

Award No. 12234
Docket No. MW-11646

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
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 a sheet steel protective cell at Bridge No. 552, to a General Contractor, whose employes hold no seniority rights under the provisions of this Agreement.

(2) The Bridge and Building employes, 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 the work, (except welding and burning) referred to in Part (1) of this claim.

(3) The Welding force employes who are entitled to the 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 of pay 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 Sheet Steel Protective cell at Bridge No. 552.

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

"ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

November 25, 1957

Re: Protective Cell
at Bridge 552

Mr. D. L. Woods
General Chairman, B.ofM.ofW.E.
450 Buchanan Street
Gary, Indiana

Board should find that such letter does constitute an agreement between the parties. The Carrier has also demonstrated that in line with the principle set down by the Third Division, NRAB, projects involving specialized equipment not owned by a carrier and not regularly used by the carrier may be contracted out; the Carrier has demonstrated that the equipment needed for this work was of such a specialized nature and is not owned by this Carrier. The Carrier also has demonstrated that the work required the special skills of a nature not possessed by its own employees. Here again the Third Division, NRAB, has repeatedly found in the past that a carrier confronted with such circumstances may contract out the work involved.

The Carrier has also demonstrated that the Organization has not submitted any evidence to the effect that any person has suffered a pecuniary loss as a result of the alleged violation. In the absence of such evidence, 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: The work at issue in this claim is the construction of a fourth sheet steel protective cell of 30 ft. diameter at Bridge 552 located at Divine, Illinois. This bridge, which spans the Illinois River, is one mile downstream from the junction of the Kankakee and Des Plaines Rivers and the government dam and locks at Dresden.

Organization makes claim that Carrier violated the Agreement when it assigned the work to a general contractor whose employees are not covered by the Agreement. It contends that from the language of the Agreement, it is clear that the work in question belongs to the Bridge and Building employees. It relies on the Scope and Rule 56-1 to sustain its position that all work of construction or dismantling of bridges shall be performed by this class of employees. It also submits that under Rule 47 Carrier is obligated to furnish the necessary equipment for this project. It points out that in 1953 Carrier obtained the consent of Organization to contract out the construction of the second cell at the same bridge. This approval, it maintains, was a recognition by Carrier that the work at issue is considered within the Agreement; and, consequently, the same interpretation should be given to the work on the fourth cell.

Carrier urges that the claim be dismissed because it is defective under Article V of the National Agreement of August 24, 1954, in that it is filed for unnamed Claimants who cannot be identified. It denies that the Scope or Classification Rule encompasses this impressive or special type of construction. It, furthermore, maintains that the job required waterway equipment not customarily used by railroad men or contemplated that Carrier furnish under Rule 47. It also argues that since Claimants were fully employed and compensated during the period in contention, the claim should be barred under Rule 62.

With respect to the jurisdictional issue, we hold that the claim is properly before the Board because the Claimants' identities are readily ascertainable.

Central to this dispute is whether under the Agreement the work at issue belongs to the Bridge and Building Sub-department employees. We look for

guidance to the Scope and Work and Classification Rules. These, we find, in broad language, grant to the Bridge and Building employes all work related to construction, repair, and dismantling bridges. This general language, however, encompasses only the construction work contemplated as within the range of the workers of this classification. In the construction of cells 1, 2, and 3, Carrier also contracted with outside companies to perform the work. The building of cell 1 called forth no protest from Organization. In the construction of cell 2, Carrier requested and received the approval of Organization to let out the contract for the work because it lacked the appropriate force and equipment for the job. Organization did file a claim in respect to the work of cell 3, but failed to progress it. This party takes the position that Carrier gave evidence that it recognized that the work in question belongs to the Bridge and Building employes when it requested Organization's approval to contract out the work for cell 2. We do not infer that this request was an acknowledgement that the work accrues to Claimants. Correspondingly, we do not accept the position of Carrier that failure to protest construction by employes other than those under the Agreement, as was true in the case of cell 1 or failure to progress the claim for the work as in the case of cell 3, is evidence that Organization regarded the work as outside the Agreement. Neither party can rely on the other's previous actions to determine whether the work on cell 4 is within the Agreement.

We find that this construction constituted unusual conditions and work not within the sphere of activities of the Bridge and Building employes. The Scope and Classification Rules cannot be construed as granting Claimants the exclusive right to build a sheet steel protective cell of the size and special nature required at this bridge. The location of Bridge 552 below a dam in turbulent waters 26 feet deep necessitated the employment of workers of special skills capable of functioning from floating equipment. They operated a crane, a concrete mixer, and an air compressor from a barge while a tug boat stood by. We regard such special circumstances as an exception to the rules of the Agreement, and, therefore, we find that the Agreement was not violated.

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 12234, DOCKET MW-11646
(Referee Engelstein)**

We concur with Award 12234 in denying the claim on the merits; however, we dissent to that portion of the opinion reading:

" * * * we hold that the claim is properly before the Board because the Claimants' identities are readily ascertainable."

Part III of Carrier Members' Dissent to Award 10969 is hereby adopted and made a part of this document. The claim here involved did not name the claimant, as required by Article V of the 1954 National Agreement and should have been dismissed.

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