Award No. 10715
Docket No. MW-9327

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Ben Harwood, Referee

PARTIES TO DISPUTE:

BOTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN RAILWAY COMPANY

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 repairing the railroad crossings at Mileposts 81.6-H and 85.4-H to a general contractor whose employes hold no seniority rights under the provisions of this Agreement;

(2) Extra Gang Foreman H. B. Phillips and Extra Gang Laborers Emmit Hunder, L. Hunter, S. Austin, George Pressley, Green McLendon, Price Banks, B. Shannon, and H. C. Henderson 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: The position of Track Foreman (Extra Gang) is encompassed within the Scope of the Agreement between the parties commonly referred to as the "Foreman's Agreement", whereas the position of Laborers (Extra Gang) is encompassed within the Scope of the Agreement between the parties commonly referred to as the "Laborers' Agreement".

Prior to July 7, 1955, the preparatory work necessary to the repairing (paving) of the railroad crossings at Mileposts 81.6-H and 85.4-H, notably that of installing the timber guards and filling the ballast up to the top of the ties, was assigned to and performed by the Carrier's track forces.

On July 7 and 14, 1955, the work of filling the aforementioned crossings with stone from the top of the ties to the top of the rails, applying asphalt and rolling with a roller, then applying the finishing course of asphalt mixture and again rolling with a roller was assigned to and performed by a general contractor whose employes hold no seniority rights under the provisions of this Agreement. Approximately ninety-six (96) hours were consumed by the contractor's forces in the performance of the afore referred to work.

The work is of the nature and character usually and traditionally performed by the Carrier's employes, using Carrier-owned equipment.

(d) Claim, being one for compensation for work not performed, is not valid under the specific language of Rules 49 and 40 of the respective agreements in evidence.

Claim being without merit, unsupported by any provision contained within the four corners of the effective agreements, and having heretofore been denied in principle by prior Board decisions, the Board cannot do other than make a denial award.

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

Carrier not having seen the Brotherhood's submission reserves the right to make appropriate response thereto.

(Exhibits not reproduced.)

OPINION OF BOARD: In July of 1955, two highway crossings over Carrier's main track and one side track at Milepost 81.6H, Atlanta Junction, and Milepost 85.4H, Silver Creek, Georgia, were paved under contract by the Ledbetter and Johnson Contracting Company of Rome, Georgia. The space to be paved was first filled by the contractor with crushed stone for a foundation. Asphalt was then applied to this base and rolled with a heavy paving roller, following which a mixture of hot asphalt was used and again rolled to form a finishing coat or surface.

In addition to alleging that the contractor's employes hold no seniority rights under the applicable Agreement, it is averred by the Brotherhood that approximately ninety-six (96) hours were consumed by the contractor's forces in performing said contract; therefore, claim is made as set forth hereinabove that the Extra Gang foreman and eight laborers should each be allowed pay accordingly. The Brotherhood further contends that the work done "is of the nature and character usually and traditionally performed by the Carrier's employes, using Carrier-owned equipment"; that the "Claimants were available, fully qualified and could have efficiently and expediently performed the work had the Carrier so desired."

The Carrier maintains on the other hand that "to do the paving in the manner in which it was done required special materials, special skills, special tools and equipment."

The above mentioned claim was duly presented and declined, as were appeals thereafter up to and including the highest officer of the Carrier designated to handle such disputes.

In evidence is the Agreement which contains rules effective August 1, 1947, and rates effective September 1, 1947.

The Brotherhood cites "Scope-Rule 1" appearing under Article I of pages 1 and 99 of two sections of the Agreement which are referred to as being the "Foreman's Agreement" and "Laborers' Agreement". These rules provide coverage for listed "employes". They do not purport to rule that all Maintenance of Way work is to be performed exclusively by the employes they cover.

With reference to Scope Rules which are general in nature, as are those here considered, this Division has laid down certain standards for their construction. Where the work encompassed is not described in a Scope Rule, it was said in Award 7790: "The Board has held in numerous cases that where this condition exists it is necessary to determine which craft has tradition-

ally and customarily performed the work at issue, using as the criteria, past custom and practice. * * * " And such work "is reserved to them." (7806 and others). "The practices on the property become material in such an instance and provide a guide to the interpretation of the rule as applied by the parties." (7861) Therefore, "we must look to see whether or not work of this particular nature was customarily performed by the claimants. * * * " (9625).

It follows, as Carrier contends, that:

> "In order to support its claim, the Organization must show conclusively that the Scope Rules of the Agreements coupled with the past practice on the property gave the Maintenance of Way employes the exclusive right to perform the work in question."

The Organization submits "that the work of maintaining and repairing railroad crossings is of the nature and character usually and traditionally performed by the Carrier's employes and is definitely within the Scope of the Agreements between the parties to this dispute.

However, Carrier avers that the work here in question was not "repair" or "maintenance" but was the construction of "two **new highway** crossings"; that in their construction "hot mixture" asphalt paving materials, not "cold mixture", were used and "that while railway forces have from time to time used the cold mixture in repairing highway crossings, they have not on any occasion applied a hot mixture in the paving of crossings in the manner in which it was applied in this case." Carrier further submits that repair and maintenance of asphalt highway crossings do not require the special skills, special tools and equipment and special materials that were required to do the new paving work here involved; that furthermore,

> "The railway company does not own or have in its possession an asphalt mixing and heating plant; nor does it own or have in its possession the special materials required to prepare the type of paving laid by the contractor in the two road crossings here involved; nor does the Carrier own or have in its possession the special tools or equipment, such as specially designed highway trucks, spreaders, rakes, furnaces, irons, etc., required and necessary to do paving work; nor do any of the claimants here involved possess the special skills required to pave the two road crossings here involved."

Carrier introduced into evidence sixteen exhibits showing a large number of instances, over many years, where paving of street and road crossings was performed by contractors. None of the instances given were denied by the Organization. Certain letters cited by Claimants, relating as they do primarily to the repair or maintenance of crossings,— (although said by Carrier not to be properly before the Board as they were not submitted to Carrier prior to submission to the Board) — do not refute above mentioned exhibits of Carrier. They do not show whether cold mixture asphalt or hot mixture was used. Further, it is pointed out by Carrier that no instance is cited by the Organization in which employes covered by the Agreement have used a hot asphalt mixture for new paving of crossings as in the case before us.

Rule 61 of the Foreman's Agreement reads as follows:

> "It is understood and agreed that this agreement cancels all previous agreements, rules relating to working conditions and interpretations which are not attached hereto (except certain memoranda relating to veterans which are not attached but are continued in effect), but does not, except where rules are altered, amended or changed, alter past, accepted and agreed to practices not in conflict herewith."

Rule 53 of the Laborers' Agreement is the same except that it omits the first six words quoted in Rule 61 above.

Carrier's sixteen exhibits mentioned above show beyond doubt the practice of contracting work of the kind here in question. Above Rules 61 and 53 sanction such past practice. See Award 6112 where it is said:

> "* * * 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.
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> "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."

And also as to past practice, in Award 5304 it was said:

> "The Carrier's submission shows the performance of about 86 similar jobs by the same contractor at various localities over the Carrier's system during 1942 to date, mostly on passenger stations and office buildings. Of these 86 jobs, 39 were on the Southern Railway proper and 9 of the 39 were performed between 1943 and 1949 at stations adjacent to Greensboro, North Carolina. The Organization does not challenge the existence of the practice, but denies knowledge of it and asserts that the prevalence and regularity of the practice suggests the need for a regular water-proofing crew in the Maintenance of Way Department."

As mentioned above, the Carrier submitted that it did not have the special tools or equipment necessary to do paving of the type contracted for here and in many other instances referred to in its exhibits. But the Organization by way of rebuttal offered exhibits showing pictures of a "Trail-O-Roller", a type of paving roller, two of which were purchased by Carrier and concerning the operation of which there was correspondence between Carrier and the Organization which resulted in establishing a rate of pay for the roller's operators. By way of reply, the Carrier stated:

> "With respect to the so-called Trail-O-Roller, referred to on pages 7, 8 and 9 of the Brotherhood's submission, these machines were purchased more as an experiment than anything else. They are small and lightweight and have been used almost entirely for repairing station platforms and patching of road crossings. It is **not** the type roller used by the contractor in paving the two highway crossings here involved; nor would these machines be suitable for that type of work. Furthermore, it takes more than a heavy roller to do work of the character here involved. Additional machines, tools and equipment are required, in addition to a plant. It is significant that the Brotherhood does **not** even allege that the Carrier owns or has in its possession the mixing plant or these other machines, tools and equipment."

It is also observed on behalf of Carrier with reference to the two "Trail-O-Rollers" mentioned above that, "there are hundreds of street, highway and road crossings on the Carrier's 8000 miles of track", and two Trail-O-Rollers

would scarcely suffice in paving "these highway, street and road crossings scattered throughout thirteen states."

With reference to the Carrier not having special tools or equipment necessary to pave road and street crossings properly with an approved type of hot asphalt mixture — for example, the asphalt materials mixing and heating plant or plants, specially designed highway trucks, spreaders, rakes, furnaces, irons, etc. — we may again note Award 5304, involving the same parties and the same Agreement as here, where this Division said:

> "It is equally well settled that work may be contracted out when special skills (Awards 3206 and 4712; compare Awards 4158, 4701 and 4920), special equipment (Award 5151; compare Awards 4671 and 5227) or special materials (Awards 757, 3839 and 5044; compare 4921) are required; or when the work is novel (Awards 2465 and 3206; compare Award 4671) or of great magnitude (Award 5151; compare Award 4760); or when emergency time requirements exist (Award 5152; compare Award 4888), which present undertakings not contemplated by the agreement and beyond the capacity of the Carrier's forces.
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> "The work contracted out is to be considered as a whole and may not be subdivided for the purpose of determining whether some parts were within the capacity of the Carrier's forces (Awards 3206, 4776 and 4954).
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> "The question is one of managerial judgment which is entitled to weight, but the burden of proof is on the Carrier to establish by factual evidence that the work was justifiably contracted out in all the circumstances (Awards 2338 and 4671)."

Also, in two other Awards, 5563 and 6112, where again involved were the same parties and the same Agreement, it was said,

Award 5563:

> "Second, work may be contracted out when special skills, equipment or materials are required, or when the work is unusual or novel in character or involves a considerable undertaking. (See Awards 757, 2338, 2465, 3206, 4712, 4776, 5028, 5151 and 5304.)
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> "* * * Over the years the carrier has contracted out new construction work such as that involved in this dispute where special machines, materials, equipment and skills were required."

Award 6112:

> "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 undertaking. See, Awards 757, 2338, 2465, 3206, 4712, 4776, 5029, 5151, 5304, 5563."

As was said in recent Award 10174:

> "The Carrier's contracting out practices . . . are of such long duration, so frequent, . . . and widespread . . . that it would seem such activities can only be eliminated or reduced through collective bargaining."

And the record here discloses that the Brotherhood served a Section 6 notice on the Carrier of its desire to revise the existing Agreements to the extent that revision may be necessary to incorporate therein certain rules. Of which, proposed Rule IX, captioned "Contracting of Maintenance of Way and Structures Work"; would provide:

> "Any construction, repair, remodeling, maintenance, or dismantling work which would be within the scope of the agreement if it were performed by the railroad company with its own employes shall not be let to contract by the railroad company except by agreement between the railroad company and the General Chairman."

In the current Agreement there is no provision requiring the Carrier to obtain the Organization's assent before letting out to contract new paving work such as here considered.

Also in Award 10174, it was held by this Division as follows:

> "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."

We are of the same opinion in the instant case and so hold.

Therefore, following full consideration of the whole record and the awards cited by the respective parties, we conclude that 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 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of July 1962.