Award No. 14004
Docket No. MW-15350

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY
(System Lines)

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

(1) The Carrier violated the Agreement when, on October 16, 1963, it assigned or otherwise permitted a Store Department employe to operate Crane X-40 which was being used in the performance of Bridge and Building department work at the Rip Track at Vancouver, Washington: (Carrier's Case No. MW-145).

(2) Machine Operator Ivan C. Larsen be allowed four (4) hours' pay at his straight time rate because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On October 16, 1963, Bridge and Building Department employes were performing their usual and customary work of repairing the load shifter located at the Rip Track in Vancouver, Washington. A crane, designated as Store Department Crane X-40, was used to assist in the hoisting and placing of catwalks. The Carrier assigned or otherwise permitted a Store Department employe, who does not hold any seniority as a Maintenance of Way machine operator, to operate this crane.

The claimant, who holds seniority in the Roadway Equipment Repair and Operation Department, was available, willing and fully qualified to operate Crane X-40, had he been called upon to do so.

The Agreement in effect between the two parties to this dispute dated June 1, 1956, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Article 1 reads:

"These rules govern the hours of service and working conditions of all employes in the Maintenance of Way and Structures Department, including derrick and steamshovel operators, pile driver opera-

directed to Third Division **Award 11371** (BMWE v. CMStP&P) in which Referee Dorsey, in a denial Award, found that:

> "Where the evidence, as here, is uncontroverted that the employes of a Carrier, having a contractual right to a certain type of work, are fully engaged in such work, it has been long established by this Board that Carrier is free to contract for the performance of such work, on a project, in excess of that which its employes can accomplish. This being so, it would be a paradox to say the work could be contracted out but could not be assigned to an available qualified employe of the Carrier."

See also **Award 10963** (BMWE v. Reading Company), Referee Dorsey, which discusses at length the function of your honorable Board in the matter of assessing damages in the event of a breach of a labor agreement.

In conclusion, Respondent submits that Petitioner has not and cannot cite any rule in the controlling agreement that supports the claim herein presented that claimant, regularly assigned operator on Machine R-14, was entitled to operate Stores Department Crane X-40 in the circumstances involved in this case; and further that in any event because he was fully employed on his regular assignment on the claim date, he was not damaged in any event; and, therefore, the claim must be denied in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: In 1963 Carrier added a steel ladder, cat-walk and railing to a load adjuster which is adjacent to the car repair tracks at Vancouver, Washington. The erection was performed by B&B crew No. 6 with the assistance of the Stores Department crane operated by an employe covered by Clerks' Agreement. Petitioner contends that the operation of the crane during its use on the project was work reserved to Machine Operators covered by the MW Agreement.

In Award No. 13517, involving the same parties as herein, we held that the operation of a crane is not the exclusive work of any craft; and, we cited, with favor, Second Division Award No. 1829, wherein it was held:

> "It is the character of the work performed by the crane that ordinarily determines the craft from which its operator will be drawn."

Therefore, there only remains for determination in the instant case: Was the operation of the crane work of a character reserved to MW Machine Operators?

Carrier contends that: (1) the Scope Rule (Article 1) of the MW Agreement is general in nature; (2) to prevail Petitioner must prove that the work has been exclusively performed by MW employes; and (3) Petitioner has failed to satisfy the burden of proof of exclusivity.

Carrier has not denied that the work was performed on "Operating property." This being so, we find a specific grant of the work in Article X, Rule 40 of the MW Agreement:

> **"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 . . ." (Emphasis ours.)

In view of the specific grant: (1) we are not concerned with the principles of interpretation and application of a general in nature Scope Rule; and (2) we find Carrier violated the MW Agreement in permitting an employe covered by the Clerks' Agreement to operate the crane on the project. We will sustain paragraph 1 of the Claim.

Carrier's response to paragraph 2 of the Claim is that: (1) the number of hours the crane was operated on the project was 2; not 4 as alleged; and (2) Claimant was fully employed on the date of the violation and consequently suffered no damages — a monetary award would be a penalty.

Point 2 of the preceding paragraph must, in logical consideration, first be resolved.

We have held in contracting out cases that a carrier's defenses are: (1) emergency; (2) lack of special equipment and tools; (3) lack of skills; and (4) lack of manpower. The four enumerated defenses are not to be considered as inclusive; there may be others of probative value in a given case.

We do not distinguish between a contracting out case and one in which work reserved to a class or craft is performed by other employes stranger to the agreement.

The fact that Claimant was elsewhere working at the time of the violation is not proof that he could not have performed the crane work. In the instant case, therefore, Carrier having failed to adduce any evidence that the work involved could not have been performed by Claimant, has failed in its burden to prove an affirmative defense to overcome Petitioner's **prima facie case.** In the posture of the record we are not confronted with the legal distinction between "penalties" and "damages." See Award No. 11937.

We find it unnecessary to decide the number of hours the crane was operated on the project. The make whole theory will be satisfied by Carrier paying to Claimant his pro rata rate for the hours the crane was operated on the project as recorded in Carrier's records kept in the ordinary course of business. We will sustain paragraph 2 of the Claim to the extent of the foregoing prescription.

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 Carrier violated the Agreement.

AWARD

Paragraph 1 of the Claim is sustained.

Paragraph 2 of the Claim is sustained to the extent prescribed in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of November 1965.

DISSENT TO AWARD NO. 14004, DOCKET NO. MW-15350

Award 14004 incorrectly holds that the work in dispute was "contracted out" and that Rule 40 of the Agreement contains a specific grant of the work to the class of employes in which Claimant was employed. Rule 40 reads:

> "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 . . ." (Emphasis ours.)

There was no contracting of work to outside parties as that term is used in the Rule. The Rule has no application to use of Carrier's own forces since there is no necessity for entering into any contract for performance of a specific job insofar as they are concerned. All of the disputed work was performed with Carrier's own equipment and by its own employes. The Rule accordingly had no application to the facts in this dispute.

After erroneously concluding that a violation of the Agreement had occurred, the Referee proceeds to grant Claimant a "windfall" in the form of a money award. Since Claimant was fully employed and did not sustain any loss, the monetary award can be nothing but a "penalty." See Awards 10963 and 13958 by the same Referee.

G. C. White
R. E. Black
P. C. Carter
D. S. Dugan
T. F. Strunck