Award No. 3
Docket No. 3

PUBLIC LAW BOARD NO. 76

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

Roy R. Ray, Referee

STATEMENT OF CLAIM:

1. The Carrier violated the effective Agreement when on or about August 15, 1961 it assigned the work of framing a building 8' x 12' to and outside contractor whose employes hold no seniority rights under the provisions of this Agreement.

2. The employes holding seniority in the Bridge and Building Department, Seniority District No. 4, the old North Texas District; namely, R. C. Curry, Foreman; J. W. Henderson, Mechanic; Anton Matz, Lead Mechanic; A. F. Davis, Mechanic, and Larry Grossman, Mechanic, each be allowed pay at their respective straight time rate for an equal proportionate share of the total man hours consumed by the contractor forces in performing the work referred to in Part 1 of this claim.

OPINION OF BOARD: At the outset Carrier challenges the jurisdiction of this Board to consider the present claim. It contends that the claim is barred because proceedings were not instituted with the Third Division of the National Railroad Adjustment Board (from which this Docket was withdrawn for presentation to Public Law Board No. 76) within the time limit fixed by Article 5 Section 1 (c) of the August 1954 National Agreement. That Section requires that proceedings be instituted with the National Railroad Adjustment Board within nine months after the claim is declined by the highest officer of the Carrier. The present claim was declined by Carrier's highest officer, authorized to handle such claims, on January 12, 1962. On October 4, 1962, H. C. Crotty, President of the Maintenance of Way Employes, wrote a letter to the Executive Secretary of the Third Division stating

that the Organization intended to file an ex parte submission within 30 days. The submission was filed after October 12, 1962 (more than nine months after denial of the claim). Carrier contends that such notice of intent to file a submission is not a petition and statement of facts with supporting data as required by Section 3 (i) of the Railway Labor Act and does not constitute an institution of proceedings as required by that Section. This same procedural defense was raised by Carrier in Docket No. 2 and in Award No. 2 we held, as have many Third Division awards, that the argument has no merit. We hold again, therefore, that the notice of intent to file a submission did constitute an institution of proceedings before the Third Division within the nine months time limit, giving the Third Division jurisdiction over the matter. It necessarily follows that the claim is properly before Public Law Board No. 76.

We turn now to a consideration of the merits. On or about August 15, 1961 Carrier purchased from Cole Construction Company of Denison, Texas, a small frame building, 8 feet wide, 12 feet long and 8 feet high for use at Dallas as an office by the Missouri-Kansas-Texas Transportation Company (a wholly owned subsidiary of Carrier). The building had been constructed by the Cole Company in its Denison shop according to specifications supplied by Carrier. It was delivered complete in all details (including hardware, paint, gas outlet and electrical wiring) to Carrier in Denison, placed on one of its cars and transported to Dallas. Upon arrival it was unloaded by employes who are claimants here and placed by them upon the foundation which they had built.

The Organization contends that the work of constructing buildings of the type involved is work belonging to Bridge and Building Department employes and that by having the building constructed by employes of the Cole Company even though off of the Carrier's property, Carrier violated the Scope and Seniority Rules of the Agreement.

The Organization has argued that this is not a case involving the purchase

of a building, but rather one involving the contracting out of work to an outsider. We do not agree. We think the record is clear that Carrier did purchase a completed building although it was not a stock item. We find nothing in the Agreement which would restrict or limit Carrier's right to purchase such a building. Certainly the Organization has pointed to no specific rule which grants to the employes an exclusive right to construct such buildings.

Various awards of the National Railroad Adjustment Board have upheld Carrier's right to purchase items manufactured to its specifications. Award 2192 - Second Division (Compressors; the Referee said that the compressors were not the property of Carrier at the time the work was performed and therefore the work claimed was not work of Carrier); Award 1990 - Second Division (prefabricated sides for hopper cars manufactured to Carrier's specification; the Referee said that before the parts were assembled the car sides did not become the property of Carrier and employes were not deprived of any work to which they were entitled). In that case Carrier was merely purchasing the completed car sides. In our case Carrier was purchasing a completed building although it had specified the dimensions. One of the best statements of the principle is found in Award 5044 of the Third Division. Referee Carter said: "The equipment was never purchased and delivered on the property of Carrier for use until after the work claimed had been performed at the factory. The rights of employes never attached until the carrier acquired possession of it . . . We fail to see, however, that a purchase of new equipment, in whatever form it may exist, can constitute a farming out of work under the Agreement for the fundamental reason that it never had been under the Agreement. That which was never within the Scope of an Agreement cannot be farmed out."

The Organization has sought to make a distinction between a building already fabricated (in stock) and one which is made to specifications of Carrier, stating that in the latter instance Carrier is contracting out specific work. We see no merit in the distinction and it has been rejected by the Awards listed above. The

important thing is whether the work was done before purchase by Carrier was completed. Here it was.

In our view, neither of the rules relied upon by the Organization have any application to work performed by some manufacturer upon a structure before the structure becomes the property of the railroad. While the building in this case was being constructed, the work performed was not work of Carrier and the present Agreement cannot give the Maintenance of Way employes any right to it. We find no violation of the Agreement.

AWARD

The Claim is denied.

Public Law Board No. 76

Roy R. Ray
Neutral Member and Chairman

A. J. Cunningham
Employe Member

A. F. Winkel
Carrier Member

Dallas, Texas
June 19, 1968