Award No. 16459
Docket No. MW-16854

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE TEXAS AND PACIFIC RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when, beginning November 16, 1965, it assigned or permitted an individual outside the scope of the Agreement to perform the work of clearing brush from the right-of-way. (System File B-247-4460)

(2) Roadway Machine Operator A. J. Averitt be allowed pay at his straight time rate for the total number of man hours consumed in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Beginning November 16, 1965, Contractor Perry Woods of Marshall, Texas, who holds no seniority under the Agreement, commenced the work of clearing brush from the right-of-way. Work commenced at Mile Post 196. Mr. Woods used a bulldozer in the performance of said work.

The work of clearing brush, trees, grass and weeds from the Carrier's right-of-way is the customary and traditional work of employes covered by the scope of the Agreement. Whenever said work has been performed with a bulldozer, a roadway machine operator has operated it.

The claimant has established and holds seniority rights as a roadway machine operator as of July 29, 1948. When Contractor Woods commenced this work, the claimant was assigned to a lower pay-rated position as a speed swing operator.

Claim was timely and properly presented and handled by the Employes 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 September 1, 1963, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

OPINION OF BOARD: Carrier employed an outside contractor to clear brush and trees from a portion of its right-of-way.

The Organization contends that the work so contracted out is the customary and traditional work of employes covered by the Scope Rule of the Agreement and also allege a violation of Claimant's seniority rights.

It is the position of the Carrier that the contracting out of this work was proper and necessary in that it did not have the equipment with which to perform the work; lack of qualified personnel available to handle such work; and it had been a practice to contract the work of clearing brush and trees from the right-of-way.

The question to be resolved is whether the Scope Rule confers upon the Organization the exclusive right to perform the work done by the contractor.

The Scope Rule is general in nature, and does not specifically reserve the work in question. It neither describes or defines the work covered by the Agreement, but only governs "the hours of service and working conditions" of the classes of employes listed therein, and there is no prohibition in the Agreement against contracting-out. See Award 10585 (Russell) (same parties). It therefore follows that where the Scope Rule of the Agreement does not delineate the work covered, the Employes have the burden of proving such exclusive past practice. This the Organization has failed to do to the exclusion of all others.

The evidence does show, which has not been denied by the Organization, that the Carrier has in fact contracted-out the work in question over a long period of time. Carrier steadfastly throughout the proceedings on the property, maintained that it had been a "long time practice" to contract this work out and it had not been done by the roadway machine operators to the exclusion of all others. Carrier in its Ex Parte Submission submitted a list of contractors who Carrier contracted with and who performed this type work. Petitioner did not deny the correctiveness of this listing, but argued that the information had not been submitted in a timely manner. In Award 14908 (Stark), involving a belated submission, the Board held:

> "Disregarding the question whether any of this factual information, submitted for the first time in Ex Parte or Rebuttal Statements, should be considered, **it is apparent that the information itself fails to support Petitioner's allegation that** fence construction work such as that contracted out in October, 1962 **has traditionally and customarily been performed exclusively by B&B Department forces.** The claim cannot be sustained." (Emphasis ours.)

The record clearly establishes that some clearing of the right-of-way has been performed by the Maintenance of Way forces and independent contractors have performed some of the work in question. In our opinion, the parties have acquiesced in such partial performance and contracting out by the other. Therefore, as stated in Award 5120 (Carter):

> ". . . The parties by their mutual interpretation of the applicable rules, have recognized the right of each to perform the work and, likewise, they have recognized that neither group has the exclusive right to. We adhere to the interpretation which the parties them-

selves had made. It has become the fixed contract of the parties which can be changed by negotiation, but not by this Board. No basis for an affirmative award exists."

The burden of proving such exclusive, customary and traditional work by the Maintenance of Way forces has not been sustained.

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 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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June 1968.

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