Award Number 17523
Docket Number MW-17757
NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Murray M. Rohman, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when it assigned the work of repairing a highway bridge at Mile Post 233.6 on March 7, 8, 9, 10 and 11, 1966 to forces outside the scope of the Agreement. (System Case No. MW-25793)

(2) B&B Foreman B. F. East, B&B Mechanics B. L. Hickey and C. Muse, B&B Helper R. Bullen and B&B Apprentice T. J. Jones each be allowed forty (40) hours' pay at their respective straight time rate because of the violation referred to above."

EMPLOYES' STATEMENT OF FACTS: On March 7, 8, 9 and 10, 1966, the work of installing new caps on the overhead bridge crossing U. S. Highway No. 27 at Mile Post 253.6 was assigned to and performed by an outside contractor, whose employes do not hold any seniority whatever under the provisions of the Agreement.

Work of this character has traditionally and customarily been assigned to and performed by the Carrier's Bridge and Building Sub-department employes.

The claimants, who were working in the vicinity, were available, fully qualified and could have efficiently and expediently performed the subject work, having performed similar and identical work, using Carrier owned tools and equipment, many times in the past.

The outside forces consumed a total of two hundred (200) man hours in the performance of the subject work. All of the correspondence exchanged between the parties during the handling of this claim on the property has been reproduced and is attached to this submission as Employes' Exhibits "A-1" through "A-9".

Claim was timely and properly presented and handled by the Employes at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated August 1, 1947, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

(Exhibits not reproduced)

CARRIER'S STATEMENT OF FACTS: Part 1 of the claim alleges violation of the controlling agreement because, there being no B&B forces available and none furloughed, employees of a contractor made certain emergency repairs to an overhead highway bridge at Mile Post 233.6 on March 7, 8, 9, 10 and 11, 1966.

Part 2 of the claim demands that five named B&B employees each be allowed forty hours pay at their respective straight time rates, purely as an exaction, penalty or windfall.

During the period specified in claim all B&B forces on the seniority district were employed on a full time basis. No employees were furloughed and qualified B&B employees were not available for hire. There was more work to be performed than could be performed by available B&B forces. The overhead highway bridge at M.P. 233.6 was in need of repair and the work had to be done as expeditiously as possible. It could not be deferred. There was an emergency.

Furthermore, the conditions under which the work had to be performed presented a considerable problem. The wooden caps, which are the transverse members through which the weight of the bridge and loads passing over the same are transmitted to the bents or bridge supports, had to be replaced. The overhead highway bridge involved carries U. S. Highway No. 27 over Carrier's tracks. The highway traffic is heavy and the State Highway Department was unable or, in any event, refused to agree to detour traffic while the defective wooden caps were being replaced. The State Highway Department did agree, however, to close one lane of the bridge at a time to highway traffic while the work was being done. Performance of the work required the use of a special truck mounted crane which Carrier did not own or have in its possession.

Carrier, not having any skilled B&B forces available to perform the work nor special equipment required, arranged with Associated Service Company, Inc., Knoxville, Tenn., to replace the defective caps in the overhead highway bridge in accordance with the usual custom and practices in such circumstances.

Associated Service Company, Inc., furnished employees skilled in the performance of work of the type here involved under heavy highway traffic and furnished the special truck mounted crane which was required. The contractor replaced the defective wooden caps in the bridge on March 7, 8, 9, 10 and 11, 1966.

On April 20, 1966 claim was presented by the General Chairman to the General Division Engineer in which he alleged Carrier violated the agreement and demanded that the here named claimants, all of whom were on duty and under pay on the dates involved, be paid for 8 hours each for the second time on such dates, purely as an exaction, penalty or windfall. Claim, being without basis and unsupported by the agreement, was declined by the General Division Engineer and by other officers of the Carrier as it was appealed through the usual channels. Correspondence exchanged between the parties during handling of the dispute on the property is attached hereto as Carrier's Exhibits A through I.

(Exhibits not reproduced)

OPINION OF BOARD: The Organization alleges in the instant dispute that the work which was subcontracted to outside forces on the claim dates, was a violation of the effective Agreement. The work performed by these

forces consisted of replacing defective wooden caps on an overhead highway bridge. At the time the work was being performed, one lane of the bridge was closed to highway traffic. The Organization contends that the B&B employees have the required skill to accomplish such repairs, inasmuch as they have performed such tasks numerous times. In addition, the Carrier possesses the necessary tools and equipment for said repairs.

The Carrier counters with a number of defenses. Foremost, is the emergency argument that the caps were badly deteriorated and in early March, two of the caps became completely crushed and failed. However, in a prior sentence, it indicated an exchange of correspondence covering a period of nine months to determine which party was responsible for the repairs. In addition, the Carrier contends that it did not have "any skilled B&B forces available to perform the work nor special equipment required." Further, the contractor "furnished employees skilled in the performance of work of the type here involved under heavy highway traffic and furnished the special truck mounted crane which was required."

Unfortunately, in our view we cannot refrain from admonishing the Carrier for extolling the qualifications of the outside forces and denigrating the skills of its own employees. This Carrier is fully cognizant of the fact that its own employees have performed and continue to perform similar work, under identical conditions. It also, is aware that the photographs of the equipment which the Organization attached to its submission, demonstrative that such was adequate for the desired purpose.

The Carrier, furthermore, argues that the instant claim is in the nature of an exaction—a penalty—as the claimants were employed on the days in question. We can only respond that this Carrier is fully familiar with the hundreds of awards which have held that a Carrier is liable in the event of a contract violation; that such assessment of damages is not an unfair labor practice, as it alleges.

Another defense raised by the Carrier is exclusivity. We gather from the Carrier's voluminous submission, that it may subcontract this type of work inasmuch as approximately thirty-four awards have sustained its position. However, it is also our view, that the Carrier cannot disregard its obligation under the effective Agreement when it has the necessary skilled employees on its force, as well as the essential equipment.

We believe the instant dispute presents a situation wherein the Carrier with proper planning, direction and control could readily have adjusted its work force. The tenuous arguments of a pseudo emergency, penalty provisions and practice cannot prevail, as against the sancitity of the collective bargaining agreement. It is, therefore, our considered opinion that the instant claim is valid.

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 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 6th day of October 1969.

CARRIER MEMBERS' DISSENT TO AWARD NO. 17523,

DOCKET NO. MW-17757

(Referee Murray M. Rohman)

Award No. 17523 is in serious error. It is not supported by the record in the dispute, the rules of the applicable agreement and the interpretation of those rules by numerous prior awards of this Division.

As the Referee indicates, there have been thirty-four prior awards of this Division involving the same agreement as involved herein and the same subject matter—the contracting of work. In recent Award 15185 (Ives), involving the same agreement, it was held:

> "This is another case between the same parties concerning the 'contracting out' of work allegedly belonging to employes covered by the Scope Rule of the controlling Agreement, which does not define the work to be performed by the employes listed therein. Positions covered are listed but no job descriptions are contained in the Rules.
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> "This Board has rendered many Awards in disputes of this nature involving the same parties and similar factual situations. The majority and more recent of these Awards have held that the Petitioner has the burden of establishing through probative evidence that the work 'contracted out' is of the type which only employes under the agreement have traditionally and customarily performed. Awards 13987, 12929-30, 12803, 12603-4, 12317, 11525 and others.
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> "In this dispute, the record on the question of customs and practice consists of the assertion by Petitioner that the work described belongs to Claimants covered by the Maintenance of Way Agreement and the assertion by Carrier that such work has not, historically or customarily, been performed by such employes. There is no evidence in the record that the type of work involved is reserved to employes covered by the Agreement through history, custom or practice.
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> "Accordingly, we must find that Petitioner has not sustained the burden of clearly establishing by evidence of probative value that Claimants of this property through consistent practice performed the same kind of work as is here involved. Therefore, the claim will be denied."

The same principle adhered to in numerous previous awards was also adhered to in subsequent Awards 16351 (McGovern) and 16609 (Devine), involving the same agreement.

In the handling of the dispute on the property the Carrier denied that the work contracted out was of the type heretofore historically performed by Bridge and Building employes. The Petitioner did not submit one iota of evidence to prove that the work involved was of the type which only employes under the agreement have traditionally and customarily performed. The Referee is fully aware that assertions are not proof. However, in this case he has accepted the unsupported assertions of the Petitioner and has, in an offhand manner, brushed aside the thirty-four prior awards involving the same agreement sustaining the position of the Carrier, and upon which the Carrier had every right to rely.

In recent Award 17354, involving another Carrier, the same Referee held:

> "This issue is not a new one between these parties. During the period from 1945 through 1966, at least 22 projects are cited which were contracted out by the Carrier. As a matter of fact, numerous disputes involving the same parties and concerning similar issues have been decided by this Board in favor of the Carrier. See Awards 11243, 11374, 12012, 15895, 15465, 15608, 15632, 15539, 16026, and others.
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> "In this posture, we believe that precedent requires us to follow such awards, unless they are palpably wrong or unconscionable. In the context of the issue before us and the circumstances evidenced therein, we cannot ascribe error to the Carrier's action."

The record in our present dispute properly required a similar holding.

In Award 14138, also by the same Referee, the claim was sustained strictly on the basis of precedent awards involving other Carriers, which award was followed in sustaining the claims in Awards 17520 and 17522, adopted on the same day as Award 17523, and with the same Referee participating. In Award 17523 the precedents established by thirty-four prior awards involving the same agreement were ignored.

Adherence to the precedent awards involving the same agreement required a denial of the claim herein. As the Petitioner failed to prove by probative evidence that the work contracted out was of the type which, by tradition, custom and practice, had been performed exclusively by employes covered by the agreement, there was no obligation on the part of the Carrier to prove an emergency, lack of skill of its employes, or the need for special tools or equipment.

The function of a Referee is to interpret and apply the agreement on the basis of the proven facts. It is not his function to admonish either party to a dispute or to attempt to substitute his judgment as to proper planning, direction and control of Carrier's work force. Neither is the Board empowered to award damages not provided for in the agreement. The agreement involved herein not only does not provide for damages where no loss is shown, but provides specifically (Rule 49) that—

"Except as provided in these rules, no compensation will be allowed for work not performed."

For the foregoing reasons, among others, we dissent.

/s/ P. C. CARTER

P. C. Carter

/s/ G. C. WHITE

G. C. White

/s/ R. E. BLACK

R. E. Black

/s/W. B. JONES

W. B. Jones

/s/ G. L. NAYLOR

G. L. Naylor