



Award No. 16440
Docket No. MW-16338

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nicholas H. Zumas, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

NORTHERN PACIFIC RAILWAY 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 leveling and grading fill material used in connection with the construction of an extension of the siding at Frenchtown, Montana to forces outside the scope of its agreement with the Brotherhood of Maintenance of Way Employees.

(2) Tractor Operators C. W. Worthington, L. L. Bowman, B. R. Kay and R. E. Carpenter each be allowed twenty-four (24) hours' pay at their straight-time rates and seven (7) hours at their time and one-half rates account of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: In conference on March 3, 1965, the Carrier's highest appellate officer sought the undersigned General Chairman's approval of the Carrier's proposal to assign the work of placing, leveling and grading fill material necessary in the construction of an extension of the passing track at Frenchtown, Montana, to a Contractor. Despite the General Chairman's non-concurrence, the Carrier did assign the aforementioned work to a Contractor who performed the work during the period from May 19, 1965 to June 5, 1965.

The Carrier owned several units of the grading equipment necessary for this work and the claimants are just a few of the many employees of the Carrier who are skilled in the operation of said machines.

Claim was timely and properly presented and handled by the Employees at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated December 1, 1962, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: Frenchtown, Montana is located between Missoula and Paradise. A siding approximately 6,600 feet in

length is located at Frenchtown. In 1965 it became necessary to extend this siding approximately 6,000 feet in conjunction with the installation of a CTC system between Missoula and Frenchtown.

The construction of the extension to this siding necessitated the placement of approximately 9,300 cubic yards of material for the grade for the trackage. The Carrier did not have available in the immediate vicinity the material necessary for this grade. Consequently, a contract was entered into with an outside concern, under which contract the Carrier purchased in place the material for the grade for the siding extension. The contractor secured the embankment material from a pit located approximately one-half mile from the siding extension and placed this material in the area where the siding extension was to be constructed. The pit from which the contractor secured the embankment material is located off the property of the Railway Company.

The contractor consumed the following number of hours in placing the embankment material in the siding extension site:

May 19 to June 2, 1965, inclusive - 100 hours in loading the embankment material in trucks at the pit site

May 19 to June 2, 1965, inclusive - 300 hours in hauling the embankment material from the pit site to the siding extension site

May 19 to June 5, 1965, inclusive - 124 hours in grading the embankment material at the siding extension site

All track work necessary in the extension of this siding was performed by Railway Company forces.

During the period the contractor was engaged in placing the embankment material at the siding extension site, Messrs. Worthington, Bowman, Kay and Carpenter were employed as follows:

C. W. Worthington	- Bulldozer Operator - Mon through Fri
L. L. Bowman	- Bulldozer Operator - Mon through Fri
B. R. Kay	- Railaid Operator - Mon through Fri
R. E. Carpenter	- Bulldozer Operator - Mon through Fri

Claim was presented and progressed on the property in behalf of:

C. R. Hurlbert
G. J. Merseal
G. H. Roberts
Donald Schmautz
G. D. Lukkes
J. O. Backlin

diesel shovel operators, for payment of their proportionate share of 100 hours consumed by the contractor in loading the embankment material into trucks at the pit site.

Claim was also presented and progressed on the property in behalf of:

P. D. Bowman
R. C. Rodriguez

dumper truck operators, for payment of their proportionate share of 300 hours consumed by the contractor in hauling the embankment material from the pit site to the siding extension site.

Claim was also presented and progressed on the property in behalf of:

C. W. Worthington
L. L. Bowman
B. R. Kay
R. E. Carpenter

tractor operators, for payment of their proportionate share of 124 hours consumed by the contractor in leveling the embankment material at the siding extension site.

The Employees in their notice dated July 11, 1966 to Executive Secretary S. H. Schulty have appealed a claim in behalf of the following employees:

C. W. Worthington
L. L. Bowman
B. R. Kay
R. E. Carpenter

tractor operators, for payment of 24 hours each at straight time rate and 7 hours each at time and one-half rate, or a total of 124 hours, representing the number of hours consumed by the contractor in leveling the embankment material at the siding extension site.

The claim presented and appealed on the property has been declined.

OPINION OF BOARD: In order for Carrier to extend its siding at Frenchtown, Montana, approximately 9300 cubic yards of fill material was required. Because such material was not available on the property, Carrier purchased the material from an outside independent contractor. The contract included the loading, trucking, and leveling of the material at the site.

Petitioner alleges that Carrier violated its Agreement when it assigned the work of leveling and grading the fill material at the extension site to the independent contractors. No claim is made for the loading and trucking, as that was work performed off Carrier's property.

Two questions are presented in this dispute: 1) Was there an exclusive right on the part of the employees to perform the work involved in the claim by virtue of the general seniority rules and the Letter Agreement of September 12, 1962; and 2) If so, did Carrier nevertheless have the right to contract out the work because it was an integral component of a single agreement.

With respect to the first question, the general rule has been succinctly stated by Referee Ives in Award 14942:

"The Scope Rule of the Agreement is general in form and contains no job descriptions. It is well established on this Board in claims of this kind that the work 'contracted out' must be of the type that historically and traditionally has been exclusively assigned to and performed by employees under the Agreement between the parties. The burden of establishing the essential facts must be carried by the Petitioner through competent evidence. Mere assertions are not proof."

We must determine, therefore, whether the Letter Agreement of September 12, 1962, satisfies Petitioner's burden of proof.

Th pertinent portions of that Agreement are set forth as follows:

"The following is agreed to with respect to the contracting of construction, maintenance or repair work, or dismantling work customarily performed by employees in the Maintenance of Way Department:

Employees included within the scope of the agreement effective December 1, 1962 between the Northern Pacific Railway and the Brotherhood of Maintenance of Way Employees perform work in the Bridge and Building Subdepartment and in the Track Subdepartment of the Maintenance of Way Department in connection with the construction and maintenance or repairs of, and in connection with the dismantling of, tracks, structures or facilities located on the right of way and used in the operation of the Railway Company in the performance of common carrier service.

By agreement between the Management and the General Chairman, particular work in connection with the construction and maintenance or repair of, or in connection with the dismantling of, tracks, structures or facilities in the Maintenance of Way Department, as described in the preceding paragraph which is customarily performed by employees described therein, may be let to contractors and be performed by contractors' forces, provided that when special skills, special equipment or special material are required, or when work is such that the Railway Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the agreement and beyond the capacity of the Carrier's forces, should the General Chairman not agree to contracting such work, the Railway Company may, nevertheless, let such work to contractors and the dispute may be processed as a grievance or claim." (Emphasis ours.)

While the language might be considered inartful and subject to different interpretations, the Board is satisfied that it constitutes recognition by both parties that construction of tracks, structures or facilities located on the Carrier's right of way is work reserved to the employees, and cannot be given to anyone else without further agreement or special circumstance. The burden of custom has thus been met by Petitioner. The Board further finds that leveling and grading is included in "construction."

We come next to the second question: Even if the work had been customarily performed by the employees, did the leveling and grading of the

material constitute an integral component of the overall contract, thus freeing Carrier from its obligation to utilize the employees?

Carrier contends that the grading work was an "integral part of a contract the major portion of which consisted of work admittedly not covered by the agreement", and further contends that "Each phase of this work was a component part of the entire project of furnishing the embankment material for the siding extension. One component part of this project could not reasonably be dissociated from the entire project.

Carrier can prevail on this theory only if it is shown that the parts or phases of the work are so interrelated and dependent that a contract could not be entered into absent any one of the parts or phases. The word "integral" is defined in Webster's New Collegiate Dictionary as "Essential to completeness * * * Lacking nothing of completeness; entire; * * *." It is clear that the leveling and grading of fill material on the property can easily be separated from the loading and trucking of such fill material.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 violated.

AWARD

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of June 1968.