Award No. 11856
Docket No. MW-9655

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

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

(1) The Carrier violated the Agreement when it assigned a general contractor to perform Work Equipment Operator's work in connection with the construction of a temporary single track bridge at Salem, Massachusetts on February 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, and 14, 1956.

(2) Each Work Equipment Operator holding seniority on the Terminal Division be allowed pay at their respective straight-time rates for an equal proportionate share of the total number of man-hours consumed by the Contractor's forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The undisputed, undenied, and indisputable facts are as stated in the letter of claim presentation which reads as follows:

"186 South St.
Reading, Mass.
March 17, 1956

Mr. J. J. MacDonald,
Supvr. Bridges & Buildings,
Boston & Maine Railroad,
Boston, Mass.

Dear Sir: —

The attention of the Committee has been called to the fact that the Railroad saw fit recently to hire a crawler-mounted crane from a private contractor, Farina Bros., Newton, Mass., as well as the services of a Crane Engineer and Oiler, both employes of Farina Bros., to operate same for the purpose of driving wood piling, installing wood caps and deck and other work incidental to the construction of a temporary single track bridge under the Danvers Branch track at easterly

established when it is necessary to rent or not rent a crane, and in that case in the Opinion of the Board it is stated in part:

> "We, of course, would not expect the Carrier to purchase a special crane solely to accompany this comparatively small project or to lease one from great distance. Considering the size and nature of this project, however, we feel that the burden is upon the Carrier to justify the farmout once challenged. Because the site of this work is in the heart of one of the Country's most highly industrialized centers, we **believe that the Carrier was under obligation to show affirmatively that it had made diligent attempts to lease this special equipment,** or, to contract solely the crane work to a private contractor."
> (Emphasis ours.)

The instant dispute is very much at par with Second Division Award No. 1952, partly quoted above. Therefore, there is no justification for claim by the Employes.

In view of the foregoing claim should be declined.

CONCLUSION

1. The Carrier could not have performed the job unless it rented the equipment because it was impossible to rent the equipment without operators.

2. Carrier did not own equipment capable of performing the job.

3. Second Division Award quoted above, No. 1952, supports the Carrier's position.

4. Third Division Award No. 5304 and applicable portions quoted above support the Carrier's position.

5. Carrier's Exhibits A, B, C and D fully corroborate the Carrier's position in this dispute and proves conclusively that the Carrier exhausted all efforts to comply with the Organization's extraneous demand.

In view of the foregoing, the Carrier requests that your Honorable Board deny this claim in its entirety.

All data and arguments contained herein have been presented to the Petitioner in conference and/or correspondence.

(Exhibits not reproduced.)

OPINION OF BOARD: The issue in this case is whether Carrier exerted a diligent effort to rent a crane with a 75 foot boom to be operated by Claimants on a tunnel project at or near Salem, Massachusetts.

On January 25, 1956, Carrier advised the General Chairman that it did not have a crane capable of doing the job which was to commence on February 3, 1956. The General Chairman took the position that Carrier was obligated to rent the equipment for operation by Claimants. Carrier then contacted four rental concerns each of whom, in letters to the Carrier under date of either January 31 or February 1, stated they rented the equipment only with operation by their own employes. This was made known to the General Chairman by letter dated February 2, 1956. In the same letter Carrier stated:

". . . we have no alternative but to contract the equipment with the operators in order to start the job on Friday evening, February 3, 1956."

The project was completed on February 14, 1956. Claim was filed with Carrier by letter dated March 17, 1956.

On August 10, 1956 the General Chairman addressed letters to two rental concerns inquiring if they rented a crane, to be operated by employes other than their own, with the specifications required on the then completed project. Affirmative answers were received. But, upon subsequent inquiry by Carrier both concerns replied that they did not have the specific type of crane available for rental in February 1956.

It has been established in prior Awards of this Division that work may be contracted when a Carrier does not own special equipment necessary to perform the job and is unable to rent the equipment for operation by its employes. This is an exception to the Scope Rule. When Carrier pleads the exception it is an affirmative defense and Carrier has the burden of proof.

Carrier by adducing evidence that it was unable to obtain the equipment without operators made a **prima facie** case which shifts the burden of going forward with rebuttal evidence to Petitioner. Petitioner has failed to introduce in the record any evidence of probative value that the specific equipment was available for rental without operators in February 1956. Consequently, the only issue is whether the four inquiries by Carrier show a diligent effort to rent the special equipment without operators.

Being constrained from engaging in speculation and suspicions we are unable to find, upon the record before us, that Carrier's efforts were not diligent. 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 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 20th day of November 1963.