Award Number 13349
Docket No. MW-14506

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Ross Hutchins, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY (SYSTEM LINES)

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

(1) The Carrier violated the Agreement when, without benefit of 'mutual agreement between the General Chairman and designated Representative of Management', it 'contracted to outside parties' the work of constructing the subgrade for an exchange track at Salem, Oregon (work was performed by Beaver State Construction Company on July 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25 and 26, 1962). (Carrier's File 18-b Case MW-133)

(2) Machine Operators L. S. Huot L. Schuh, C. C. Beard, D. Legore, A. A. Ackaret, Ruel McLean, J. Whitney, L. L. Brown, A. Loghry, R. Lamping, R. P. Thiel, L. J. Curtis, R. Johnson, Truck Drivers A. C. Courville, F. T. Obabao, S. V. Suckow, H. F. Godfrey, Machine Operator Helpers O. L. McLean, W. W. Howell and O. L. Wells each be allowed pay at their respective straight time rates 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: In conference on May 25, 1962, the Carrier's highest appellate officer sought the General Chairman's approval to allow outside parties to perform certain work in connection with the construction of an exchange track at Salem, Oregon. The Carrier wished to contract the work of constructing the subgrade. All other work on this project was to be performed by forces under the scope of the Agreement.

The General Chairman took the Carrier's request under consideration and, in a letter dated June 1, 1962, to the Carrier's highest appellate officer, he offered to agree to the contracting of the hauling of 4140 yards of fill material if the Carrier would agree that all other work would be performed by the Carrier's forces and that no employes in the Roadway Equipment Repair and Operation Department would be affected by force reduction while outside forces were performing work on this project.

OPINION OF BOARD: Rule 40 provides:

> "All work on Operating property, as classified in this Agreement, shall be performed by employes covered by this Agreement, unless by mutual agreement between the General Chairman and designated Representative of Management, it is agreed that certain jobs may be contracted to outside parties account inability of the railroad due to lack of equipment, qualified forces or other reasons to perform such work with its own forces. It is recognized that where train service is made inoperative due to conditions such as, but not limited to washouts or fires, individuals or contractors may be employed pending discussion with respect to such mutual agreement."

The rule establishes that all work on the property shall be performed by the Organization unless:

(1) There is mutual consent with the General Chairman

(2) There is an inability to perform the needed work with its own forces because of

(a) lack of equipment
(b) lack of qualified forces
(c) other reasons

(3) That there are conditions making train service inoperative.

The burden of establishing the employment of outside forces is upon the Organization, but the burden of establishing an exception is upon the Carrier. The Carrier seeks to establish an exception under Item (2) above. However, their evidence is shallow, unsupported by some of the admitted facts and soundly disputed by the Organization.

Additionally the ruly clearly imposes upon the Carrier a duty to seek mutual Agreement. The Carrier does not seem to have made a bona fide effort to reach mutual Agreement.

Accordingly, there has been a violation of the Agreement.

However, the Carrier contends the Claimants have proven no damages. It is firmly established that one injured by breach of an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned. Brotherhood of Railway Trainmen vs. Denver & Rio Grande Railroad Company (10 circuit C.A. 7651 & 7632) related specifically to a dispute between a railroad and the members of a union. This case is binding upon this body. As stated the evidence shows that the Carrier has failed to employ the members of the Brotherhood as agreed. But the evidence also establishes that the Claimants were employed at another point on the Carrier's lines on the dates the disputed work was performed. However, the evidence indicates the employes and at least some of the equipment were available at other times and further that the work could have been done at other times.

The burden is upon the employe to show what his loss has been. But upon showing that he has sustained a loss of certain work and what that work was he has overcome this burden. If the Carrier wishes to show in mitigation that the employe received other income, the burden of proof is upon the Carrier.

Further, in a case such as this where the employe could have done the work at more than one time the Carrier must show that the employee was employed at all times when he could reasonably have done the work.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence finds and holds:

That the parties waived oral hearing;

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1965.