Award No. 8756
Docket No. MW-7950

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Sempliner, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

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

(1) The Carrier violated the effective Agreement when it assigned the work of installing hot (asphalt mixture) top surfacing to the grade crossings at Spencer Street, Ashland Street, Medford Street, Maine Street, Eustis Street and a hot (asphalt mixture) top side walk at Summer Street to a General Contractor whose employes hold no seniority rights under this agreement;

(2) The employes assigned to the various track crews on District No. 2, who were assigned to and did perform the preliminary work necessary to the installations referred to in Part (1) of this claim, each be allowed pay at their respective straight time rates 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: In 1954 the Carrier applied hot (asphalt mixture) top surfacing to the grade crossings at Spencer Street, Ashland Street, Medford Street, Maine Street, Eustis Street and to a sidewalk at Summer Street, which are located on District No. 2 of its Terminal Division.

The preliminary work of removing the old surface material at each of the afore-mentioned grade crossings was assigned to and performed by the employes assigned to various track crews on District No. 2.

The work of spreading and leveling the hot asphalt mixture as well as the operation of a roller to compact the material at the above referred to locations was assigned to and performed by a General Contractor whose employes hold no seniority rights under the provisions of this Agreement.

The work of constructing and maintaining grade crossings to the desired height (top of rails) has been traditionally performed by the Carrier's trackmen under the supervision of a track foreman.

The claim should be denied.

All data and arguments herein contained have been presented to the Committee in conference and/or correspondence.

(Exhibits not reproduced.)

OPINION OF THE BOARD: The Organization claims the Carrier violated the agreement when in 1954 the Carrier contracted with independent contractors to resurface grade crossings at

Spencer Street

Ashland Street

Medford Street

Main Street

Eustes Street

and to resurface a sidewalk at Summer Street.

The resurfacing was done with hot asphalt mixture commonly called blacktop, or bituminous concrete. The independent contractor applied the mixture after the Organization employes had prepared the roadbed.

The Carrier defends on six grounds, viz:

1. Failure to specify the City or Town where the alleged violation occurred.

2. Failure to name claimants, either in general or individuals.

3. Failure to cite any dates on which the alleged violations occurred.

4. Failure to make any specific monetary claim.

5. That application of blacktop was highly skilled work and it had neither the skilled men nor the equipment to perform the task.

6. That in the past it had contracted out such work, without objection from the Organization.

While previous awards have clearly stated the principle that the burden of proof is on the claimant, which cannot be shifted by vague statements, nor can the Carrier be required to search its records to develop claims for claimants, a certain amount of cooperation and diligence can be expected from both sides. Failure to specify the Cities in item one, and to specify the dates in item three, while extremely poor pleading, is not grounds for denial. The information was readily available as shown in Exhibit A of Carrier's submission July 27, 1956.

Item five claims that the work was of such a highly technical nature that it required special skills which the Organization did not have. In addition, the claim is made that a special roller was required, not the usual equipment of the Carrier. There is no evidence beyond the assertions to support the defenses. Blacktopping is not a new process and there is no showing of a special skill requirement or special equipment being needed. Repair of

grade crossings is customary work of the claimants, and within the framework of the agreement.

Item six claims this type of work had been contracted out many times in the past, and is supported by Exhibit A of the July 27, 1956 submission. The work is such that if it were performed by the railroad it would be performed by the maintenance of way employes. It is work of a character which the maintenance of way employes are capable of performing. There is no just cause shown why the work should not be or could not be done by the claimant. It is thus work belonging to the organization. However, as the evidence indicates, it had been condoned in the past and there is no evidence of prior warning by the Organization to cease and desist, there can be no penalty for the instant violation.

The claimants were deprived of work, and the agreement was violated. In accord with the finding, however, no compensation can be granted.

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 was violated as set forth in the Opinion, but as the practice had been condoned in the past, there can be no penalty for the instant violations.

AWARD

(1) Claim sustained.

(2) Claim denied in accordance with the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 6th day of March, 1959.