# Award No. 4888
# Docket No. MW-4800

## NATIONAL RAILROAD ADJUSTMENT BOARD
## THIRD DIVISION

Edward F. Carter, Referee

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**MISSOURI PACIFIC LINES**

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

(1) That the Carrier violated the Agreement by assigning to the Schneider Constructiin Company the construction of an addition to Building No. 224 at Houston in September and October of 1947;

(2) That the following B&B employes:

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| Foreman Fritz Caswell | Ben Powlaski |
| J. E. Heath | W. L. Bruce |
| Louis Dickey | T. A. Ray |
| O. H. Walston | R. A. Rodriguez |
| J. B. Tyboroski | J. F. Barkley |

be compensated at the pro rata rate for an amount of time equivalent to that required by the employes of the contractor to perform the work involved in this claim;

(3) That each of these claimants be paid for his proportionate share of the total time worked by the employes of the Schneider Construction Company during September and October of 1947.

EMPLOYES' STATEMENT OF FACTS: On or about September 18, 1947 the Carrier assigned to the Schneider Construction Company the work of building an addition to the Carrier's building identified as No. 224. The size of the addition to this building was 36' 3" long and 16' 6" wide. A floor, ceiling and 6 windows were installed in this referred to addition to the Carrier's Building 224. The Carrier was making a place for the Telephone and Telegraph Department.

During the period that this work was being performed the contractor employed by the Carrier used one man on the job September 18, two men September 19, three men September 22 and four men in the period from September 23 to 30 inclusive; four men October 1 and 2 and two men on October 3, making a total of 320 manhours.

The Agreement in effect between the two parties to this dispute, dated August 1, 1938, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Scope Rule No. 1 (a) and (c) of the effective Agreement states as follows:

3. Under the circumstances there was no violation of the agreement as alleged by the Employees.

4. It has always been the practice for the Carrier to have work performed by contractors where the Carrier did not have sufficient force to perform it, and the character and urgency of the work was such as to preclude its being deferred indefinitely, and until comparatively recently the practice has been acquiesced in by the Employes.

5. Claimants have lost no time in any capacity as a result of any work being performed by contractors.

6. Your Board has previously denied claims for pay in favor of Carrier forces when work was performed by contractors, even though it was recognized that such work properly belonged to Carrier Maintenance of Way forces, when the Carrier forces lost no time. (Third Division Awards 1453, 1610; Second Division Award 1042).

7. The Board has recognized that a claimant must assume the burden of presenting some consistent theory which, when supported by the facts, will entitle him to prevail. In this case claimant has not presented any consistent theory supported by facts which would entitle him to prevail.

(Exhibits not reproduced.)

OPINION OF BOARD: On or about September 18, 1947, Carrier assigned the construction or an addition to Building No. 224 to a contractor. The contractor in performing the work used his employes for a period of 318 man hours. Claimants demand compensation for a like period because of being deprived of the work.

The work was the kind that was customarily performed by B&B employes under the Maintenance of Way Agreement. The Carrier contends that it could properly be let to a contractor because the building was needed for immediate use, that certain materials were required which the contractor could get but which the Carrier could not, and that Carrier's regular gang was employed in other work which could not be deferred.

We must again point out that the Carrier has contracted with B&B employes for the performance of all the work that is historically and customarily performed by this class of employes. To enter into a second contract with persons not within the collective agreement without first negotiating with the Organization has been many times condemned by this Board. We may accept as true the statements of the Carrier as to the immediate need for the building, the shortage of labor, the difficulty of obtaining essential materials and the necessity for using its employes on other urgent work. But this does not excuse the failure to negotiate with the party with which it first contracted for the performance of the work.

While it is true that B&B employes who were regularly employed were not available because of press of programmed maintenance work, it is altogether possible that an understanding could have been worked out that would eliminated the necessity for contracting the work. The work of the B&B employes might have been reallocated, it might have been assigned to system gangs or to gangs which could be spared from other divisions. The work might be assigned to another craft by agreement and avoid the necessity for farming it out. The Carrier made no effort to investigate these possibilities and dispose of the matter by negotiation. It might be argued that to pursue such a course would serve only to risk an unreasonable attitude on the part of the Organization. But as we said in Award 3251, if negotiation fails and the Carrier elects to farm out the work, the reasonableness or unreasonableness of the parties will be considered along with all the facts and circumstances in determining whether the violation was technical or one requiring the imposition of a penalty to preserve the agreement made.

We think the violation in the present case was more than technical in view of the Carrier's failure to negotiate with the Organization in an attempt to overcome the unusual situation with which it was faced. The nature of the work farmed out is not such as to bring it within any exception to the general rule announced by this Board on numerous occasions. See Award 3251. An affirmative award is required.

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: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of June, 1950.