Award No. 14982
Docket No. MW-15853

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Gene T. Ritter, 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 it assigned or otherwise permitted other than B&B department employes to make repairs to stone pier and lift stool on the south end draw span of Bridge 9-3 over the Columbia River and the down river protection pier on June 20, 22, 23, 24, 25, 26, 29, 30, July 1, 2, 3, 6, 7, 8, and 9, 1964. (Carrier's file 1181-a.)

(2) B&B Foreman J. Harper, Assistant Foreman W. Eriksen, Carpenters T. Phelps, O. Jones, W. Smith, G. Ditmer, L. Kramer, O. Larson, H. Herschberger, O. Arp, J. Woldrich, R. Henderson, G. Brumfield and L. Buttram 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: The facts in this case were fully and accurately set forth in the General Chairman's letter of claim presentation dated July 27, 1964, the pertinent portions of which read:

"On June 19, 1964 the SS Massmar at about 5:20 P. M. Daylight time bumped into the Columbia River bridge damaging capstone and lift stool on the up river side of the south end draw span rest. Operation of traffic over the bridge was permitted to resume using the south bound track at about 12:40 A. M. June 20, 1964.

B&B employes were called shortly after damage was done June 19, 1964 and remained on the job until the morning of June 20, 1964. No work was performed by either Carrier or contractor employes on Sunday, June 21, 1964.

'* * * * *'

into the river, twisting the shoe around and leaving it hanging at a 45 degree angle; sheared off one side plate that enclosed the roller nest; damaged the opposite side plate; and sheared off all four of the anchor bolts that secured the shoe to the pier. In addition, a number of sheathing plank were torn from the protection pier.

As result of this collision the bridge was immediately taken out of service; a contractor, who had the necessary floating equipment and skilled personnel, was engaged to repair the damage; and the representative of the Brotherhood Petitioner here, was so notified (see Respondent's Exhibit A). By working continuously through the night and most of the next day temporary repairs permitted traffic to resume at restricted speed on one main track, but the other main track necessarily remained out of service continuously until the repairs were completed eighteen days later.

This railroad bridge, which carries a double track main line, provides the only access for all trains into Portland from the north, including passenger and freight service operated by Great Northern Railway, Northern Pacific Railway and Union Pacific Railroad between Seattle and Portland, as well as all of Respondent's passenger and freight traffic between Portland and all point Vancouver, Washington and east.

(Exhibits not reproduced.)

OPINION OF BOARD: On June 19, 1964 Carrier's Columbia River Bridge was damaged. On the same date, shortly after the Bridge was damaged, B&B employes were called and remained on the job until the following morning when temporary repairs permitted traffic to resume at restricted speed on one main track. The other main track remained out of service until repairs were completed eighteen days later. Carrier engaged a contractor to complete the repairs between June 20, 1964 and July 9, 1964. The Organization contends that Carrier violated the Agreement when it engaged the contractor to finish the repairs. Carrier contends that the claim is without merit because: (1) Time was of the essence; (2) The work was of great magnitude; (3) The requirement of special skills and equipment; (4) Past practice agreed upon by the parties; (5) Untimely protest by employes, and; (6) no damages were suffered by any of the employes.

We have held that the burden of establishing the employment of outside forces is upon the Organization, but the burden of establishing an exception is upon the Carrier (Award 13349 (Hutchins), 14472 (Dorsey)). In the instant case, Carrier has failed to prove any of its defenses. Mere assertions and allegations are not proof.

Under the provision of Rule 40 of the agreement, Carrier was required to give the work to its own employes unless an agreement was reached with the General Chairman permitting the contracting of this work. Here the carrier made no effort to reach an agreement with the General Chairman. It's action was unilateral and arbitrary. This dispute is squarely in point with Award 7060 (Carter), which has been followed by Awards 13349 (Hutchins), 13845 (Kornblum), and 14004 (Dorsey).

By agreement, the contracted work in this case belonged to the employes. If a true emergency existed, the work performed would have been carried on around the clock. The record reflects that repair work was not performed around the clock and rest days were observed. There being no evidence tending to show that Claimants were not qualified or that they did not have access to

needed equipment, Claim No. 1 herein is sustained.

In resolving Claim No. 2 herein, we will follow Award No. 14004 (Dorsey). In this award, the Board held that there was no distinction 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. Also, in Award 14004, we stated:

> "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."

Award 14004, supra, involved these same parties and is controlling in the instant case. Accordingly, Claim No. 2 herein is sustained.

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 was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of November 1966.

DISSENT TO AWARD 14982 (DOCKET MW-15853) (Referee Ritter)

We do not agree with the conclusions concerning the merits, but what is confusing is the conclusion on the question of damages, particularly in light of Award 14981 (Ritter) wherein it was held:

> "Carrier has injected the issue of damages by contending that claimants herein were fully employed on the dates set forth in the claim and suffered no monetary loss. By raising this issue, the burden of proving monetary loss (damages) was placed on the claimants

(Award 14853, Dorsey). In this dispute, the record is void of any evidence that claimants suffered monetary loss. It may be that Claimants did lose work on overtime or rest days, but this Board is without power to speculate. There is no showing by Claimants that the work could have been performed during overtime hours or on rest days.

In absence of proof that Claimants suffered a monetary loss, this claim represents a request for a penalty. This Board is without authority to assess a penalty (Awards 13958, Dorsey; 13154, McGovern and 14853, Dorsey). Therefore, we will deny Paragraph 2 of the Claim."

The facts of record in the instant case showed that the involved work had to be performed at the time it was and could not be put off to a later date. On the dates in question the claimants were fully employed and suffered no loss. In fact, the record showed that at the time they were working with a contractor for the purpose of become qualified on steel bridge work so that such work would not have to be let on contract in the future. Thus, not only is Award 14982 invalidly premised on the question of damages, but by allowing a penalty the Board exceeded its authority.

For these and other reasons we dissent.

J. R. Mathieu
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C. H. Manoogian
W. M. Roberts
W. B. Jones

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