Award No. 16631
Docket No. MW-17357

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it permitted and continues to permit individuals outside the scope of the Agreement to perform B&B work near the Passenger Station at Hartford, Connecticut instead of assigning said work to the employes named below. (System Docket No. 10,481)

(2) B&B Foreman J. P. Katilus, M. J. Hickey, E. Dazy, B&B Carpenters A. W. Bill, Jr., E. D. Enko, J. F. McDermott, A. Barile, A. Riccio, E. H. Mullaly, G. Pavone, J. Kulikauskas, R. D. McKay, B. M. Favale, S. Lounder, R. W. Dyer, D. H. Lounder, J. N. Zitani, J. T. Gieras, Sr., H. Sudol, J. T. Gieras, Jr., N. W. Webb, P. E. Storm, Maintenance Helpers S. Marzano and J. J. Carey each be allowed eight (8) hours' pay at their respective straight time rate for each day of the violation referred to above.

EMPLOYES' STATEMENT OF FACTS: On November 29, 1965, the Carrier sold (with certain reservations) its passenger station building at Hartford, Connecticut (and the land upon which its was situated) to The Connecticut Company. The Carrier retained ownership of the existing viaducts, platforms, trackage, foundations and related railroad structures and facilities located thereon.

On or about January 10, 1966, and on dates subsequent thereto, with the full knowledge and consent of the Carrier, employes of a contractor and/or contractors employed by The Connecticut Company performed B&B work on the property which the Carrier retained near the passenger station building. Said work included the removal of all wooden walls and partitions, including rooms, offices and storage areas that partially enclosed, bordered or were a part of the platform structure for Track 3, including a portion of the roof and canopy over same; the removal of a portion of the "subway" and stairways leading from the passenger station building to the platform on Track 3

(b) 5,000 square feet for other railroad purposes (exclusive use)."

Shortly after the purchase of the property, the Connecticut Company employed a contractor for extensive alterations, repair and improvements to the property, both inside and outside.

Subsequently, a claim was entered on behalf of three Bridge and Building Foremen, nineteen Carpenters and two Maintenance Helpers (truck drivers) for a day's pay each for each day that the contractor's forces were engaged in certain portions of the work, as set forth in the appeal from General Chairman Christensen, dated August 4, 1966, which is attached hereto as Carrier's Exhibit 1.

Copy of decision, dated November 21, 1966, by the undersigned is attached hereto as Carrier's Exhibit 2.

Agreement dated September 1, 1949, and all supplements or amendments thereto, is on file with this Board and, by reference, is made a part hereof.

(Exhibits not reproduced.)

OPINION OF BOARD: In November 1965 Carrier sold (with certain reservations) its passenger station and land adjacent to it at Hartford, Connecticut, to the Connecticut Company. The deed of sale made certain reservations, including the following:

"A. Reserving to the Trustees, their successors and assigns:

I. The ownership of the existing viaducts, platforms, trackage, foundations and related railroad structures and facilities located on the premises conveyed (Not including the existing station building), and the right to use, maintain, repair, and replace the same.

II. The right, for as long as required for railroad purposes, to use the air space above, and the land below, the existing viaducts, platforms, and trackage located on the premises conveyed, without cost or expense to the Trustees, their successors or assigns, to the extent that may be required for railroad operational purposes, subject to the right of Releasee to use the same to the extent that such use shall not impair or restrict the Trustees, their successors or assigns, in the exercise of the rights hereby reserved."

Shortly thereafter, as stated in the claim on the property, the Connecticut Company had employes other than those covered by the Agreement:

"1) remove all wooden walls and partitions, including rooms offices and storage areas that partially enclosed, bordered or were a part of the Track 3 platform structure, including a portion of roof and canopy over same; 2) remove a portion of the "Subway" and stairways leading from the Passenger Station building to the Track 3 platform and the Spruce Street entrance to said station and platforms; 3) remove and/or barricade stairways with enclosures leading from Asylum Street to platforms of Tracks 1 and 2. (Spruce Street being a public street directly west of the Passenger Station building and

Asylum Street being a public street directly south of the Passenger Station building.) Further, following date of our original claim the Connecticut Company, again with full knowledge and consent of Carrier Management, had a contractor make certain repairs to the subway, as well as the wooden fence and railing on Track 3 platform."

Employes' claim is based on the argument that the involved work was performed on platforms, structures and related railroad facilities over which Carrier had, under A I of the deed of sale, retained ownership and control.

Carrier's only defense on the property was set forth in a letter dated November 21, 1966, in which it invoked Section A II of the deed of sale and argued:

"The work you claim was performed by contractors employed by the Connecticut Company did not involve those portions of the building which were reserved to the ownership of, or the exclusive use of the Trustees as required for railroad operational purposes.

In the circumstances, there was no violation of the agreement with your organization . . ."

In its Ex Parte Submission, Carrier added several new defenses, which Employes in the Rebuttal argue should not be considered by us as they were not raised on the property. We find that the Employes are correct that the following issues cannot properly be considered by us as part of the dispute because they were not raised by Carrier on the property, with the result that Employes had no opportunity on the property as contemplated by the Act to adduce facts and arguments to meet these issues and so to develop a record on the basis of which we might fairly dispose of those issues:

New Issue No. 1: That the claim for a day's pay for each Claimant for each day on which contractor's forces performed the involved work is excessive when compared with Carrier's Engineering Department estimate.

New Issue No. 2: That the involved work was a small portion of a large project.

New Issue No. 3: That Claimants had suffered no loss in earnings.

Employes in the Rebuttal contend that Carrier's defense that the work was on structures and/or buildings which were not necessary for railroad operational purposes was also an issue not raised on the property. We find that this issue was one of those raised on the property in the above quoted letter of November 21, 1966.

The record shows that the work was performed on structures, facilities and property reserved to the ownership of Carrier by Section A I of the deed of sale. Carrier's attempt to apply to work on such structures, facilities and property the "exception" to its reserved rights contained in Section A II must fail if Section A is normally construed.

Section A I reserves ownership and use of "existing viaducts, platforms, trackage, foundations and related railroad structures and facilities" without

exceptions, while Section A II reserves the use of the "air space above, and the land below" the things reserved to Carrier ownership in A I, subject to the stated exception. We can in a normal way only construe the words "the same" in the exception as referring to the air space above and the land below, and not to the things listed in A I, ownership of which Carrier retained under that Section along with "the right to use, maintain repair, and replace . . ." them. If Carrier would have us construe the words "the same" as referring to the things listed in Section A I, so that Carrier's defense would be viable, it was Carrier's burden to place in the record facts and argument on the basis of which such a special construction of the language would be justified. This Carrier did not do.

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 11th day of October 1968.

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.