Award No. 12532
Docket No. MW-11708

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it assigned to outside forces the work of constructing and erecting a paint shop building in the Burnham Yards at Denver, Colorado.

(2) B&B employes Gus Sideros, Jerry Jones, R. L. Lundy, R. R. Zerfas, C. F. Kock, Pete Kirsacht and E. A. Elving each be allowed pay at his respective straight time rate for an equal proportionate share of the total number of man hours consumed by outside forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Without benefit of negotiations with or approval of representatives of the Carrier's Maintenance of Way employes, the Carrier assigned to the Hemmenger Construction Company the work of constructing and erecting a prefabricated steel building to be used as a paint shop for carmen at Burnham Yards. The building is of simple design and construction, is 180 feet long and 26 feet wide with a concrete foundation and floor. All skills, tools and equipment necessary to construct and erect this building were readily available to and from the Carrier's B&B forces, such B&B forces having constructed and erected similar buildings in the past, in addition to the performance of considerable repair, maintenance and remodeling work on other prefabricated metal buildings.

The Contractor's forces started work on this building on January 10, 1959, at which time there were at least fifty (50) employes holding seniority in the B&B department who were in a furloughed status due to force reductions on the Pueblo Division (where the subject work was performed).

The instant claim was timely and properly presented and progressed on the property and was declined at each and every stage of handling, with the only excuse given by each Carrier officer for his respective declination of the claim being the statement that the subject work represented "new construction" with the inference that new construction work is not encompassed within the scope of the Agreement.

and obviously, if under the existing agreement Carrier did not have the right to contract out certain work, there would be no need for the employes to seek the inclusion of the rule above quoted in the current agreement. See Third Division Awards 213, 507, 887, 1257, 1397, 2326, 2436, 3727 and 4349.

The Employes may contend as in numerous cases that have been appealed to your Board in the past, all of which have been denied to date, that they have performed certain parts of the work that was necessary to be performed under the contract in question. There are many technical and mechanical items of construction in this contract which B&B employes have never performed and it has been consistently held by the Third Division that work contracted out may not be subdivided for the purpose of determining whether some part could be performed by employes of the Carrier. See Third Division Awards 3206, 4776, 4954, 5304 and 5563 enunciating this principle.

There is no merit to the claims and they must be denied.

OPINION OF BOARD: Under date of December 22, 1958, a contract was made by and between the Carrier and Edward Tamminga of Denver, Colorado, a building contractor, for furnishing labor and materials for the construction of a 26 ft. x 120 ft. paint shop with a 40 ft. x 12 ft. addition and a 26 ft. x 60 ft. stencil shed; trackage within said paint building; drainage of the immediate area; and all exterior utility lines; the said work including all general construction, plumbing, heating, ventilating and electrical work, with the exception that railroad forces perform all track work to 6 feet outside the building limits.

Further, the Carrier contracted with the DeVilbiss Company for installation of a traveling spray painting booth, exhaust duct work, exhaust stack and installation of machinery for handling disposal of paint spray. The contract with Tamminga amounted to $57,650 which included in addition to the building: the electrical work, the sheet metal work, plumbing, heating and ventilating, which items alone amounted to $14,000. The DeVilbiss contract was for $43,360 for their portion of the contract, making a total contract of over $101,000. This building, extensions and technical machinery, ventilation, etc., was of such magnitude as to require approximately nine months to complete.

Claim was made by the Brotherhood of Maintenance of Way Employes for seven named claimants who were at that time employed on the B&B gang for straight time rate for an equal proportionate share of the total number of man hours consumed by Contractor Tamminga's forces in constructing the buildings described.

The Organization submitted a series of photographs designed to demonstrate that the building in question, while it consists of new construction, is not beyond the capacity of the B&B employes to perform as contrasted with other work done by these men in the past and, since only B&B employes are covered by the Agreement of the parties, to have assigned the work to other employes not covered by the contract represents a violation of the Scope Rule of the Agreement.

The Scope Rule in the instant case nowhere sets forth the class or character of work employes are to perform. Nor is there any provision elsewhere in the Agreement explicitly indicating that the maintenance of way employes have a contractual right to perform the work claimed herein. The Carrier's practice of more than 42 years in contracting similar construction, all set forth on page 30 of Third Division Award 6549 on this property,

demonstrates a consistent past practice where new construction is involved. The instant matter concerns a new paint shop which was entirely new construction.

It is significant to point out that the practice of contracting out work of magnitude was the usual procedure when the employes negotiated the present Agreement, effective February 1, 1941. There was no request from the Organization at that time to extend the Scope Rule to guarantee use of maintenance forces to perform heavy construction. On May 22, 1957 the Organization served a Section 6 Notice on the Carrier to revise the existing agreement to add the following rule:

"RULE IX — CONTRACTING OF MAINTENANCE OF WAY AND STRUCTURES WORK

"Any construction, repair, remodeling, maintenance, or dismantling work which would be within the scope of the agreement if it were performed by the railroad company with its own employes shall not be let to contractors by the railroad company except by agreement between the railroad Company and the General Chairman."

The record is silent as to whether this proposal was agreed to and included in the current Agreement. There is no such Rule included on pages 10-12 of Rule 9 in the Agreement. Nor does such additional Rule appear in Supplement E, Rule 9 (f) or elsewhere in the said Agreement, and the above quoted language does not appear in the Scope Rule.

It would seem clear that if the Organization thought its Agreement precluded the Carrier from contracting out heavy construction work and thereby giving work to employes not covered by the Seniority provisions of the Agreement, there would be no reason to seek a new Rule giving them this protection. See Third Division Awards 4259, 8538 and 11878 which hold, inter alia, that:

"It is well settled by many awards that the attempt to negotiate a rule evidences the absence of such a provision; but it recognizes the negotiable character of the subject and it is persuasive of the conclusion that the Petitioner is seeking to secure in the wrong forum what they should have obtained by negotiation across the conference table. To seek a rule change, or an additional rule, through the adjustment machinery which Petitioner was unsuccessful in obtaining by negotiation runs counter to the well settled proposition that this Board is without authority to grant by means of an award something which the Agreement does not provide. It is beyond the authority of this Board to add, subtract or modify the substantive provisions of an Agreement." (See Awards 4259, 8538 and 12192.)

For a dispositive statement of the principles which govern the instant case, the Board cites with approval Award No. 8538 (Coburn) where, in an analogous set of circumstances, we held as follows:

"Claimants here have not conclusively established their right to perform the work in question to the exclusion of others similarly employed, either through custom and practice on this property or under the terms of the contract. Thus, in effect, this Board is being asked to grant something the agreement does not provide. **The rule that we are without authority so to do is too well established to require further comment.**" (Emphasis ours.)

The Carrier does not deny that there were certain parts of the work involved in this entire project which could have been performed by its Bridge and Building employes. But there were so many technical and mechanical items of construction which Bridge and Building employes have never performed that it would have been impractical to subdivide the project for purpose of allocating to these employes that part of the work they were capable of handling. This Board has many times held that if a Carrier has the right to contract "new" construction work, the work need not be subdivided for the purpose of determining whether some part could be performed by employes of the Carrier. See Awards 3206, 4776, 4954, 5304 and 5563.

The Carrier recites in its submission the pracise dimensions of the buildings and an itemization of the work that was contracted out and the cost of the contracts, plus the further fact that the work contemplated was of such magnitude as to require approximately nine months to complete.

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 Carrier did not violate the Agreement.

AWARD

The claims are denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of May 1964.