Award No. 21
S.B.A. Case No. 21

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 by assigning contractors' forces to the re-roofing of the Carrier's building used by the Market Wholesale Grocery Company at Los Angeles, California, during the period October 31, through November 10, 1958.

"(2) The Carrier now compensate Bridge and Building Department employes:

M. W. Golden	W. Johnson
A. H. Dousett	C. Sheckler
W. A. Gunther	J. Souza
W. Terry	J. Poche
L. Earth	W. M. Gibson

nine (9) days pay each, at their respective pro rata rates of pay, on account of this violation of Agreement."

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 of B&B Carpenters for time worked by forces of an outside contractor in renewing the roof of a building held by carrier under a lease in the industrial section of Los Angeles. The building is leased in turn to a wholesale grocery company. The carrier retains the responsibility for maintenance of the building. The building is on the carrier's line. Some B&B forces were laid off at the time the work in question was done. Their competence to do the work is not denied. No emergency is claimed.

The main issue in the case is whether the work in question is so reserved to Maintenance of Way employes by the scope rule of the current 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 designed 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 the agreement.

(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 come under the jurisdiction of the Building and Constructions Trades Department of the AFL by agreement between the Department and the Brotherhood of Maintenance of Way Employes dated May 21, 1943, and whether the carrier's attempting to do the work with its Maintenance of Way employes would put it in the middle of a jurisdictional dispute between these two labor unions.

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 my 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 the 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 ALR 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 its presentation of this case, the Organization showed that on at least one occasion in 1954, the carrier asked the organization for its permission to contract out a roofing job and obtained that permission. This implies a recognition of some limitations upon its right to contract out. In that case the carrier stated that all B&B forces were working and that an emergency was involved.

The carrier lists nine other reroofing jobs on nonoperational industrial buildings done by contractors between 1952 and 1957 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 side agreement of 1943 which reserved 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 kinds of contracting out have long existed. The side agreement permits it 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 ten instances, one apparently on one side, nine apparently on the other, all between 1952 and 1957.

The Organization's case rests on the argument that its "employes have always performed work very similar to what was performed in the instant docket" and that this kind of work is reserved exclusively to them.

This assertion is obviously too broad, too sweeping. We know there have been exceptions. The nine cases cited by the carrier may have been exceptions. The Organization's agreement with the Building and Construction Trades Department recognizes some exceptions. Another exception is the construction and maintenance on the company's resort property at Sun Valley, Idaho. None of it 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.

We realize that this is a most difficult type of case to prove, but the Organization has the burden of proving it 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