

Award No. 12132

Docket No. MW-10726

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Arthur W. Sempliner, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO AND NORTH WESTERN 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 constructing concrete foundations for air compressors in the Power House Building and the installation of a concrete floor in that building; the remodeling of the Oil House Building; the construction of concrete skids; the construction of a Paint and Lumber Building and the construction of a concrete roadway at Clinton, Iowa was assigned to and performed by a general contractor whose employees hold no seniority rights under the provisions of this Agreement;

(2) The B&B foremen, Carpenters and Carpenter Helper named in General Chairman Schultz's letter of April 24, 1957 to Engineer of Maintenance, Mr. M. S. Reid each 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.

EMPLOYEES' STATEMENT OF FACTS: Under date of June 13, 1956, the Carrier's Chief Engineer - Maintenance, addressed the undersigned General Chairman as follows:

"CHICAGO AND NORTH WESTERN RAILWAY SYSTEM

June 13, 1956 L/g
4-70-650

Mr. J. F. Schultz
General Chairman
Box 885
Appleton, Wisconsin

Dear Sir:

The construction of a mill type building 160' x 1000' with overhead cranes, welfare and painting facilities has been authorized by

[1006]

Attention of the Board is directed to this matter in order that this Board may be fully familiar with the circumstances in this case and as showing to this Board that the agreement in effect when this Board's Awards 6299 and 6300 were rendered is still effective on this property.

The carrier submits that the claim in this case must be denied in its entirety.

All information contained herein has previously been submitted to the employes during the course of handling of this case on the property and is hereby made a part of the particular question here in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The dispute is centered about the contracting out of certain work, for which the Claimants claim compensation at their respective straight time rates, for an equal number of hours as that required by outside contractors to perform work, on behalf of listed Maintenance of Way employes. The claim is based on the Scope Rule of the effective Agreement which reads as follows:

"Employes (not including supervisory officers above the rank of foremen) engaged in or assigned to building, repairs, reconstruction and operation in the Maintenance of Way Department.

Employes engaged in maintenance of way work.

Coal chute foremen and laborers, pumpers, track, bridge, tunnel and highway crossing watchmen and flagmen at railway (non-interlocked) crossings.

NOTE: Employes governed by provisions of existing agreements between the railway company and other labor organizations, such as mechanical crafts, steam shovel, locomotive crane, and ditcher engineers, cranemen, firemen, and watchmen, when performing work of their assigned craft in the Maintenance of Way Department are excepted from this agreement."

Prior to the contracting out of the work, the Carrier wrote on June 13, 1956 to the General Chairman as follows:

"Mr. J. F. Schultz
General Chairman
Box 885
Appleton, Wisconsin

Dear Sir:

The construction of a mill type building 160' x 1,000' with overhead cranes, welfare and painting facilities has been authorized by our Board of Directors to be constructed at Clinton, Iowa for making heavy car repairs with a capacity for repairing 7,000 cars and the construction of 1,000 cars annually. This structure will be primarily of metal on concrete foundation.

As you can see, this is a very large project beyond the capacity of our B&B forces to carry out the work covered in the scope of the

Maintenance of Way Agreement. Hence, it is planned to contract same, and I would like to have your concurrence in this matter of contracting.

Looking forward to a favorable early reply, I am

Very truly yours,

/s/ L. R. Lamport
Chief Engineer - Maintenance"

Subsequently the General Chairman replied by letter that he was not in concurrence with the request of the above letter, but still later he responded with the following letter:

"BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

July 3, 1956

Mr. L. R. Lamport
400 West Madison St.
Chicago, Illinois

Dear Sir:

With further reference to my letter dated June 29, 1956 in regard to your request that you be permitted to contract and construct a mill type building 160' x 1,000' at Clinton, Iowa.

Confirming our telephone conversation this morning, this is to advise that the employees are agreeable to let this work to contract providing, of course, there will be no reduction in forces in the B&B department, and that any maintenance work to be performed in connection with the erection of this building will be done by maintenance of way employees.

Yours truly,

/s/ J. F. Schultz
General Chairman"

The Carrier then contracted out the construction of the building, which contract, in addition to the construction of the building 160 feet by 1,000 feet included the construction of a Paint and Lumber Building, requiring 9,750 hours of outside labor, a concrete floor in the Power House Building, including concrete foundations for air compressors, requiring 1,530 hours of outside labor; remodeling the Oil House, requiring 3,379 hours of outside labor; the construction of a concrete roadway north of the 160 x 1,000 foot car shop building requiring 1,993 hours of outside labor; and the construction of concrete skids east of the Car Shop building, requiring 565 hours of outside labor.

The employees claim the work listed above, other than the construction involved in the Car Shop building, for which concurrence was obtained in Chairman Schultz's letter of July 3, 1956.

The Carrier defends on several grounds:

A. That the concurrence of the General Chairman was given, and that the work done was either incidental to the main building, or formerly a part

of that building and through a subsequent change of plans, constructed outside the building;

B. That the contract did not require concurrence of the Organization for such work, as it was outside the scope of the effective Agreement and the employees did not have exclusive right to such work.

C. That in the past, the Carrier had contracted out work of much lesser magnitude, thus evidencing the right to so contract.

It is apparent that Chairman Schultz did concur in the contracting out of the main building. The concrete driveway and the concrete skids, north and east, respectively, of the main shop building, were clearly incidental appurtenances of the Shop building, and thus included in the concurrence of Chairman Schultz. The Carrier's position that the balance of the work was included, cannot be sustained. The Power House Building and the Oil House Building were separate buildings existing prior to the construction of the main shop building. The Paint and Lumber Building (160 feet by 40 feet) was additional roof area not included in the 1,000 feet by 160 feet shop building. The shop building was not reduced in size. In no sense could the construction of the paint building be included within the meaning of painting facilities mentioned in the original letter of June 13, 1956, as included in the main building.

We now must consider the question of the Scope Rule. The Carrier has cited numerous awards indicating that work of constructing entire buildings may be contracted to outside contractors. The contract has been negotiated several times since these awards were handed down, but no change had been made in the Scope Rule. (See Awards 6299 and 6300.) The cited awards, on this same property, indicate that construction of much less than this magnitude has been contracted out for a long period of time, and denies a claim involving a building 22 feet by 44 feet. Award 6299, on page 11 thereof, reads in part:

"In the record we find a showing made by the Carrier that between November 1, 1941 and November 1, 1951, it contracted out work of the character here involved in 29 instances. The effective Agreement bears date of January 1, 1947, and part of the 29 construction contracts were awarded before and part after that Agreement was negotiated. The Carrier also makes the positive statement that for thirty years it has been its uniform practice to contract for the construction of new facilities as it did in this case, without any protest whatever from the Organization in the past ten years. New contracts have been negotiated between the parties while these practices obtained."

The Organization bases its position in part, on Awards 4158, and 5090, both on this property. In Award 5090, the Carrier contracted out certain work which the award describes as follows:

'OPINION OF BOARD: On or about October 7, 1947, the Carrier awarded to an independent contractor work involving (a) construction of reinforced concrete three stall drop pit in enginehouse at Chadron, Nebraska, (b) construction of concrete piers and abutment wing walls at Bridges 732 and 738 in the vicinity of Glen, Nebraska, and (c) construction of 112 pre-cast reinforced concrete blocks to be placed on bridge seats of 12 bridges between Ft. Robinson and Glen, Nebraska.

A special agreement was reached between the Carrier and Organization for letting the outside contractor perform the work covered under (a), subject to the express understanding that the Organization's consent would not establish a precedent, and that such work is covered in the scope rule of the agreement. Neither (b) nor (c) appears to have been covered by the special agreement. . . ."

It is to be noted that the claim only concerned the making of reinforced concrete blocks for bridge seats, and that concurrence was given by the Organization for a drop pit, while neither concurrence nor claim is found in regard to bridge piers, or abutment wing walls. Award 5090 makes a careful analysis of previous awards, among those being Awards 4158 and 4159 which are dealt with as follows:

"In Award 4158, under the same agreement and between the same parties to the confronting dispute, the Board undertakes a distinction between new construction and maintenance. That award is authority for the proposition that it is not a matter of principle, but a matter of degree which determines the exception. The Board held that a clear exception would appear to be the building of a large structure from the ground up or the construction of any type improvement requiring large capital outlay. On the other hand, the Board says that the building of a small station, of tool houses and small annexes to existing structures may not be excepted. Further, that ordinary maintenance work such as painting of existing structures, plumbing repairs, repairs to existing tracks, buildings and bridges necessary to the operation of the railroad are clearly not excepted from the scope rule. In a companion case, Award 4159, the Board concluded that the construction of the extension of a platform at a passenger station was excepted, but qualified the rule as not intended to be an indication that all new construction work is outside the scope of the agreement."

Thus, the authority has been established in these awards, as in 6299 and 6300, that such construction work is not exclusive, and that the work has not been exclusive under the scope rule. Interpretation and past practice, however, has established the principle that the work may not be contracted out to others, if it is of the type and magnitude usually performed by the employees of the Carrier.

Here, where the work was of sufficient magnitude the contracting out of the work was in order. The Carrier obtained the General Chairman's concurrence to such contracting-out, though such concurrence is not required by the Agreement or previous awards. Work was then performed which was not within the concurrence obtained, but was a part of the general contract for which claim is here made. Award 10300 comments on a similar situation as follows:

"There is no doubt that many of the operations performed by employees of the contractor were the same or similar to those performed elsewhere or capable of being performed by employees of Carrier, but this fact alone does not establish a violation. As we have stated heretofore, the work need not be fragmentized. The work as a whole is the important thing. Each case, of course, must stand or fall on its own set of facts, and after studying the matter from all angles—pro and con—we are of the opinion and accordingly hold that the work here permitted its being contracted out without violating the Agreement. As stated in Award No. 4158:"

The instant claim for 74 employes of the Clinton, Iowa, force, involved only a part of the entire contract, but the parts claimed required over seventeen thousand hours of labor. The Claimant crew had a daily potential of but 592 hours; thus, the work claimed would have required their entire attention for thirty days to the exclusion of all normal work, clearly beyond the capability of the Claimant force, even if such force were substantially augmented. The claim, therefore, will have to 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 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 24th day of January 1964.