Award No. 10174

Docket No. MW-8779

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Harvey Daly, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

READING COMPANY

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

(1) The Carrier violated the Agreement when it assigned the work of installing rail posts along the Carrier's driveway at Willow Grove to a contractor whose employes hold no seniority under the effective Agreement;

(2) Masons Frank Corvino and Donald W. Long and Mason Helpers Joseph DeGiovanni and Rocco Fabiano, 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 April of 1955, the Carrier installed thirteen rail posts, embedded in concrete, along its driveway between the west end of its Willow Grove Station and Freight House.

The necessary excavation, placing of the rail posts, and the concrete work was assigned to and performed by the Fern Rock Paving Company's employes, without negotiations with or concurrence of the employes' authorized Representatives.

The work of painting the rail posts and the cutting off the tops of the rails to make each of equal height was assigned to and performed by the Carrier's employes. Also the supervisory work in connection with the installation of the rail posts was performed by a Paving Inspector, who is covered by the agreement between the parties.

The work which was assigned to contract was of the character usually and customarily performed by the employes holding seniority as mason and mason helpers in the Bridge and Building Sub-department.

The claimants, Masons Frank Corvino and Donald W. Long and Mason Helpers Joseph DiGiovanni and Rocco Fabiano, who have established and hold seniority as such, but who were furloughed account of force reduction during the period the aforementioned work was performed, were available, fully

The Brotherhood of Maintenance of Way Employes have negotiated agreements with the Carrier effective January 15, 1936 and January 1, 1944, Corrected October 1, 1951. The Brotherhood has known of the long past practice of contracting work as set out in Carrier's Exhibit C-1. However, when these agreements were negotiated, existing practices were not abrogated or changed by their terms and Carrier maintains that such practices are enforceable to the same extent as the provisions of the contract itself.

Carrier has shown that work on this property in connection with the installation and construction of rail barricades, guard posts and fences has never been considered the exclusive duties of Carrier's bridge and building employes and section forces, and such work has been performed by contractor's forces in the past and Carrier submits that this practice was not abrogated by agreements subsequently negotiated. Further, since bridge and building and section forces were fully employed at the time the guard posts at Willow Grove were installed, the claim as submitted is for penalty only and Carrier submits that it is a well established principle that penalties cannot be awarded under an agreement unless specifically provided for therein.

Under the facts and evidence set forth hereinbefore, it is the Carrier's position that the claim as here advanced by the Brotherhood of Maintenance of Way Employes is without merit and not supported by rules of agreement or past practice in effect for many years, and respectfully requests the Board to deny the claim in its entirety.

This claim was discussed in conference and handled by correspondence with representatives of the Brotherhood of Maintenance of Way Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: In April 1955, the Carrier erected thirteen guard rail posts along the driveway and parking area of its Willow Grove, Pa., Passenger Station. The Carrier assigned the work to the Fern Rock Paving Company — whose employes hold no seniority under the current Agreement.

The work was supervised by a Paving Inspector, who is covered by the current Agreement. The work of painting the rail posts and cutting off the posts' tops to make them all of even height was performed by Carrier Employes.

The Claimants, who have seniority in the Bridge and Building Sub-Department, were on furlough but they were available and fully qualified to perform the work in question, according to the Organization.

The Organization contends that the work in question was usually and customarily performed by B&B Sub-Department Employes and that the Carrier violated the Agreement when it contracted out such work without the consent of the Organization.

The Carrier, on the other hand, maintains that the right to perform the work in question does not belong solely and exclusively to Employes of the Bridge and Building Sub-Department.

The Carrier contends that past practices — which ante-date the first Agreement between the parties — and which have not been abrogated by the current or prior Agreements — still prevail and must be so recognized.

The Organization does not deny that the Fern Rock Paving Company had been doing work for the Carrier prior to the existence of the first collective bargaining Agreement between the Carrier and the Organization.

The record shows that from August 1943 to September 1954 — approximately 170 jobs — both minor and major — were performed by the Fern Rock Paving Company. The record also shows that between January 1944 and September 1954 — the Fern Rock Paving Company in 33 instances installed, constructed, or repaired fences and rail barricades in the Philadelphia area.

The Carrier's contracting out practices with the Fern Rock Paving Company are of such long duration, so frequent, varied and widespread, and of such a substantial character that it would seem such activities can only be eliminated or reduced through collective bargaining.

There is no provision in the current Agreement that requires the Carrier to obtain the Organization's permission before contracting out work.

In this case — because of the customs and practices prevailing openly and abundantly for so many years — we do not believe that the Organization has established its right to the work in question. Accordingly, we must deny this claim.

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 here; and

Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of November 1961.