Award No. 6706
Docket No. MW-6738

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

J. Glenn Donaldson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

GRAND TRUNK WESTERN RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it assigned a general contractor to construct a garage building at Port Huron, Michigan, during July, 1952;

(2) The following Bridge and Building Department employes:

T. H. Hodge	James DiDurd
Blair R. Wagner	Henry C. Wahl
Alex G. Pratt	Jesse E. LaTurno
Floyd Grandy	James Busha

be allowed pay at their respective straight time rates of pay for an equal proportionate share of the total man hours consumed by the contractor's forces in performing the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Carrier contracted with the Peacock Lumber Company for the construction of a small building to house its truck and certain of its tools and equipment. The building was constructed in accordance with the following specifications:

Size—14' x 20'—12' studs

Roof—Gable with prepared roofing

Foundation—Concrete slab

Siding—Cove

Door—1 large overhead

Window—1

Location—Between Freight House and Main Line

The contract was let without negotiation or discussion with the Employes. Approximately 160 man-hours were consumed in the construction of the garage. The assignment of the work to a contractor was protested and suitable claim filed and progressed in the usual manner, the Carrier declining in all instances to allow the claim.

this statement by past practice and the fact that on March 27, 1953 they served notice for a rule (but not agreed to by Carrier) which would take away the right of Carrier to contract out work except by agreement with the Organization. Until such time as Carrier might agree to such a proposed rule there is no basis for claim such as here presented. The claim not being supported by the Working Agreement should be declined.

This claim has been handled in the usual manner on the property and has been declined. All data contained herein has heretofore in substance been presented to the employes and is a particular part of the dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier contracted out to a private concern for constructing a small frame garage building to house its Water Department truck, tools and equipment. The garage, 14' x 20' in size is located between the Freight House and the main line at Port Huron, Michigan. One hundred sixty hours were consumed over a thirty-one day period in its erection. The cost of construction was $996.05. The Employes point out that every type of mechanic needed upon such a building project are listed in the Scope Rule. No negotiations between these parties proceeded the letting of the contract.

The Carrier ascribed several reasons for farming out this work but the only reasons worthy of serious consideration, in view of the past Awards of this Division, are the two principal contentions advanced and relied upon, namely, (1) that there is nothing in the current working Agreement which restricts the Carrier in the contracting out of its work and (2) that there is no record of any protest on the part of the Organization to 347 regular contracts entered into since 1937 with private concerns, and 528 letter contracts let since 1945.

It is a fundamental rule that work of any class covered by an Agreement belongs to those for whose benefit the Contract was made. In the case before us we are directed to the following provisions of the Agreement as support for the Organization's claim to the right to construct the small garage involved in controversy:

ARTICLE I

Preamble

"These rules govern hours of service and working conditions of employes in the Maintenance of Way Department for whom rates of pay are provided in this schedule."

ARTICLE VII (as amended)

"Bridge and Building Department (Positions and rates are therein shown)	**Rates effective September 1st, 1949**

"* * * * *

"Note: A definition of classified positions, as outlined in the current Agreement which has been in effect since March 1, 1938 is to be included. * * * *"

In explanation of the above Note it should be mentioned that in the 1938 Agreement job descriptions are set out in Article VII, Rates of Pay, for certain classifications. The Note would indicate that the parties contemplated that similarly job descriptions would be covered in the amended Article VII, but the docket does not reflect that this has been done. However, 1949 Memorandum provides that it shall "supersede conflicting existing rules." Until new job descriptions are supplied, we find that the old descriptions, being non-conflicting are entitled to consideration.

The Carrier contends that an Organization proposal to enlarge upon the Scope Rule made some months after the completion of the project in question, constituted an admission that the Carrier possessed the right to farm out Maintenance of Way work under the present Agreement. An attempt to obtain a more favorable or less controversial rule by negotiations does not constitute a limitation on a rule already in existence. (Award 5430). No admission of lack of merit in a pending claim can be implied therefrom any more than the installation of improved safety devices at a crossing can imply Carrier's negligence in connection with a prior accident at that point.

Certain Awards called to our attention (Awards 4760, 5470, 5471, 5848, 6199, 6200 and 6234) construe agreements which go beyond the skeleton Scope Rule before us and throw some light upon the scope of the work intended by the parties to be encompassed within the agreements. By way of illustration, the Agreement in Award 6199 first lists certain mechanics and craftsmen and continues, "engaged in construction of maintenance of buildings or other structures under the jurisdiction of the Maintenance of Way Department." These Awards are therefore not controlling.

Award 4888, however, concerns a Scope Rule and construction project similar to those involved here. In sustaining the claim asserted, it should be noted that we first found that the work was of the kind customarily performed by B. & B. employes under the Maintenance of Way Agreement. There was evidence of record there to support a finding to that effect. But, upon what evidence in the record before us are we to base such a finding?

So far as this docket is concerned there is no showing that the B. & B. forces on this line ever constructed a single building, or asserted a right to do so, prior to the project in question. Carrier, on the other hand, made an elaborate and unchallenged showing a long-continued practice of using outside concerns to build everything from screen doors to new stations. This practice on the lines of this Carrier has weathered at least two rule revision sessions without material change in the Scope rule.

On the record made in this case, and without intending to preclude a different result in a future case by a different showing, we must find that past practice upon this property, overcomes the prima facie right to the work in question based upon tradition and custom in the industry generally.

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 has not been violated by the showing made herein.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 9th day of July, 1954.