Award No. 12230
Docket No. MW-11647

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ELGIN, JOLIET AND EASTERN 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 an addition to its O & O Building to a General Contractor whose employes hold no seniority rights within the scope of the subject Agreement.

(2) The employes in the Bridge and Building Sub-department who are entitled and/or permitted to perform work on the territory where the work was performed, 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 all work (except welding and burning) referred to in Part (1) of this claim.

(3) The welding force employes who are entitled to perform welding and burning work in connection with the work referred to in Part (1) of this claim 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 welding and burning work on the subject building.

EMPLOYES' STATEMENT OF FACTS: The factual situation involved here is fully set forth in correspondence reading as follows:

"ELGIN, JOLIET, AND EASTERN RAILWAY DEPARTMENT

Joliet, Illinois

August 5, 1957

D. L. Woods
Gen. Chairman
B. of M. of W. E.
450 Buchanan St.
Gary, Indiana

dispute. Throughout the handling on the property, the Organization has never challenged the Carrier's statement nor has the Organization come forth with any allegation or evidence to show that the magnitude and intricacy of this project was sufficient to fall within the scope of this agreement. In view of this, the Carrier considers that this point is admitted by the Organization and the sole issue concerns the validity of the September 28, 1945 letter as an agreement. Further, the Carrier has demonstrated that the construction of this building required the use of a great number of persons capable of performing special skills that were not in the employ of the Carrier. In view of this and in the light of the past findings of the Third Division, NRAB, in cases of this nature, the Carrier feels that these claims should be denied.

Further, the Carrier has demonstrated that the Organization has not submitted any evidence to the effect that any person has suffered any pecuniary loss as a result of the alleged violation. In view of this, there is no monetary award that can be made under the provisions of Rule 62 of the basic agreement between the parties.

In view of the foregoing, the Carrier respectfully requests a denial award.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim arose in connection with the work of construction of a two-story extension of the Office and Operations Building at East Joliet, Illinois. Each floor of the new construction covers an area of 9980 square feet and is subdivided into 13 offices which now accommodate 160 people.

Claim is made by the Brotherhood of Maintenance of Way Employes that Carrier violated the Agreement by assigning the construction to a general contractor. This party maintains that under the Scope Rule and Rule 56, all construction work is specifically pre-empted to the Bridge and Building Sub Department with the exemption of such work as is involved in the Tri Parte Agreement of November 8, 1939, which is not of concern in the instant dispute. It further argues that the Bridge and Building men had the requisite skills and experience to perform the work.

Carrier contends that the Board does not have jurisdiction because of failure to identify the Claimants in whose behalf this claim is made as provided for under Article V of the National Agreement. It also submits that since the Claimants are not identified, it cannot be demonstrated that they sustained a pecuniary loss. Moreover, it asserts that the Bridge and Building employes were all fully employed and hence did not suffer monetary loss. Rule 62, it argues, prohibits recovery of a monetary claim when no loss is suffered.

On the merits, this party takes the position that the structure erected was of such a nature and of such size and cost that Carrier did not have adequate and competent forces to do the work, and that the Agreement did not contemplate that Bridge and Building employes erect this type of project. It urges that neither the Scope Rule nor the Classification Rule of the Agreement can be construed as bringing such work exclusively within the Scope of the Agreement.

Previous awards pertaining to Carrier's contention that the claim be barred because of non-compliance with Article V, Item 1 (a), which sets forth the rule in unnamed Claimants, both bar and overrule the plea. The basic

question to be answered is whether or not the Claimant can be ascertained so that if compensation is allowed, he may be identified for payment. In the instant case, we are of the opinion that this identification is possible. We, therefore, reject Carrier's plea in bar.

We now turn to a consideration of the merits of the case and specifically to whether under the Scope Rule and Classification of Work Rule 56-1 the work is pre-empted to Bridge and Building employes. The language of the Scope is broad and the Classification of Work Rule 56-1 clearly designates that "all work of construction, maintenance, repair and dismantling of buildings . . . shall be Bridge and Building work." From these rules, it would appear that all construction work is encompassed by the Agreement and that Carrier could not hire out such work to be performed by other than Maintenance of Way employes. It is apparent to us, however, that the parties could not have included such language without intending that the work be within the skills, the range, and the sphere of work ordinarily performed by Bridge and Building employes. The erection of such a large and involved construction project, five times the size of any previously built by Carrier, could not have been within the contemplation of the parties. A project of this nature requires an unusually large number of workers with skills and abilities of various types available at the appropriate time. The record gives evidence that the Bridge and Building employes did at times participate in construction of new buildings; but, it also shows that Carrier, on occasions, contracted out for the construction of some of its buildings. In fact, the original building upon which the addition in question was constructed was the work not of the Bridge and Building employes, but of another contractor. That Carrier used other than Bridge and Building employes for this unusual undertaking does not restrict the work of the Bridge and Building employes under the Agreement in the work usually accepted as within its sphere, for this construction project was an exception which we believe was reasonable to infer from the Scope Rule. Award No. 4158, which also involves a Scope of broad language, expresses a similar position.

We have carefully considered Award No. 10751, and its docket, because it includes the same parties, the same rules, a similar issue involving the construction of a large building, and the presentation of contentions and counter arguments comparable to those submitted in the instant case. This denial award was primarily based upon the grounds that Carrier was forced to hire workers outside of the Bridge and Building employes because there was a shortage of skilled masons due to the Korean War. This situation constituted a basis for the exception to the Scope Rule. Although we do not find a shortage of Bridge and Building employes for the same reason, we do hold that the demands of the project in the case at bar could not be met by the available Bridge and Building employes. We do not believe it necessary to comment on the numerous contentions and counter arguments individually because we have given them due consideration in arriving at our decision.

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 of the parties 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 February 1964.

CARRIER MEMBERS' CONCURRENCE TO AWARD 12230, DOCKET MW-11647

The Award is correct in ruling that the work involved in this claim is not reserved to MofW Employes, but it is gravely in error in ruling that the provisions of Article V, 1(a) were complied with by the Employes. The Statement of Claim does not identify the Employes involved in the alleged violation. See our dissent to **Award 10969** and our recent **Awards 11450, 11229, 11230, 11372, 11373, 11499, 11897.**

G. L. Naylor
W. M. Roberts
R. E. Black
W. F. Euker
R. A. DeRossett