Award No. 13966
Docket No. MW-14833

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

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

(1) The Carrier violated the Agreement when it assigned paving work on the Eads Bridge to the Alpha Asphalt Company without benefit of prior discussion and agreement with the Brotherhood of Maintenance of Way Employes (Carrier's file 013-293-14).

(2) Assistant Masonry and Concrete Foreman John Kedge be allowed eight hours' pay at his straight-time rate for each of the days, beginning with June 19, 1962, that outside forces were used to perform the work referred to in Part (1) of this claim.

(3) Mason and Concrete Mechanics John Sokolich, Otto Unle, Joseph Duvall, John Zmaila, Ed. Howe, James Kilkenny, Elmer Luecke, Ernest Strubelt and Emil Visintin each be allowed pay at their straight-time rates for an equal proportionate share of the total number of man-hours (exclusive of supervision) consumed by outside forces in the performance of the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Bridge and Building Sub-Department employes (Group 5) have historically and traditionally performed all work of the character involved in the instant dispute.

Commencing on June 19, 1962, all work in connection with the paving (with bituminous concrete — blacktop) of a portion of the upper roadway and of the east approach to the Eads Bridge was assigned to and performed by the Alpha Asphalt Company, East St. Louis, Illinois. Despite the fact that the Carrier is prohibited, **by agreement,** from contracting Maintenance of Way work until and unless the General Chairman has agreed thereto, the Carrier did **not** consult the General Chairman regarding the contracting of the subject work.

forcing was of a specialized character and without the proper skill and equipment it would be extremely hazardous. The Employes argued that the carrier could have performed the work with its own forces and that the necessary equipment could have been found somewhere on the railroad system. The Board, however, took cognizance of the carrier's argument that it had neither the skilled force nor equipment necessary to satisfactorily perform the work and ruled that its managerial judgment ought not to be lightly disregarded in matters affecting the safety of its men as well as that of the public. The claim was denied.

In processing this claim on the property the Organization has not disputed the Company's position that it is not equipped to do the work under contention except to state that it was not the Organization's responsibility or fault that the Carrier was not equipped. (See the General Chairman's letter of April 13, 1963 to the Manager Labor Relations.)

Without waiving its position that it had neither the equipment nor skilled manpower to perform the work in contention and that claim is therefore without merit and should be declined, Carrier also states that all employes were employed on the dates of claim and suffered no loss of wages. In this regard attention is called to the following excerpt from the findings in Third Division Award 10963:

> "In the instant case Petitioner has proven the violation. It has not met its burden of proving monetary damages. There is no evidence in the record that any Employe in the collective bargaining unit suffered any loss of pay because of Carrier's violation of the contract."

It has been the practice to contract out the work complained of due to the need for special equipment which the Carrier does not possess, as it would be used very infrequently, and because Carrier's forces are not qualified to perform the work in question. None of the claimants suffered monetary loss. The contention of the Organization lacks the support of the Agreement.

The Carrier did not violate the Agreement and the claim of the Organization should be denied in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier contracted with Alpha Asphalt Company to pave with bituminous concrete (blacktop) a portion of the upper roadway and the east approach to the Eads Bridge. The claim is that this work belonged to the bridge and Building Sub-Department employes (Group 5) and that it was a violation of the applicable Agreement and of the sub-agreement of October 2, 1939.

The sub-agreement was contained in a letter from General Superintendent J. A. Mathewson to Maintenance of Way Employes Vice President C. E. Cook, which stated, in part:

> "Of course, having been put on notice by the organization, we will refrain from any contracting in the future until the question is settled by the national Committee handling it unless we can convince our General Chairman of the propriety of the action."

It is undisputed that Carrier did not consult the General Chairman about contracting out this work. It is our opinion, however, that the sub-agreement is no longer operative and, hence, is not controlling. The commitment it contained was not intended or understood to be a permanent one. It was merely a modus vivendi until the committee which was working on a program to stabilize jobs completed its work. Although the committee never settled the question of contracting, it ceased to function after the Organization served a Section 6 Notice which ultimately resulted in the adoption of the National Mediation Agreement of October 7, 1959. There has been no committee at work on this problem since then and the sub-agreement ceased to be by its own internal conditions.

Award 5848, relied on by the Petitioner also does not apply. Although it upheld the validity of the sub-agreement, it antedated the 1959 Agreement and dealt with the sub-agreement while it was still operative.

The Organization argued that the 1959 Agreement cannot have terminated the sub-agreement because it did not settle the question of contracting, there being no mention of it in the Agreement. The point is not well taken. The sub-agreement ceased to be operative not because the question of contracting out was settled but because the committee handling the problem had ceased to function. The purpose of the sub-agreement was not to provide the method of operation until the question was settled but until the committee settled it. To hold that the commitment survived the demise of the committee would be possible only if we ignore the reference to the committee.

The Organization also relied on the Scope Rule and other rules which, it argued, reserved this work to the Bridge and Building forces. The Scope Rule is a general one which, we have frequently held, confers no exclusive right to work unless it is proved that such work was by custom and practice so reserved. Award 12952 and others. The Organization contended that Carrier always assigned work of this nature to the employes up to June 4, 1962 when it changed, thereby giving rise to a dispute which is Docket No. MW-14621. In that case Carrier's highest appellate officer wrote:

> "Your argument was that paving of whatever nature has always been done by concrete mechanics. Probably that is true, but the point here seems to be that the 'Blockrete' material is something new . . ."

The Organization also pointed out that Carrier never denied that paving work was reserved to the Organization.

A careful study of the record does not support the argument that Carrier conceded the work was reserved to the Organization. Carrier pointed out that the Scope Rule and the Classification Rule were not pertinent to the case and that the Agreement is silent on the contracting out of work. It also asserted that Terminal forces have never applied hot asphaltic concrete.

Carrier took the position that whatever the merits of the argument that paving was reserved to the employes it was irrelevant because this was a new kind of paving never done before by the employes and had been done twice previously, in 1955 and in 1956 by a contractor. This is not a concession that all paving work was reserved to the Bridge and Building forces. However history may support the Organization's claim to other paving work, it does not support the claim to this kind of paving which requires specialized equipment and qualified forces to perform. The Organization did not contest

that such equipment and forces were necessary. It took refuge in the argument that it was not the Organization's responsibility but the Carrier's if the equipment was not available and that its forces were prepared to do any work of their craft.

We have held that Carrier is not required to have or obtain specialized equipment not usual to its operations. In Award 10715 we upheld the right of Carrier to contract out new paving work which required special tools and equipment similar to that involved here.

The experience of the employes with asphalt was in patching small areas. The job contracted out was extensive and required equipment and men capable of performing the job quickly before the asphaltic concrete cooled down.

In our opinion, this work was of the kind and nature the Board has previously sustained Carrier's right to contract out. Awards 13272, 12980, 11862, 10715 and others.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of November 1965.