

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC
RAILWAY COMPANY**

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

(1) That the Carrier violated the effective agreement when they assigned the work of installing a drainage line in the Carrier's yard at Danville, Kentucky to Armco Drainage and Metal Products, Inc.;

(2) That the Bridge and Building employees holding seniority on the North End Division be paid at their respective straight time rate of pay an equal proportionate share of the total man hours consumed by the contractor's forces during the time they were engaged in performing the work referred to in Part (1) of this claim."

EMPLOYES' STATEMENT OF FACTS: During the period June 19, 1950 to July 6, 1950, both dates inclusive, a drainage system was installed in the north end of the Carrier's yard at Danville, Kentucky, by employees of the Armco Drainage and Metal Products, Inc. Approximately fourteen employees of the Contractor were engaged in the above work, working approximately eleven (11) hours per day.

The drainage system involved the digging of a suitable ditch, installing a corrugated pipe, fastening it to the adjacent pipe with a bolted metal band, backfilling the trench and the building of suitable concrete bolsters at various points. The tools that were required and used were picks, shovels, a six-foot ruler and a six-inch wrench.

After the contractor's forces completed their assignment the Carrier's Bridge and Building crew under the supervision of Foreman M. T. Spears, extended the drainage system across four (4) additional tracks.

Approximately seventeen (17) Bridge and Building employees were furloughed during the period the instant work was performed.

The Agreement in effect between the two parties to this dispute dated August 1, 1947 and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

(11) The Brotherhood is here attempting to cause the Carrier to pay or deliver or agree to pay or deliver money in the nature of an exaction for services which were not performed. The Labor Management Relations Act of 1947 and the Communications Act of 1934, makes demands such as this unlawful.

For all the reasons given the claim should in all things be denied and the Carrier respectfully requests that the Board so hold.

All relevant facts and arguments involved in the dispute in this case have heretofore been made known to the employe representatives.

The Carrier, in making response to the notice of the Third Division of the Adjustment Board, without having seen the Brotherhood's statement of facts and position, undertaking to meet the issues raised in the handling of the claim on the property, reserves the right, after having seen and studied the petitioner's submission, to present such additional factual evidence and written or oral argument as to it may seem appropriate and necessary for a complete presentation of the case.

(Exhibits not reproduced.)

OPINION OF BOARD:

There is an agreement in effect between the parties dated August 1, 1947, and subsequent amendments and interpretations are by reference made a part of the statement of facts.

The Carrier entered into a contract on May 17, 1950, with Armco Drainage & Metal Products, Inc., Middletown, Ohio, manufacturers and specialists in the fabrication and construction of drainage systems. By the terms of the contract the contractor agreed to furnish all necessary skilled and unskilled labor, tools, and appliances, and necessary materials and supplies and to fabricate in its plant and construct in the north end of the Carrier's yard at Danville, Kentucky, a drainage system outlined on a print of drawing No. 24713, dated August 22, 1947, revised May 13, 1948, except as to an open ditch shown thereon. While the print of drawing No. 24713 indicates it was originally planned that cast iron pipe and square concrete catch basins and manholes with cast iron covers be used, the plans were changed after the drawing was made, primarily for the reason that the Carrier was unable to procure cast iron due to the war situation. Work of fabricating the Armco Asbestos Bonded Fully Coated and Paved Pipe and fittings of various sizes was done in the plant of the contractor and shipped to Danville. We deem it unnecessary to set forth these items, but have taken cognizance of the same. On-the-ground construction work, including such work as excavating, cutting, fitting, and securely fastening the pipe and fittings, manholes, tees, and elbows together, securing them in place, backfilling, etc., was started by the contractor on June 21, 1950, and completed July 6, 1950.

The employes assert the drainage system involved the digging of a suitable ditch, installing corrugated pipe, fastening it to the adjacent pipe with a bolted metal band, backfilling the trench, and the building of concrete bolsters at various points. The tools required and used were picks, shovels, a 6-foot ruler, and 6-inch wrench. After the contractor's forces completed their assignment, the Carrier's Bridge and Building crew, under the supervision of a foreman, extended the drainage system across four additional tracks.

In this connection, the Carrier alleges the facts to be that on July 1, 1950, railroad forces installed approximately 50 linear feet of 8-inch cast iron B & S pipe on the extreme end of the line of pipe extending easterly from a connection with a line installed by the contractor, and designated the manner in which this work was done.

The catch basins were concrete with dimensions of 30" x 36", with scrap metal covers. Water falling into these catch basins through cast iron B & S pipe goes into a drainage system constructed by the contractor of 12 gauge corrugated, galvanized iron.

The position of the Employees is that the work here involved was not of great magnitude, nor were special tools, skill, or materials required that were not available to the Carrier.

The Carrier's position is that the claim of the Brotherhood involves but a portion of the work performed by the contractor. It includes only the on-the-ground construction, and not the manufacturing or fabrication of the pipe, fittings, etc. The claim was denied by the Carrier on the ground that the work performed by the contractor constituted new construction, as distinguished from maintenance or repair work, and was not embraced within the agreement between the parties.

The Employees cite and rely on several rules. Scope—Rule 1, is cited as follows: "These rules govern the hours of service and working conditions of the following employees in the Maintenance of Way and Structures Department and employees specifically named herein in other departments as represented by the Brotherhood of Maintenance of Way Employees: * * *." We need not enumerate the employees covered by the rule or the sub-departments shown therein.

The Employees make reference to awards of this Division where, on numerous occasions, Scope Rules similar to this have been interpreted as intending to reserve all work usually and traditionally performed by a certain class of employees to that class of employees that are a party to the Agreement. See Awards 2701, 2812, 4158.

The Employees make reference to Rule 3 (d), and 3 (h). In Rule 3 (h) the ranks of employees in the Bridge and Building sub-department are included.

Rule 4 (a), (b), (c), and (d) are cited, which deal with seniority and force reduction. These rules have been noted with reference to their applicability to the present dispute.

There are many awards of this Division dealing with the right of a Carrier to contract work to others than are included in the Agreement between the parties. It is true that a difficult task is presented in drawing the line of demarcation separating work coming within the scope of an agreement and that which may be properly a subject of an independent contractor. In this connection, certain rules have been laid down in various awards and are a guide with reference to viewing the factual situations in connection therewith.

The rule is well established and settled by awards of this Division that work covered by the Scope Rule of an Agreement cannot be taken away from employees covered thereby by contracting that it be performed by others who are outside the Agreement. See Awards cited in 3839, also Awards 5151, 5563, 5839.

The Carrier may contract work out when special skills, equipment, or materials are required, or when the work is unusual or novel in character, or involves a considerable understanding. See, Awards 757, 2338, 2465, 3206, 4712, 4776, 5029, 5151, 5304, 5563.

The work to be contracted out is to be considered as a whole and may not be subdivided for the purpose of determining whether some of it could be performed by the employees of the Carrier. See, Awards 3206, 4776, 4954, 5304, and 5563.

The burden of proof is on the Carrier to show by factual evidence that its decision to contract work out is justified under the circumstances. See, Awards 2338, 4671, 5304, 5457, 5563; also Award 4776, involving the letting of a contract by the Carrier to a contractor for installation of drainage pipe. In this case, the point was made that the contract should be considered as a whole, and not subdivided for purposes of discerning whether some of it could be performed by the employees. See, also, Award 3891, which deals with material made in the contractor's shop and delivered to the property for installation.

While Maintenance of Way employes have performed services of like kind or nature insofar as the ground construction is concerned, we believe, in the light of the evidence adduced, and previous awards of this Division, that the Carrier has not violated the Agreement.

In addition to what has been said, it has been the practice for several years by this Carrier to contract out certain types of construction and work connected therewith, which has been acquiesced in by the Maintenance of Way forces. In this connection the Carrier cites Rule 61 of the Agreement which, insofar as material, provides: "It is understood and agreed that this agreement * * * does not, except where rules are altered, amended or changed, alter past, accepted and agreed to practices not in conflict herewith." We make reference to Award 5304 to disclose contracts made with contractors outside of the Agreement between the parties with reference to Maintenance of Way employes, and the fact that the Organization did not challenge the existence of the practice. We believe that Rule 61 is applicable to the circumstances of this claim. We find the practice here complained of not abrogated by the Scope Rule of the effective Agreement.

When a contract is negotiated, and existing practices are not abrogated or changed by its terms, such practices are enforceable to the extent as the provisions of the contract itself. See Award 5747. There are other awards of this Division to the same effect too numerous to cite.

In consideration of the whole record and the awards cited, we conclude the claim should be denied.

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 Employee involved in this dispute are respectively Carrier and Employee 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 claim should be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of February, 1953.