Award No. 12961
Docket No. MW-12505

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, 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 part of the work of renewing the passenger platforms at its Lake Forest Depot to a contractor.

(2) B&B Foremen Louis G. Aspatore and J. F. Flynn, Assistant Foreman Henry Tapaninen and B&B Mechanics Alex DeGrand, W. S. Edee, James E. Johnson, William Johnson, R. M. Boucher, Raymond Poupore, Charles J. Bertrand, Sam Hammerberg, Roy M. O'Donnell and Orville W. Knessin each be allowed pay at his respective straight time rate for an equal proportionate share of the total number of man hours consumed by the contractor's forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: For the period extending from September 30 to October 3, 1959, the Carrier assigned or otherwise permitted employes of the West Asphalt Company of Gurnee, Illinois to perform the work of installing bituminous concrete (commonly called black-top) as the finish coat in the renewal of the passenger platforms at its Lake Forest Depot.

The Carrier's B&B forces had removed the existing brick topping, the stone curbing which was 4 feet deep and 5 inches thick, and the unusable base material and had installed new timber curbing and a base consisting of screening, with the base extending to within two and one-half inches from the top of the timber curbing.

The Claimants and/or other B&B employes have performed precisely identical work, using equipment either owned by or rented to the Carrier and, in several of such instances, the projects completed by the Carrier's forces were of much greater magnitude than the one here involved. The renewal of the depot platforms at Kenosha, Wisconsin and at Highland Park, Illinois are two examples of similar work but of a greater magnitude performed by the Carrier's forces.

employed during the period in question. Nor is there any basis for the organization's claim on behalf of these employes that they should have performed work performed by the contractor's truck drivers, since in most cases even if the carrier's B&B employes are used to perform blacktopping work, the material has been delivered at the site by the supplier's truck drivers.

The claim is without merit and should be denied.

OPINION OF BOARD: The following facts are undisputed — from September 30th to October 3rd, 1959, the Carrier assigned to an outside contractor, whose employes had no seniority under the prevailing Agreement, the work of installing a top of bituminous concrete, or black-top as the finishing work in the renewal of Carrier's passenger station platforms at the Lake Forest, Illinois, passenger station. All of the work preparatory to installing the black-top was performed by B&B Department employes.

This action was taken without negotiation or agreement with the employes embraced within the coverage of the Agreement either with the Brotherhood of Maintenance of Way employes or their accredited representative.

The primary issue before this Board is — whether or not Carrier assigned work belonging to its Maintenance of Way employes as a seniority right to forces which held no seniority or employment rights under the effective Agreement, and as a violation thereof.

To resolve the issue we must consider the Scope Rule of the Agreement and its effect on the parties which is, as follows:

"PREAMBLE

* * * * *

The following agreement will govern hours of service and working conditions of employes of the Chicago and North Western Railway Company enumerated in the scope rule, and will supersede all previous agreements and rulings thereon in conflict herewith.

SCOPE RULE

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

Employes engaged in handling roadway machines, when used in maintenance of way work. * * *"

Webster's New Collegiate Dictionary contains the following definition of reconstruction — "something reconstructed" and reconstructed is defined as "Made again or anew; rebuilt".

It is the contention of the Claimants that the seniority provisions of the Agreement restrict the right to perform work comprehended within the Scope of the Agreement to the seniority class entitled to perform it; and the paving of or reconstruction of the station platform here in question is work within the Scope and coverage of the Agreement. Consequently, they contend that the Agreement provisions exclude the employes of the con-

tractor, in the instant case, from doing the work. In support of this contention Claimants have cited several instances of similar work performed by B&B employes and the equipment used furnished by the Carrier and Claimants contend that the projects were completed in their entirety by Carrier forces using equipment owned by or available to the Carrier.

Carrier admitted that B&B employes had paved station platforms in the past at some locations but that the black-top used was a cold mix which could be raked by B&B employes and then rolled by a small roller owned by Carrier. However, Carrier contends that the station at Lake Forest was a large job where in the exercise of efficiency and economy it was more practical to use hot mix delivered in insulated trucks spread by a paving machine and rolled with a large type power roller owned by the contractor which was much greater in size than the small roller owned by the Carrier.

Carrier further contends that the performance of the work by the contractor was not in violation of the agreement because work of such magnitude had not been performed exclusively by Carrier's B&B employes as evidenced by past practice. Carrier cited several instances of general paving jobs though only three of the jobs named involved the paving of station platforms.

Carrier further contends that it did not own equipment necessary to perform the work and that there is nothing in the Agreement which prevents Carrier from contracting for work and equipment outside of the Agreement.

Lastly, Carrier contends there is no basis for a penalty claim and that all the Claimants except four were employed and sustained no monetary loss.

Claimants in rebuttal of Carrier's contentions, assert that they had used "hot mix" on some of the jobs that they had performed. They further asserted that a former highest appellate officer of the Carrier had agreed with a former General Chairman that no work in the Maintenance of Way and Structure Department would be assigned to outside contractors until the General Chairman approved and agreed to it. It is further asserted by Claimants that as to all three stations where Carrier paved station platforms that the work was performed after an agreement with the General Chairman. This assertion in part is corroborated by correspondence, evidenced in the record, between the General Chairman and the Chief Engineer of Maintenance.

Let us turn to some of the prior awards of this Board. In Award 6905 (Coffey) we note the following:

> "It is to be remembered that the subject of the Carrier's contract with its employes is work and not equipment. . . . If the Carrier has work but not equipment, and under those circumstances alone, could contract out its work a second time with impunity in every case, the last vestige of right which the Employes have under the collective bargaining agreement would disappear.
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> The Employes have no right to object because the Carrier, in the exercise of its managerial judgment, has seen fit to contract for equipment. They have no right to interfere if the Carrier also permits, or contracts with others to operate that equipment in violation of its Employes' contractual right to do the work. The only remedy is to make claim for an equal amount of time as was done."

In Award 4158 (Robertson) involving these same parties we find the following:

> ". . . the Carrier should not permit a situation to arise where it is necessary to contract out such ordinary repair and maintenance work. Where it does arise, if sufficient manpower cannot be recruited to perform such as is non-deferable, negotiation with the Employes should be carried on to arrange for performance of the work by other means, as has been done before by this Carrier. Should the Employes take an unreasonable view of the situation, they would certainly be in an unfavorable position should they come before this Board with any claims."

In Award 5470 (Carter) also between the same parties, we find:

> "It will be noted that the Carrier has contracted with employes for the performance of building, repairs, reconstruction, and operation in the Maintenance of Way Department. The burden is upon the Carrier to show that conditions exist which permit the diversion of the work to a contractor. . . ."

See also Award 5839 (Yeager) which though a denial award repeats the above principle.

See also the following awards involving the same parties — Award 5090 (Coffey); Award 5136 (Coffey); Award 5471 (Carter); Award 5841 (Yeager); Award 6234 (Stone).

In Award 11208 (Coburn), a denial award, the following principles are enunciated:

> "The Board will consider the merits of this dispute in the light of certain principles governing the contracting out of work which have been promulgated and adhered to in numerous awards of this Division. They are clearly set out in Award 5563:
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> > 'First, as a general rule the carrier may not contract out work covered by its collective bargaining agreements.
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> > Second, work may be contracted out when special skills, equipment or materials are required, or when the work is unusual or novel in character or involves a considerable undertaking. (See Awards 757, 2338, 2465, 3206, 4712, 4776, 5028, 5151 and 5304.)
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> > Fourth, the burden of proof is on the carrier to show by factual evidence that its decision to contract out work is justified under the circumstances. (See Awards 2338, 4671 and 5304.)' "

Let us then apply the foregoing principles to a determination as to whether or not the Agreement was violated in the instant case. It appears quite conclusively that on a number of occasions the B&B employes had been used in the reconstruction or paving of station platforms with company owned equipment. Whether or not hot black top mix was used on these jobs is controversial though Carrier has conceded that at least in one instance it

was used by B&B employes. It also appears that in three instances involving the paving of station platforms Carrier called in an outside contractor but, significantly, it may be properly inferred from the record that it was done only after negotiation with the Organization through their accredited representative. We then conclude that it was recognized that this was work reserved to the B&B employes under the Agreement. Though we do not challenge the right of the Carrier to hire outside equipment for work that it feels cannot be done by equipment owned by Carrier nor by Carrier's forces we do feel that under the circumstances presented here, Carrier should have done so after negotiation with the Organization as it had in the past. Therefore we do not feel that the decision to contract out the work was justified and consequently, there has been a violation of the Agreement.

It appears from the record that all of the Claimants save four, W. S. Edee, James E. Johnson, William Johnson and Sam Hammerberg, were employed and sustained no monetary loss. These four named employes had been laid off. Each of them is to be reimbursed for the pay they lost from September 30 to October 3, 1959, on a pro rata basis.

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 has been violated.

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of October 1964.