Award No. 12317
Docket No. MW-11437

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

BROTHERHOOD 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 constructing a concrete foundation and floor for a 12 ft. x 24 ft. metal building at Norris Yard, the moving and installing of the building on the foundation and the painting of the interior of the building to a General Contractor whose employes hold no seniority rights under the provisions of this Agreement.

(2) Furloughed B&B Foreman C. L. Hammack, B&B Mechanics A. W. Butts and Till Chandler, B&B Helpers E. V. Rector and J. A. Hutchenson, B&B Apprentices L. A. Burnell and J. Faulkner each 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.

EMPLOYES' STATEMENT OF FACTS: Commencing in March of 1958, the work of constructing a concrete foundation and floor for a 12 ft. x 24 ft. metal building at Norris Yard, the moving of the metal building approximately 3,000 feet, and installing it on the concrete foundation and the painting of the interior of the building was assigned to and performed by Mac's Contracting Company, Inc., whose employes hold no seniority rights under the provisions of this Agreement.

Similar work has heretofore been assigned to and performed by the Carrier's Maintenance of Way and Structures Department Employes, using equipment provided by the Carrier.

The Claimant Bridge and Building Department employes, who were in furloughed status, were available, fully qualified and could have efficiently and expediently performed the work assigned to contract.

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

Prior awards of the Board involving not only this Carrier, but others as well, have held, as in Award 5563, that the work contracted out is to be considered as a whole and may not be subdivided for the purpose of determining whether some it it could be performed by employes of the Carrier. Here, the Brotherhood would have the work subdivided contrary to prior holdings of the Board. The record is therefore clear that prior awards of the Board, several of which interpret the Agreement here in evidence, have denied claims identical in principle to the one which the Brotherhood here attempts to assert.

CONCLUSION

Carrier respectfully submits that:

(a) The claim and demand are vague and indefinite and are barred.

(b) The effective Maintenance of Way Agreement was not violated as alleged, and the monetary claim and demand are not supported by any provision contained therein.

(c) Work here involved was not of the character usually, customarily or traditionally performed by maintenance of way employes. It was work usually, customarily and traditionally contracted.

(d) Prior awards of the Board have denied claims identical in principle to the claim and demand which the Brotherhood here attempts to assert.

Claim and demand being barred should be dismissed for want of jurisdiction. If, despite this, the Board assumes jurisdiction, it cannot do other than make a denial award because the claim and demand are not supported by the Agreement.

OPINION OF BOARD: This is another so-called "contracting out" case where it is alleged by Petitioner that a portion of the work performed belonged exclusively to employes covered by the Scope Rule of the Maintenance of Way Agreement. Typically the rule lists positions covered but does not describe the work to be performed by each classification.

The contractor retained by the Carrier in this instance relocated a 12 ft. x 24 ft. prefabricated metal building which had been used by carmen as a wash and locker room. It rested on a concrete foundation and had a concrete floor. It contained the usual water and electrical utilities, including a telephone, and was served by a 2″ water pipe and a sewer.

The record shows the actual work of relocating the building performed by the contractor consisted of:

> ". . . disconnecting and plugging the existing plumbing facilities, constructing a slag foundation for the building approximately three feet high, pouring a 4″ concrete floor slab for the relocated building on the slag foundation, removing the building from the existing foundation and transporting it on a low-boy trailer to the new location, setting it on the concrete foundation constructed for that purpose, furnishing and installing necessary 4″ extra heavy cast iron sewer pipe from the new building site beneath the railroad tracks to the sani-

tary sewer and making the necessary connection, furnishing and installing 2" galvanized iron water pipe from the water main near the street to the relocated building, encasing such pipe where it was laid under the tracks, securing the necessary permits for moving the building and installing sewer and water facilities, and painting the interior of the building after moving it and placing it on the newly constructed foundation."

Claim is made for only that portion of the work involved in constructing the foundation and floor for the building at the new location, removing and installing the building itself and painting the interior.

Respondent objects to the Board's consideration of the merits of the case on grounds that the claim is so general and vague as to the extent of the damages sought that it is barred. We do not agree. The Claimants are named and the measure of the damages claimed can readily be ascertained from the Carrier's records.

One of the accepted and established tests of the validity of claims of this kind is whether or not the work contracted "out" is of the type which employes under the Agreement have traditionally and customarily performed. The burden of establishing the fact of performance must be carried by the Petitioner as the moving party. Proof of such performance may be shown by competent evidence of past practice. Mere assertions are not proof.

Here the only attempt to establish performance of work of the character of that which was contracted is an assertion by the Local Chairman of the Organization to the effect that the employes had moved buildings larger than this one involved in this dispute and had built new buildings as well as concrete foundations. Respondent concedes employes may have moved ". . . certain small buildings such as small tool houses, etc. . . ." but asserts work of the type and size done here has always been contracted.

On this state of the record the Board has no alternative but to find that Petitioner has not sustained the burden of clearly establishing, by evidence of probative value, the essential fact that covered employes, under the consistent practice on this property, usually and customarily performed substantially the same kind of work as is here involved. Absent proof of such performance, Claimants may not now successfully argue that the Agreement was violated by Carrier's contracting of work to which they have failed to show an exclusive right to perform.

Moreover, this Board has held that the work involved in a dispute of this kind must be considered as a whole. It need not be divided into portions so as to permit a finding that some but not all of it could have been or should have been performed by covered employes. (Awards 5563 and 6112 in point). On its face, the claim in this dispute is for only a portion of the contracted work and thus comes within the foregoing principle.

For the foregoing reasons, the claim will 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 6th day of March 1964.