Award No. 14061
Docket No. MW-15265

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

UNION PACIFIC RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it assigned or otherwise permitted outside forces to perform the work of repairing the roof on the roundhouse at Green River, Wyoming.

(2) B&B Foreman A. L. Hales and B&B Carpenters James M. McNamara, Lewis Groshel, George D. Follmer and Shirley A. Peterson each be allowed pay at their respective straight-time rates 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: Commencing on or about September 3, 1963, the Carrier, without benefit of negotiations with or the concurrence of the employes' authorized representatives, assigned the work of repairing the roof on the roundhouse at Green River, Wyoming to the P. K. Roofing Company of Rock Springs, Wyoming.

The work consisted mainly of renewing the roofing on a portion of the subject roof. The work was completed on or about September 20, 1963.

This work was of the nature and character that has heretofore been assigned to and performed by the Carrier's Bridge and Building Department employes.

The claimants were available, willing and fully qualified and could have efficiently and expeditiously performed the work here involved, had the Carrier so desired.

The Agreement in effect between the two parties to this dispute dated May 1, 1958, together with supplements, amendments and interpretations thereto, is by reference made a part of this Statement of Facts.

handled by the private contractor. At the time the work was performed by the private contractor all B&B employes on the roster were working and the roster was completely exhausted. There were thus no employes "available to perform such work" within the meaning of the letter agreement, and Carrier was clearly entitled under the provisions and intent of that agreement to have such work performed by private contractor in accordance with the established and long accepted practice.

The letter agreement recognizes and confirms the right of the Carrier to contract any of its work to the extent it had previously done so during normal peacetime periods. This particular work of renovating a roof was that type of work which, both prior and subsequent to that letter agreement, the Carrier had assigned to private contractors. In addition, the letter agreement only restricts the use of contractors to perform "maintenance work" where regular Company forces are available. The regular Company forces were not available in this case. They were all fully employed during this period and were being utilized to perform other usual and necessary work. Neither the Claimants nor any other employe suffered any loss whatsoever by reason of this work being performed by a private contractor. Under these circumstances, the performance of this work by a private contractor was fully in compliance with the provisions and intent of the letter agreement of November 18, 1943, and the claim of alleged contract violation is entirely without foundation. The claims are without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier, about September 3, 1963, contracted out repair of the roof of its roundhouse at Green River, Wyoming. The work, according to Carrier, involved approximately 10,000 square feet of roof and consisted of "tearing off of the old roofing to the sheathing, replacement of layer of 15 lb. felt, installation of new gravel top, mopping of two layers of 15 lb. felt, then mopping of 1 layer of 65 lb. cap sheet, and, finally, a brushing with aluminum coating." The Organization alleges that the Agreement reserved this work to B&B Carpenters.

Carrier's given reasons for declination of the Claim, on the property, were consistent at each stage in the usual handling on the property. The chief operating officer of Carrier designated to handle the dispute set them forth in a letter, herein called Carrier's Position, to the organization which, in pertinent part, reads:

> "It has never been the intent to let out work under contract without first giving consideration to our forces. In this case, project had been deferred for a considerable time account it was felt would not require immediate attention; however, developed later that roofing was deteriorating to an extent that re-roofing should be done without further delay, and at the time determination was made that re-roofing was necessary, additional appropriation was asked for to cover the work and it was imperative that work be done within the month the funds were granted and this roof installed before cold weather set in and also to prevent the possibility of sudden complete failure of the roof.
>
> Our B&B forces were given consideration and a check was made of the B&B Seniority Roster and this check revealed that all B&B employes were working and the roster was completely exhausted, also

all of the B&B forces were on maintenance and repair work as well as work order projects that were just as important and necessary to handle to completion; therefore, the company was within its rights to contract this work which was done under normal conditions.

You will agree it is necessary at times to contract some items in order to complete projects and get the work out of the way and that established custom and practice in handling of contract projects in the past will show work of this nature has been done by contract forces.

Additionally, page 75 of the effective agreement provides that the company has the right to utilize contract forces to the extent that such work was handled by contract during normal conditions and it is felt under the circumstances normal conditions existed and that no abuse was made of this rule just to eliminate work for the B&B forces.

As there was no loss of wages by the claimants and the fact no B&B employes were available, due to seniority roster being exhausted, I do not feel there was a violation of the agreement.

For reasons stated above, I must respectfully decline your request. However, will be happy to discuss with you at your convenience."

Carrier argued:

1. This is a Scope Rule case. The Scope Rule is general in nature. The Organization has failed to prove that customarily the employes represented by the Organization have, exclusively, performed work of the nature here involved;

2. In a Memorandum of Understanding dated November 18, 1943, Carrier was vested with the right to contract out the work here involved;

3. Our Award No. 8184, involving the parties herein, in which claim was denied, is binding precedent; and, Awards Nos. 21 and 23 of Special Board of Adjustment No. 313, on this property, compel us to deny the Claim herein; and,

4. Because all B&B Carpenters in the seniority district were employed at the time the work contracted out was done, the Claimants — even if a violation be found — have not been damaged.

RESOLUTION

1. Carrier's Position

We can tersely dispose of certain averments in Carrier's Position:

There is no evidence of an unforeseen or unforeseeable need to repair or replace the roofing material. Carrier admits the "project had been deferred for a considerable time account it was felt would not require immediate attention." This admission rules out a defense of emergency.

We are not concerned with Carrier's auditing, disbursement, and budgeting procedures. They have no bearing on Carrier's obligations to comply with the Collective Bargaining Agreement.

Carrier adduced no evidence to prove "the possibility of sudden complete failure of the roof." Its own description of the work performed belies any structural failure of the roof.

Carrier's assertion that "the company was within its rights to contract this work which was done under normal conditions", fails for lack of proof in the record as made on the property.

2. Scope Rule – Grant of Work

We are not confronted with interpretation and application of a Scope Rule general in nature. The Claim is founded on an alleged breach of the Agreement effective May 1, 1958. Rule 3 of the Agreement specifically grants work of the nature here involved, as follows:

> "NOTE 9: Classification of Work – Bridge and Building Department: The work of . . . maintenance and repair of buildings . . . **shall** be performed by employes in the Bridge and Building Department." (Emphasis ours.)

Usual defenses to failure to comply with such a grant are: (1) emergency; (2) lack of skills; (3) lack of special tools and equipment; (4) size of the project not within the contemplation of the parties at the time of execution of the Agreement; and (5) lack of manpower. Of these, only the last one is a probable defense in this case. We consider it, **infra.**

3. Prior Awards

Carrier cites Award No. 8184 as being dispositive of the issue raised in the instant Claim. In that case "The Organization took the position that the erection, and painting of the addition to the building was of the type that was contemplated by the Scope Rule of the effective agreement, and as such, to be performed by the employes covered thereby. It was asserted that the work was of a nature that had historically and traditionally been performed by Maintenance of Way forces." It was concluded in the Opinion in that Award that:

> "The Scope Rule of this agreement is a general one; it does not enumerate the work covered thereby. However, we are confronted with a special understanding between the parties which concerns the right of this Carrier to assign construction work to others than those covered by the effective Agreement. This Memorandum of Understanding was entered into on November 18, 1943, and among other things contained the following provisions:
>
> '3. The performance of maintenance work by contractors will be curtailed to the extent employes included within the scope of the agreement effective December 1, 1937, are available to perform such work, and the company has necessary equipment.
>
> It is understood the company reserves the right to contract projects to the extent that such work was handled by contract during normal conditions.'

> We are of the opinion that this provision which reserved to the Carrier the right to 'contract out' work to the extent that such work was handled by outside forces during normal conditions, granted to the Respondent freedom of action to contract the work in question. This conclusion is based on the fact that the work in question was an addition to a building which was initially constructed by outside forces, and that like initial construction or additions to existing buildings at this location had been 'contracted out' under conditions that were there, as here, 'normal' within the meaning of such Memorandum of Understanding."

The alleged violation in Award No. 8184 occurred in October and November, 1953. The Agreement there involved was effective September 1, 1949. The Agreement involved in the instant case became effective May 1, 1958. While both Agreements have appended the Memorandum of Understanding dated November 18, 1943, its force and effect have been diminished by the 1958 Agreement.

In Award No. 8184 we were confronted with interpretation and application of a Scope Rule, general in nature. Not so here, for in the 1958 Agreement a specific grant of the work here involved was agreed to in Rule 3, Note 9, **supra.** This specific grant prevails over the Scope Rule and the 1943 Memorandum of Understanding. It is an elementary principle of contract construction that a later agreement between the same parties prevails in variances with an earlier but continuing agreement.

Even assuming the interpretation that Carrier would give to the 1943 Memorandum of Understanding, Carrier fails to merit its application inasmuch as it did not prove, in the record made on the property, its affirmative defense of "normal conditions."

We find no aid to adjudication of the instant case in Awards Nos. 21 and 23 of Special Board of Adjustment No. 313.

4. Availability – Damages

Carrier has not controverted that Claimants herein — B&B Carpenters — would have performed the work involved if it had been done by its employes. Its defenses are: (1) "all B&B employes were working;" (2) "all of the B&B forces were on maintenance and repair work as well as work order projects that were just as important and necessary to handle to completion;" (3) "the company was within its rights to contract this work which was done under normal conditions;" and (4) Claimants were not available and suffered no loss of wages. The Organization admits the averment in (1). Two and three are affirmative defenses which were put to issue by the Organization. As we have repeatedly held, controverted assertions are not evidence — they have no probative value. The burden of proving defenses (2) and (3) was Carrier's. In this it failed. We, therefore, find wanting affirmative defenses (2) and (3) for lack of proof.

It is not enough for Carrier to assert that Claimants were not available to perform the work contracted out because they "were on maintenance and repair work as well as work order projects that were just as important and necessary to handle to completion;" because, this assertion was also put in issue by the Organization. The Organization averred that Carrier, without detriment, could have scheduled the work so as to be performed by Claimants. Here, again, Carrier failed to satisfy its burden of proof.

Because of the nature of the work involved and Carrier's admission that "project had been deferred for a considerable time account it was felt would not require immediate attention", we find, in the light of the evidence properly before us, that acumen on the part of Carrier would have permitted it to schedule the work for performance by Claimants. Its failure to do so violated the Agreement and resulted in Claimants being damaged as alleged in the Claim.

5. Conclusion

For the foregoing reasons we find that Carrier violated the Agreement as alleged in paragraph (1) of the Claim; and, the prayer for a monetary Award, in paragraph (2) of the Claim, is sustainable as damages. We will sustain the Claim.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of December 1965.