NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25860
THIRD DIVISION Docket Number MW-25745

John E. Cloney, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Norfolk and Western Railway Company

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

(1) The Carrier violated the Agreement when it assigned outside forces to perform masonry repair work in the Hickory Tunnel at Hickory, Pennsylvania November 1 through November 24, 1982, both dates inclusive.

(2) As a consequence of the aforesaid violation, furloughed B&B employes T. Ciesielski, O. M. Marsili and D. L. Wingard shall each be allowed one hundred forty-four (144) hours of pay at their respective straight-time rates."

OPINION OF BOARD: Article I, the Scope Rule in the Agreement, provides:

> "These rules govern the hours of service and working conditions of all employees in the Maintenance of Way and Structures Department ... and all other employees performing work properly recognized as work belonging to and coming under the jurisdiction of the Maintenance of Way Department ...."

Article II provides that "seniority rights of employees are confined to the subdepartment in which employed" with some exceptions not applicable here.

On August 26, 1946 Carrier's predecessor and the Organization signed the following:

> "MEMORANDUM OF NEGOTIATION
> PAINT AND MASONRY GANG
>
> "Purpose of meeting is to negotiate rates for a proposed gang to be known as the Paint and Masonry Gang. The work of this gang will cover the entire system of cleaning and painting of bridges, buildings and other structures. It will also embrace such work as the repairs, construction and reconstruction of masonry structures of culverts, archer bridges, tunnel linings, drains, sewer lines, ash pits, water station foundation, etc.
>
> "* * *

"Journeymen - B & B mechanics and painters rate is agreed at $1.125 per hour. The same rate is now paid on Bridge Carpenter Gang."

Article IV of the 1968 National Agreement of the parties states:

"ARTICLE IV - CONTRACTING OUT

"In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance ... as is practicable and in any event not less than 15 days prior thereto."

The Article further provides for a meeting if requested by the General Chairman and goes on to state:

"... but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article IV shall effect the existing rights of either party in connection with contracting out ..."

In December, 1981 the parties agreed to establish a Labor-Management Committee to study problems related to contracting out and efficient utilization of the work force. In a letter dated December 11, 1981 it was stated:

"The carriers assure you that they will assert good faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees."

On August 6, 1982 Carrier wrote the Organization "to advise that we intend to make repairs to Hickory Tunnel using a contractor". The Organization requested a meeting, it was held on August 31, 1982, and on September 27, 1982 Regional Engineer Beesley advised:

"we are proceeding with the contracting of the work at Hickory Tunnel was stated in my letter of August 6, 1982 on the basis that the Railway has neither the specialized equipment, labor, or supervision to perform the work required."

The work included inspection of the tunnel for cracks and use of pressurized epoxy and concrete to repair them where found.

In filing the claim on November 25, 1982, General Chairman Gardner contended that at the conference the Organization requested Carrier "rent machines needed" but Carrier responded "what they do with their money is their business." Carrier declined the claim on January 28, 1983 on the basis that the Organization failed to cite a rule; that it was excessive and the work was "beyond the training and expertise of our employes in that they have not worked with pressure applied epoxy and shotcrete and we do not have the equipment to perform this work with our forces." The claim was advanced and on February 22, 1983 the Regional Engineer affirmed denial for the reasons previously stated plus the further reason that "no B & B Carpenters were furloughed during the time the contractor worked ...." and "Painters cannot be considered proper claimants for this type of work." In a May 13, 1982 letter to the General Chairman, Carrier stated the "work involved the use of pressure - applied epoxy and shotcrete, which must be applied with the aid of specialized equipment which Carrier does not own. Also, Carrier's employes have no experience concerning these techniques and are not qualified to perform this specialized work ...." The Organization responded that Supervisor C. H. Cummins had been B & B Foreman during a two year period when certain tunnel work was performed including "Grout was pumped in the Pittsburgh Tunnel, holes drilled in tunnel wall, and grout pumped in behind the wall."

The Organization argues the work involved is clearly reserved to the Paint and Masonry Gang by the August, 1946 Agreement and cites numerous Awards including Award 3955 which hold:

> "It is a fundamental rule that work of a class covered by an agreement belongs to those for whose benefit the contract was made. A delegation of such work to others not covered by the Agreement is violative ...."

The Organization concedes Carrier did not own the equipment required to apply epoxy and shotcrete but insists Carrier was required by the December 11, 1981 letter to make a good faith effort to rent or lease such equipment. The Organization characterizes the assertion that Carrier employes lacked the necessary expertise as untrue, but argues even if it were true, it would not constitute a valid reason for subcontracting. In taking these positions the Organization relies on Awards which hold that "the subject of the Carrier's contract with its employes is work and not equipment" (Award 6905) and "It appears well established that mere lack of qualified employes does not furnish a carrier with grounds for removal of work covered by a Scope Rule" (Award 5839).

Referring to a Third Division Award issued in September, 1974 (Award 20372) dealing with a dispute between these parties the Organization notes Carrier in that case argued it was using the shotcrete process. Thus the Organization contends this process has been Carrier's standard method of tunnel repair and if, as argued, the Carrier's forces lacked necessary skills there was an obligation to train employes.

Carrier contends the work requires use of expensive, specialized machinery which must be closely monitored. It notes the work on the tunnel should last 20 years and therefore there is not enough of this work to enable its employes to become proficient. In this regard Carrier relies upon Awards holding "Carrier's right to contract work when special skills, equipment or material are required ..." (Award 18046) and "The Carrier is not required to have expensive equipment whose use is only occasionally needed ..." (Award 13272).

Carrier does not dispute the Organization's claim regarding pumping grout, etc. in the past but denies that it is comparable to the work at issue. It states the use of shotcrete and pressurized epoxy are new developments and every project where the processes were involved has been let to contract.

Finally the Carrier argues the purpose of the August, 1946 Agreement was to formulate rates for a particular gang and this gang was discontinued years ago.

In considering Carrier's argument that the 1946 Agreement dealt solely with a gang long since discontinued we immediately note this assertion is not supported by evidence, nor was it raised during handling on the property. We believe the work involved here is work reserved to the Bridge and Building Department by Agreement unless contracting of it can otherwise be justified. As stated in Award 20372, "Carrier has the burden to justify an exception". (In our view Carrier has not supported its position that its employes are not qualified to perform the disputed work. While admitting its employes pumped grout, etc. Carrier makes no explanation of how the skills for these jobs differ, if at all.) Rather Carrier merely asserts the epoxy and shotcrete are new developments, but the facts show at least with reference to the shotcrete, that there have been disputes between the parties concerning it since about 1970. While the Carrier now states it has consistently contracted every project where the process has been used no evidence in support of this assertion is offered. Neither can we find any indication of this argument being raised during handling on the property. (As we find this is work of a type reserved by Agreement to the claiming employes, and as Carrier has presented no evidence to establish its employes were not capable of performing the work, or that the work has consistently been contracted out, there is no need to reach the question of the extent of Carrier's responsibility to train.)

Carrier has cited Awards which stand for the proposition that "Carrier is not required to have expensive equipment whose use is only occasionally needed ..." (Award 13272) and need not "purchase a substantial amount of equipment which it might not use again" (Award 11493). We are again faced with an evidentiary void. The record is silent on the question of how extensive or expensive the necessary equipment is, how readily available leased or rented equipment might be and what efforts in that direction were made by Carrier. The only information of record is the Organization's undenied statement that when it requested Carrier to rent needed machines Carrier replied that "what it did with its money is their business". Thus there is no showing that machine rental would not have been feasible.

This Board has repeatedly held:

> "... one of a group entitled to perform the work may prosecute a claim even if there be others having a preference to it. The essence of the claim by the Organization is for Rule violation .... The fact that another employee may have a better right to make the claim is of no concern ... and does not relieve Carrier of the violation .... " (Award 18557)

We believe the above stated principle applies here. If, as Carrier contends, no B & B Department carpenters were on furlough and it would have been carpenters, rather than Claimants who would have performed the work, no relief would be afforded Carrier by virtue of that fact. The seniority roster is departmental and its benefits are available to all within its coverage.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of January 1986.