

Award No. 11477

Docket No. MW-10476

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS**

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

(1) The Carrier violated the effective Agreement when on or about May 1, 1957, it assigned the work of constructing a new grade for additional tracks in its Bellmead Yard to a General Contractor, whose employees hold no seniority rights under the provisions of this Agreement.

(2) Each Machine Operator and Machine Operator Helper holding seniority on the territory where the work was performed be allowed pay at his respective straight time rate 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.

EMPLOYEES' STATEMENT OF FACTS: In 1957 the Carrier decided to construct a number of new tracks between mile posts 841 and 842 in its Bellmead Yard.

Commencing on or about May 1, 1957, the work of constructing the new grade for the above referred to tracks was assigned to and performed by a General Contractor.

The work was of the nature and character that has been traditionally performed by employees holding seniority in the Machine Operator's class or craft, using equipment provided by the Carrier.

The employees holding seniority in the Machine Operator's class or craft on the territory where the work was performed were available, fully qualified and could have expeditiously performed the above referred to Machine Operator's work.

The Agreement violation was protested and the instant claim filed in behalf of the claimants.

(Exhibits not reproduced.)

OPINION OF BOARD: On or about May 1, 1957, the Carrier began work on constructing new grade for tracks between milepost 841 and 842 in its Bellmead Yard. Petitioner contends that the work was of the nature and character that has been traditionally done by employees holding seniority in the machine operators class or craft. Petitioner contends that by provision of the scope rule that was work belonging to them. Carrier contends that petitioner alleged no past practice on the property and submitted no proof of past practice.

We find from examination of the record that the scope rule is general in character. Therefore, we must turn to past practice on the property to determine if the work is of the nature that has been reserved to the claimants.

The only evidence furnished by petitioner is a letter which is inadequate to sustain an allegation of past practice on the property. There is in the record an instrument entitled: "File Memorandum Contracting Maintenance Of Way Work" which is set forth in full below:

"Conference June 21, 1946, with Messrs. E. Jones, Turner, Salyers, J. J. Gallagher, E. J. Hanmann, O. W. Campbell, Discussed the subject generally.

"Was agreed that would continue the subject without attempting now to formulate any statements or agreement on it.

"Each situation involving contract matters will have to be given careful and close attention; and handled generally in line with the following:

"Work in Maintenance of Way Department will not be contracted out by railroad except where special machinery or skills are necessary which are not ordinarily employed by the railroad or where the railroad does not possess a sufficient amount of suitable equipment necessary for the job; or where the efforts of organization and railroad do not produce a sufficient supply of labor of proper kind to permit of reasonable prosecution and completion of the work.

"The margin between what would be held violation or non-violation of agreement is too narrow and uncertain to justify arbitrary or summary action by the railroad and will be preferable to confer freely with the organization on the individual situations."

We note the paragraph wherein it was agreed that they would not formulate any statement or agreement on that question at that time. We can construe the instrument as to general procedure as to how the parties were going to continue to treat the contracting out of maintenance of way work. We note that one exception which provided that the railroad could contract out maintenance of way work was where the railroad did not possess a sufficient amount of suitable equipment necessary for the performance of the job. Petitioner contends they could have purchased or rented the equipment. However, this provision is not in the File Memorandum Agreement and therefore does not compare with the general line of cases where no such memorandum is in effect.

The Board holds that there is insufficient evidence to sustain a claim of past practice on the property. For that reason we find the agreement was not violated.

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 Employees involved in this dispute are respectively Carrier and Employees 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 6th day of June 1963.