Award No. 11791
Docket No. MW-11265

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when, on April 22, 23 and 24, 1958, it assigned other than Bridge and Building department employes to perform Bridge and Building work at the Roundhouse in Armourdale, Kansas.

(2) Furloughed Bridge and Building employe G. P. Kilpatrick be allowed thirty-eight (38) hours' straight time pay because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: In April of 1958, the work of dismantling a concrete sidewalk and old floor in the extension of No. 1 stall in the Roundhouse at Armourdale, Kansas, was assigned to and performed by the Carrier's Bridge and Building employes.

On April 22, 23 and 24, 1958 the work of removing the resulting concrete debris was assigned to and performed by the Carrier's Mechanical Department employes, who hold no seniority rights under the provisions of this Agreement. Approximately thirty-eight (38) man-hours were consumed by the Mechanical Department employes in the performance of this work.

The Claimant, who was in furloughed status, was available, ready and willing to perform the work assigned to the Mechanical Department employes, but was not notified or called to do so.

The Agreement violation was protested and a suitable claim filed in behalf of the Claimant.

The claim was handled in the usual and customary manner on the property and was declined at all stages of the appeals procedure.

The Agreement in effect between the two parties to this dispute dated May 1, 1938, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

When safety of operation requires additional help same shall be provided, the helper performing such work as required by the operator.

(f) Laborers may be employed, as required, to do excavating or back filling and similar miscellaneous pick and shovel work."

In the instant case, B&B Carpenter C. A. Taylor performed the work of breaking concrete. The work of removing and cleaning up the concrete debris was performed by two mechanical department laborers. That work performed by the laborers cannot be found anywhere in the Scope Rule of the Agreement covering work such as involved here. It was neither construction nor maintenance and removing the broken concrete was ordinary laborer's work permitted under paragraph (j) of the above rule.

There was no skill required; it was ordinary "pick and shovel" work.

We assert that the burden of proof is upon the petitioner to show by proper evidence that their agreement was violated. This, they have not done in handling the case on the property and they can show no proof.

For the reasons advanced above, the Carrier submits that the claim is without merit and respectfully requests the Board to so hold.

It is hereby affirmed that all of the foregoing is, in substance, known to the organization's representatives.

OPINION OF BOARD: The facts are not in dispute. After a concrete walk had been broken up by certain employes of the Bridge and Building Department there remained some debris which needed to be cleaned up. The Carrier assigned this work to some common laborers, not members of the B&B Department, who cleaned up the debris.

The Brotherhood bases its claim on the fact that there were available to do this job certain laborers whose work this should have been who are part of a so-called Group 1, which consists of Bridge & Building Department employes and further, that the Agreement between the parties, provides in Rule 1, Scope, Group 1, subdivision (f) as follows:

"Laborers may be employed, as required, to do excavating or back filling and similar miscellaneous pick and shovel work."

The Carrier contends that cleaning debris requires no special skill or knowledge, is merely "pick and shovel work," and does not involve excavating or back filling and, therefore, to have assigned this work to any group of laborers was certainly not a violation of the Agreement between the parties.

In order to prevail, the burden of proof is on the Petitioner to show that the said Petitioner has always done this type of work; or that it is the custom and practice under the Agreement for B&B laborers to do the work of cleaning up debris.

It cannot be said that the language of the contract quoted supra explicitly grants this work exclusively to laborers employed by the B&B Department; nor is there any evidence in the record before us that the complaining employes have performed this work in the past.

The Scope Rule in the instant case is of a broad and general nature; note the concluding language of Group 1, subdivision (f), "* * * and similar miscellaneous pick and shovel work." The major issue is to decide if the Petitioner can show that the disputed work has been traditionally or historically performed by the said Petitioner. It is submitted that the record contains no such proof.

Award 8173 (L. Smith):

> "The confronting Scope Rule is of the broad and general type. It does not set out the various items of work coming thereunder. Certainly crossing protection work is not mentioned. In interpreting and applying similar rules this board has on each occasion made a determination as to whether or not the work there in question was of the type that had historically or traditionally been assigned to and performed by employes covered by that particular agreement."

To the same effect see Awards Nos. 11082, 7299, 7322, and 8076. It should be further noted in this connection that the Scope Rule in the instant case does not grant cleaning up debris work by any express language to any particular craft. Award 11658 (Dolnick) states in pertinent part as follows:

> "* * * it is the consistent position of this Division that under the Scope Rule of this Agreement it is necessary to determine whether the work claimed is historically and customarily performed by Maintenance of Way employes. The burden of proving such custom and practice is upon Petitioner. There is no such proof in the record."

To the same effect see Award 11758.

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 Scope Rule 1, (f), was not violated by the Carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of October 1963.