NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21287

THIRD DIVISION Docket Number MW-21334

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Chicago and North Western Transportation Company

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

(1) The Carrier violated the Agreement when it assigned outside forces to construct a 16' x 32' addition to the Butler Yard Office at Milwaukee, Wisconsin (System File 81-8-165).

(2) B&B employes V. Walker, G. Leach, G. Aspatore, L. Peterson, E. Gillespie, G. Miron, A. Tapaninen, L. Broederdorf, A. DeGrand, J. J. Schneck, H. Otto, M. Weinberg, A. Rotkovic, R. F.Jablonski, D. Schrader, K. Knaack and E.Polishak each be allowed pay at their respective straight-time rates for an equal proportionate share of the total number of hours expended by outside forces in performing the work described in Part (1).

OPIRIOR OF BOARD: This claim arises out of the subcontracting to outside forces of the construction of ah addition to the Carrier's Yard Office at Butler Yard, Milwaukee, Wisconsin. By letter dated February 26, 1974 Carrier notified the General Chairman of the Organization as follows:

> "Please be advised we plan to contract the construction of a 16' x36' addition to the Yard Office at Butler Yard In Milwaukee. The work will consist of excavation, back-filling, concrete footings, foundation walls and floor, concrete block walls, structural steel beam and lintels and various carpentry work.
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> We do not consider that this is a change in work methods as referred to in Mediation Agreement Care No. A-5987 of October 7, 1959; however, notice of such contracting is afforded you in accordance with Article IV of the Hay 17, 1968, agreement. If you do consider this such a change, we will be glad to discuss with you the manner in which, and the extent to which, the employee8 you represent may be affected."

In conference on February 27, 1974 the General Chairman contended that the work should be performed by Carrier's B&B employer, under the Maintenance of Way Agreements. At that time there were furloughed B&B employes but these all were recalled by April 10, 1974. Notwithstanding the Organization's protests, Carrier subcontracted the work. Construction

commenced on May 13, 1974 and the yard office addition was completed by employes of the outside contractor. By letter dated June 11, 1974 the Organization filed the instant claim, on behalf of some seventeen (17) named B&B employes of the Wisconsin Division, alleging a violation of the Scope Rule and seeking money damages. The claim was denied at all levels on the property and comes to us for disposition.

At the outset the Organization contends that, by affording the Article IV meeting on February 26, 1974, Carrier tacitly "admits" that the work in question is reserved to the B & B employes. We do not share this view. There is herein no suggestion that Article IV was violated. Rather the Organization urges that by complying wlth that notice requirement Carrier, ipso facto, is precluded from thereafter subcontracting the work. To state the argument is to demonstrate its lack of merit. We adhere in this case to the principle announced in Award 20920, to wit: " . . . The giving of such notice, therefore, merely serve6 a6 formal compliance with the Agreement; it does not of itself establish exclusive Scope Rule coverage of the disputed work, negatively or affirmatively." (Underlining in original Award)

Stripped of this erroneous presumption, the case, like 60 many others of its type, turns on a determination whether the work is reserved exclusively to the employes by express Agreement language or, failing that, by substantial evidence of system-wide custom, practice and tradition. There is no serious argument that the contract by express terms reserves the work to the employes. The need for these employee to look outside the contract's literal language for evidence to carry their burden of proof was established in our early Award 6299 involving the same Agreement and parties as in the present case:

> "Manifestly, the Scope Rule of the Agreement is couched in such broad and general language as to be of practically no help in the instant case. Doe6 it purport to mean that all building operations come under the agreement? In Award 4158 this Board said that such a conclusion is obviously absurd. On the other hand, if the Rule is to be interpreted literally, as saying that only such building, repair and reconstruction work as is performed in the Maintenance of Way Department is under the Agreement, then it is practically meaningless. This situation prompted this Board to say in Award 5840 that,
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> 'It, therefore, becomes necessary to ascertain the 'definition or definition6 (as to what work comes within the scope of this maintenance of way agreement) from usage, custom, tradition and the disclosed facts bearing on the subject.'"

We look first to the instant record for evidence of reservation of this work to the employes by custom, practice and tradition. In doing we require for the employes, as the moving party, *to carry* the burden of going forward with probative evidence to support their claim and the burden of overall persuasion. Not only has the Organization failed to advance competent evidence other than bare assertions regarding past practice, but it has failed to rebut substantial evidence to the contrary offered by the Carrier. Among the Carrier's proffer of proof are prior awards of this Board involving essentially the same issue, parties and Agreement. In those Awards we made certain determination6 of fact which are relevant on the central factual issue herein regarding exclusive system-wide practice, custom and tradition. Thus in Awed 6299 cited supra we found as follows:

> "The Carrier also make6 the positive Statement that for thirty years it ha6 been it6 uniform practice to contract for the construction of new facilities as it did in this case, without any protest whatsoever from the Organization in the past ten years. New contracts have been negotiated between the parties while these practices obtained. The only answers attempted to be made to these showings by the Organization have been a categorical denial and the statement that it cannot be charged with knowledge of what take6 place throughout the Carrier's extensive railway system. However, we can hardly believe that there would be many instances where the erection of a new passenger station would long escape the notice of the Organization's responsible *representatives."*

Also in our more recent denial Award 13822 dealing with another such claim we stated:

> "The Scope refers to 'Employes . ..engaged in or assigned to building, repairs, reconstruction, and operation in the Maintenance of Way Department.' Hence Maintenance of Way employes involved in building work are under this Agreement. However, under the language of the Agreement all building work is not exclusively reserved to Maintenance of Way employes.
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> Following a well recognized principle of this Board, Claimants must therefore establish their right to this work by custom, tradition, and practice. The record doe6 not disclose such proof. On the contrary, Carrier indicate6 that there has bean a past practice of contracting building construction to outside firm. Furthermore, this practice was continued after the negotiation of a new Agreement in 1961.

"Awards both in support of and against claim6 arising from contracting work to outside firma, involving the same Scope Rule, have been cited by the parties. If any underlying principle is discernible in these awards which have been cited, it is that the nature of the construction work is the controlling factor in the determination of the issue. Generally, claims were denied in which construction of a new structure was involved, while those which involved repairs to or improvement of existing construction including such work as tuckpointing, blacktopping, and roofing were sustained. The instant dispute involved the construction of new building6 which wascustomarily awarded to outside contractor6 by Carrier."

Given the paucity of evidence adduced by the Organization on these essential points we have no alternative but to conclude the record does not support the employee' claims. In the absence of any proof of exclusive system-wide reservation the offers of proof of availability and ability to perform the work are irrelevant. Carrier raised several issues regarding measure of damages but we do not reach these point6 herein because we must dismiss the claim for failure of proof.

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 ha6 jurisdiction over the dispute involved herein; and

The Agreement was not violated.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Grderof Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, thfs 12th day of November 1976.