Award No. 11938
Docket No. MW-10148

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when it assigned the work of erecting a prefabricated steel shed at Greensboro, North Carolina to a General Contractor, whose employes hold no seniority rights under the provisions of this Agreement.

(2) B&B Foreman C. Crisman, B&B Mechanics A. H. Johnson, C. Anderson, and M. G. Shelton, B&B Helpers G. W. Atkinson, H. N. Updike, and R. B. Hedrick, and B&B Apprentices E. M. Vaden and C. S. Rorer now 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: The facts in this case were briefly set forth in the letter of claim presentation dated November 8, 1956, said facts reading:

"During the latter part of August, 1956, Claimants constructed a concrete unloading platform size 16' by 140' near the freight depot, Greensboro, N. C. preparatory to the erection of the prefabricated steel shed erected by employes of the contractor. The platform floor was of concrete approximately 8" thick and 6' above the ground, supported by a retaining wall filled to the bottom of the floor with stone. Concrete pedestals with anchor bolts for the erection of the steel shed were poured in conjunction with the platform floor. The work of erecting the steel prefabricated shed over the unloading platform was not novel nor did it require any special skills or special tools not possessed by the employes. The carrier has in the past constructed similar metal buildings with its own forces and claimants were fully qualified to have performed this work. The steel shed and concrete platform were constructed on the site of a wooden platform that was maintained by company forces for a number of years. Claimants hold seniority on the district where the work was performed. Employes of the contractor hold no seniority under agreement rules."

CONCLUSION

Carrier respectfully submits that:

(a) The furnishing of all materials and fabricating and constructing the galvanized steel building on the concrete foundation at Greensboro, North Carolina, is **not** embraced in the scope of the Maintenance of Way Agreement here in evidence.

(b) The effective Maintenance of Way Agreement has **not** been violated, as alleged.

(c) Work here claimed is **not** of the character usually, customarily, or traditionally performed by Maintenance of Way forces. It was clearly "construction" work, as distinguished from maintenance and repair work.

(d) The Board has, on five previous occasions, denied claims identical in principle, when interpreting the agreement here in evidence.

(e) Claim demands compensation for work **not** performed, which cannot, by the plain language of Rule 49 of the Agreement in evidence, be sustained.

Claim being without any basis, and unsupported by the Agreement in evidence, and the Board having heretofore denied claims identical in principle when interpreting the rules here allegedly violated, the Board cannot do other than make a denial award.

All relevant facts and argument have heretofore been made known to employe representatives.

Carrier, not having seen the Brotherhood's submission, reserves the right to make appropriate response thereto.

(Exhibits not reproduced).

OPINION OF BOARD: The ultimate issues in this case are: (1) whether the work involved was historically, customarily and usually performed by the employes covered by the Agreement; (2) did Carrier violate the Agreement by contracting out the work; and (3) should a violation be found are Claimants entitled to a monetary award?

THE FACTS

Carrier states in its Submission that:

"In 1956, Carrier, acting through Lambeth Construction Company, Greensboro, North Carolina, contracted with Armco Drainage and Metal Products, Inc., for a lump sum amount, the furnishing of all materials, the fabrication in its shops and erection on a concrete foundation at Greensboro, North Carolina, a steel building of galvanized metal construction. 'Steelox' patented interlocking panels were used for roof and side walls of the building. ('Steelox' is a trade name used by Armco for roofing or siding, approximately 16" to 18" wide, with an interlocking section on each edge.)

"The building was fabricated by Armco's forces in Armco's shops,

using posts, roofing, siding, trusses and other parts designed by Armco. The overall size of the building is 30′ x 140′.

"After the building was fabricated by Armco, it was shipped to Greensboro and erected in place on September 18, 19, 20, 21, 24 and 25, 1956, by Armco's force which consisted of a foreman and three skilled erection workers."

The position taken by Petitioner relative to the contracting out of the work is found in its letter of claim dated November 8, 1956. It reads:

"During the latter part of August, 1956, Claimants constructed a concrete unloading platform size 16′ by 140′ near the freight depot, Greensboro, N. C. preparatory to the erection of the prefabricated steel shed erected by employes of the contractor. The platform floor was of concrete approximately 8" thick and 6′ above the ground, supported by a retaining wall filled to the bottom of the floor with stone. Concrete pedestals with anchor bolts for the erection of the steel shed were poured in conjunction with the platform floor. **The work of erecting the steel prefabricated shed over the unloading platform was not novel nor did it require any special skills or special tools not possessed by the employes. The carrier has in the past constructed similar metal buildings with its own forces and claimants were fully qualified to have performed this work.** The steel shed and concrete platform were constructed on the site of a wooden platform that was maintained by company forces for a number of years. Claimants hold seniority on the district where the work was performed. Employes of the contractor hold no seniority under agreement rules." (Emphasis ours).

In the record, in the Petitioner's Submission, is a letter from one of the Claimants addressed to the General Chairman, under date of October 27, 1956, signed by all the Claimants. It reads in part:

"We the undersigned wish to collect pay for Contractor putting up Armco Steel Building at Greensboro, N. C. dimensions 30 ft. x 140 ft. which we had to pour platform and all pedestals set anchor bolt for the building which it looks like if we could do part of this which is the most complicated part we could have finished it. **This work has been done in the past by B&B men. I was the one to put up 4 of these Armco prefabricated building. We have got men cut off and there is no shortage of labor."** (Emphasis ours).

Petitioner's claim pertains only to the erection of the building. It admits that Carrier had the right to contract out the fabrication.

RESOLUTION OF THE ISSUE WHETHER AGREEMENT WAS VIOLATED

The Scope Rule of the Agreement is broad and general. It has been long established that where such is the case the work reserved to the employes covered by such an agreement is that which has historically, customarily and usually been performed by those employes.

Carrier has not denied, in the record, that its employes have erected Armco prefabricated buildings. Its affirmative defenses are that: (1) the buildings erected by its employes were small in comparison to the building herein

involved; and (2) the erection of the building involved required skills not possessed by its employes and the use of special tools.

Carrier has made no showing that it could not have contracted out the work of fabrication of the building with the work of erection to be performed by its employes.

The size of a prefabricated building is not determinative of the skills required in its erection. Carrier has failed to adduce any evidence tending to prove that any greater skills were required than were employed in the past erection of Armco prefabricated buildings by its employes. The burden of proof is Carrier's. It failed to satisfy it.

As to the special tools required for the erection of the building, Carrier names them: "nut runners, drills, metal cutting shears, etc. were used." We do not consider common tools, such as these, as special tools.

Inasmuch as Carrier's employes had prior to the erection of the building herein involved erected Armco prefabricated buildings; and, Carrier has failed to prove that the building herein involved required: (a) skills not possessed by its employes; or, (b) the use of special tools, we find that Carrier violated the Agreement in contracting out the erection work.

DAMAGES

Carrier argues that Rule 49 of the Agreement bars this Board from making a monetary award. The Rule reads:

> "Work Not Performed—Rule 49:
>
> Except as provided in these rules, no compensation will be allowed for work not performed."

We do not agree. A monetary award by this Board is predicated upon a breach of contract. Its legally recognized objective is to make whole employes for wages they would have earned absent violation of an agreement; it sounds in damages. The argument advanced by Carrier is that Rule 49 gives it the contractual right to violate the Agreement with impunity. This is a sophistry in that it ignores the principles of contract law applicable in protection of rights arising out of contract. It would, indeed, make the execution of the Agreement a meaningless gesture. Rule 49 has a much narrower application than what Carrier advances in this case. We find it unnecessary to interpret Rule 49 other than to find that it does not immunize Carrier from damages should Carrier violate the Agreement.

Further, Carrier argues that: (1) the number of employes assigned by the contractor to the erection of the building was less than the number of Claimants' herein and therefore all the Claimants would not have been assigned to the erection of the building had it been done by Carrier's employes; and (2) Carrier paid the contractor a lump sum payment for both the fabrication and erection of the building and is therefore unable to determine the total number of hours of work devoted to the erection of the building. As to (1), the claim identifies the employes alleged to be involved. Carrier adduced no evidence that any of the named employes would not have done some of the work had it been performed by Carrier's employes. As to (2), Carrier, the perpetrator of the violation, has means of informing itself, and Petitioner, of the total number of hours of work done by the contractor's employes in the erection of the building.

Inasmuch as the amount of the damages must be equated to the number of hours worked by contractor's employes in the erection of the building the following formula is to be employed in computing the monetary award: the total number of hours worked by the contractor's employes in erecting the building divided by nine, the result to be the number of hours for which each Claimant shall be paid at his hourly rate of pay prevailing at the time the building was erected.

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 Carrier violated the Agreement.

AWARD

Claim sustained with monetary award to be computed as prescribed in that part of the Opinion captioned "DAMAGES".

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 12th day of December, 1963.

CARRIER MEMBERS' DISSENT TO AWARD NO. 11938, DOCKET NO. MW-10148

Our dissent to Award 11937 is equally applicable to Award 11938 and is, by reference, made a part hereof.

Under the well-established principles of this Board, particularly with respect to disputes between the same parties, arising under the same agreement, that the only work reserved to employes covered by the agreement is that which has ben historically and customarily performed exclusively by such employes, and that the burden of proving such historical and customary practice is upon claimants, the claim herein should properly have been denied.

The building here involved, that was manufactured and erected by Armco for a lump sum payment, was a specially designed building, with dimensions of 30′ by 140′. The type of buildings previously assembled by Carrier's employes, and referred to by the Referee, were small, prefabricated buildings which may be ordered from a catalogue, and purchased by anyone, by merely referring to the catalogue or building number. The Petitioner submitted no proof whatsoever that employes it represents had ever assembled a building of the type here involved, much less proved that they had performed such work exclusively. Although the Carrier was not required to prove that its action was permitted by the agreement, it asserted throughout the record, which as-

sertions were not contradicted, that the construction of large buildings such as the one here involved, had always been contracted. The Referee clearly erred in concluding that because employes may have assembled small, catalogue, tool-house type prefabricated buildings, this gave claimants the exclusive right to the erection of the specially designed prefabricated building involved in the dispute.

What we have said in our dissent to Award 11937 concerning the application of Rule 49, and the awarding of damages in the absence of a showing of loss by the claimants is equally applicable here. Here the award imposes a penalty, and, in addition, expects the Carrier to develop the claim and the extent of the penalty compensation to be allowed claimants for work not performed by them.

For the reasons stated, we dissent.

/s/ P. C. Carter

/s/ D. S. Dugan

/s/ W. H. Castle

/s/ T. F. Strunck

/s/ G. C. White