIDERATION FOR POSITIONS

"Rights accruing to employes under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Railroad as hereinafter provided."

"RULE 4.

"DEPARTMENT LIMITS

"Except as otherwise provided, the seniority rights of employes are confined to the sub-department in which employed. The sub-departments are as follows:

1—Track Sub-department;
2—Bridge & Building Sub-department;
3—Roadway Equipment & Machine Sub-department;
4—Maintenance of Way Welding Sub-department."

Carrier does not deny that if there was a crane operator, employed in The Roadway Equipment & Machine Sub-department, available, that the contract would require it to assign to him the work performed by Flint. Its defense is that: (1) all the qualified employes in the Sub-department were fully employed, including Claimant Marr, and therefore not available to do the work performed by Flint; (2) all of its crane equipment was in full use other than Crane X-105; (3) under the circumstances it would have been justified in contracting out the work performed by Flint; and, (4) it is unreasonable to claim it violated the contract by assigning the work to one of its available employes of another Sub-department, represented by Petitioner under the Agreement, instead of contracting to have the work performed by an outsider.

As to the claimed violation on July 23, 1956: Petitioner has not questioned that there had been heavy rains in the area of the bridges and that the waterways had to be cleared. It has adduced no proof that the work could be prudently delayed. It argues, instead, that "possible" washing out of track as a result of the rains does not prove an emergency. We do not agree. The potential contingency of imperilment of life and loss of property, in the absence of immediate remedial action, is an emergency. We will deny the claim.

As to the claimed violations on August 2, 3, 8, 9 and 10, 1956: Where the evidence, as here, is uncontroverted that the employes of a Carrier, having a contractual right to a certain type of work, are fully engaged in such work, it has been long established by this Board that Carrier is free to contract for the performance of such work, on a project, in excess of that which its employes can accomplish. This being so, it would be a paradox to say the work could be contracted out but could not be assigned to an available qualified employe of the Carrier.

Petitioner, in this case, has not come forward with any evidence that the work on the Council Bluffs project could have been performed in any other manner, than it was, to meet the exigencies.

Since the record makes clear that Claimant Marr was fully employed and therefore not available to do the work at the time it was performed by Flint; and, inasmuch as the record contains no evidence that such work could have been done, without undo hindrance, at a time when Claimant Marr would have been available, we will deny the claim.

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 Carrier did not violate 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 26th day of April, 1963.