Award No. 23
S.B.A. Case No. 23

SPECIAL BOARD OF ADJUSTMENT NO. 313

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
and
UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

"(1) The Carrier violated the effective Agreement on or about December 13, 1958, by assigning contractors' forces to the repair of the Carrier's building at Garrett, Washington, leased to an outside party.

"(2) The Carrier now compensate Second Class Carpenter Lyle E. Goodyear three (3) days' pay at his respective pro rata rate of pay of $2.34 per hour."

FINDINGS:

Special Board of Adjustment No. 313, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

The carrier and employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Board has jurisdiction over the dispute involved herein.

This is a claim for three days' pay as second-class carpenter, on behalf of B&B Carpenter Lyle E. Goodyear, due to the fact that an outside contractor made repairs on the roof of a warehouse building owned by the carrier on or about December 13, 1958. The building was leased to a private individual who used it for storage of produce during the truck-farming season. The carrier retained the responsibility for maintenance of the building and paid for any work done. The building is on the carrier's line. The claimant was on furlough status at the time. There was no question but that he was competent to do the work.

The main issue in this case is whether the work in question is so reserved to Maintenance of Way employes by the scope rule of the current working agreement that the contracting out thereof was a violation of the agreement.

The main issue can be divided into three parts for convenience in analyzing the problem:

(1) Whether the scope rule embraces only the work in connection with carrier's functions as a railroad common carrier or embraces all B&B (carpenter) work which the carrier has to do and which is on property to produce revenue to the railroad whether or not it is an integral part of the railroad's common carrier operations.

The carrier claims the former. The Organization claims that so long as the work exists in the prosecution of any part of the carrier's business, it belongs to the employes covered by this agreement, and cites three previous instances in which comparable work was done by B&B employes on this same building. The instances are admitted.

(2) Whether it has been a common and accepted practice of this carrier to contract out similar work under normal conditions, and, if so, to what extent has such work been handled by contract?

(3) Whether alterations, repairs and additions to such buildings would generate jurisdictional labor difficulties by coming under the jurisdiction of the Building and Construction Trades Department of the AFL by agreement between the Department and the Brotherhood of Maintenance of Way Employes dated May 21, 1943.

The carrier has waived objection to the timeliness of the filing of the appeal and concedes that the appeal was timely.

The scope rule of the current working agreement reads as follows:

> "This agreement will govern the wages and working conditions of employes in the Maintenance of Way Department listed and described in rules 2 through 12."

Rules 2 through 12 list all classifications or positions and the rates of pay therefor. Some of the rules further itemize or define the jobs involved. There is a side agreement dated November 18, 1943, which reads as follows:

> "It is understood that the company reserves the right to contract projects to the extent that such work was handled by contract during normal conditions."

It will be observed that this scope rule says very little. It does not reserve in specific language all work to the employes filling the listed positions, or provide that the scope is limited to work performed by the carrier in its functions as a railroad common carrier, or contain any specific provisions prohibiting the carrier from contracting out work.

The language is "bare bones" but these scope rules have been enlarged over the years by custom and by awards of Adjustment Boards and Special Boards, apparently with management's acquiescence, so that they are now interpreted to mean that the work traditionally and customarily done by the covered employes, the work they are regularly performing at the time of the negotiation of the contract, the work of the class covered by the agreement, will accrue to the employes filling the positions listed in the agreement and is presumed to be reserved to them unless there are exceptions.

We need not decide Issues No. 1 or 3 for the reason that the Organization's case falls by our decision on Issue No. 2.

We move now to Issue No. 2--Whether it has been a common and accepted practice of this carrier to contract out similar work under normal conditions and, if so, to what extent has such work been handled by contract?

Other awards are not very helpful for we are not sure that the factual situations in the other cases were the same as in our case or that the contract provisions were the same, and because the awards on contracting out are in hopeless confusion.

Contracting out is a very controversial subject, not only in the railroad industry but in industry generally. Management is fighting to convince arbitrators, referees and courts that this is a managerial prerogative, and unions are claiming that scope rules or recognition clauses impliedly reserve work to them exclusively. The law is unsettled. See Amalgamated Assn. of Street, Electric Railway and Motor Coach Employees of Am. v Greyhound Corp., 231 F 2d 585 (1956), 57 AIR 2d 1394, and "The Arbitration of Disputes Over Sub-contracting", by Donald A. Crawford, printed in the Proceedings of the Thirteenth Annual Meeting of the National Academy of Arbitrators (BNA 1960).

In the presentation of this case the Organization has shown that on at least three prior occasions, the carrier has assigned similar work on this same building to Maintenance of Way employes. This is admitted by the carrier.

The carrier lists 36 other repair jobs on non-operational, industrial buildings, jobs done by outside contractors between 1955 and 1959, and argues that they show a past and accepted practice of contracting out such work during normal conditions. The carrier believes that these, together with the sdie agreement of 1943, which reserves to the carrier"the right to contract projects to the extent that such work was handled by contract during normal conditions," shows that the practice has not only existed but has been concurred in by the Organization.

The Organization disputes that such work was done with the knowledge of the employes, points out that some of the instances may have been emergencies and contends that the past practice indicates that the Maintenance of Way "employes have always performed work very similar to what was performed in this instant docket."

The side agreement of 1943 shows conclusively that some cases of contracting out have long existed. The side agreement permits this to continue as before 1943. The nature and extent of the practice before 1943 we do not know. There was no evidence submitted on this. All we have to be guided by are 39 instances, three or four apparently favoring one side and the rest apparently favoring the other, all between 1955 and 1959.

The Organization's case rests on the argument that its employes have always performed work very similar to what was performed in the instant case and that the work on this particular building had always been performed by the carrier's own B&B forces.

The first part of the statement is obviously too broad, too sweeping. We know that there have been a number of exceptions. The 36 cases cited by the carrier may be exceptions. The Organization's agreement with the Building and Construction

Trades Department, dated May 21, 1943, recognizes some exceptions. Another exception is the construction and maintenance on the company's resort property at Sun Valley, Idaho, none of which is done by Maintenance of Way employes.

The organization presents some evidence to support its broad claim, and the carrier presents some evidence which belies it. There is insufficient evidence to establish "the extent that such work was handled by contract during normal conditions" either before 1943 or since, and insufficient evidence on which we can make an intelligent decision. There is also no evidence to support or refute the company's argument that these were emergency repairs.

We realize that this is a most difficult type of case to prove, but the Organization has the burden of proof and has not done so in our opinion.

For these reasons the claim should be denied.

AWARD:

The claim is denied.

SPECIAL BOARD OF ADJUSTMENT NO. 313

(s) Marion Beatty
Marion Beatty, Chairman

(s) A. J. Cunningham
A. J. Cunningham, Organization Member

(s) A. D. Hanson
A. D. Hanson, Carrier Member

Omaha, Nebraska
November 21, 1960