

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22367
Docket Number M-22262

Nathan Lipson, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(The Kansas City Southern 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 painting Bridges A-326, C-326, A-328 and A-331 to outside forces beginning June 14, 1976 (System File **013.31.178**).

(2) **B&B Employees** D. G. Brown, N. Maggard, H. N. Tucker, J. W. Randolph, T. Forsee and J. McKay each be allowed pay at their respective rates for an equal proportionate share of the total number of hours expended by outside forces in performing the work described in Part (1) hereof."

OPINION OF BOARD: The instant claim was precipitated by a letter dated April 9, 1976 from the Carrier to the Organization advising that 4 steel bridges **in** the Poteau, Oklahoma area had deteriorated to the point that sand blasting was required to remove old paint, dirt, grease and rust, prior to said bridges being painted. The letter went on to advise that **some** of the deck girders consisted of 4 girders per span, rather than the usual 2 that are found, which, in the opinion of the Carrier, compounded the surface preparation and painting problem. Their letter finally stated **"Such sandblasting and painting requires equipment and** supervision not possessed by us, and **in** addition our forces **are** fully occupied and have not performed such work in the past **20** years." The letter concluded with a statement of the **Carrier's** decision **to** contract the work out.

The record contains un rebutted evidence from the Carrier that there has not been a "paint gang" among the employees for over 20 years, and that even when there was a crew regularly assigned to painting, only brushes were used. None of the Bridge and **Building** Gang **employees** have had experience in either sand blasting or spray painting with **commercial equipment**, nor was any evidence offered

that said **employees** had the qualifications to do the work. In addition, the Carrier does not possess sand **blasting** or spray painting equipment, nor are the supervisors familiar with such work. It is, however, quite **clear that** the involved employees have frequently painted, using brushes, and that such painting has included work **on** bridges, and **presumably, the preparation** of surfaces to be painted.

On the other hand, the Carrier presented substantial **evidence** that on many instances, over a period of many years, **maintenance** of bridges, including painting, was contracted out, and that this has long been accepted by the Organization. The Organization's position in said regard is that the contracting out of large projects of **this nature** is not in dispute, but that none of the bridges involved **in** the instant claim is more than fifty feet long; **Such** bridges, in the opinion of the Organization, are "small jobs" which **could well be** handled by the employees, using existing methods. **In any** event, the Organization feels that the contract **preserves work** for the employees, and the equipment used is irrelevant --- **i.e., the** Carrier can acquire additional equipment if necessary to **meet** its obligations to the employees.

The following contractual **provisions** have been asserted by the Organization as applicable to the instant **claim**:

"RULE 1

Scope,

These rules govern the hours of service, **working** conditions, and rates of pay of employees in the **Maintenance** of Way & Structures Department in the sub-departments shown below:

(a) **Bridge and Building** sub-departments:

- (1) Bridge and Building **Gangs**
- (2) Scale **Gangs**
- (3) Water Service **Gangs"**

* * *

"RULE 2

Seniority

2-3. Seniority rights of employees to new positions and vacancies as set forth **in** Rule 11 shall be restricted to their respective sub-departments and territories."

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"RULE 4

Seniority Rosters

4-1. Seniority rosters of employees for each classification and territory as set forth in Rule 2-5 will be separately compiled, and **will** show names and seniority dates."

There can be **no** doubt that the Rule provisions set forth above have at least the implied effect of establishing the rights of the employees **covered** to their traditional work **assignments**. When the Carrier and Organization entered into a collective bargaining agreement, that fact alone demonstrated their **mutual** recognition of the bargaining unit and implied an **understanding** that said bargaining unit would not be undermined.

When the parties further adopted Rules **on** Scope, Seniority and Seniority Rosters, they added weight **to the** idea that, the affected employees' jobs would be protected. **Thus, when** Bridge and Building Gangs are set forth in a Scope Rule, it has been held that said employees were entitled to the work involved, and further that **"--- Bridge and Building work consists of the construction, repairing, maintaining or dismantling of bridges."** (Award No. 4077 - emphasis added). Accordingly there can be **no** doubt that if the work at issue were the traditional work of the Bridge and Building Gangs, the instant claim would have to be granted.

The Organization, both in **its** submission of the dispute to this Board, **and** in the course of oral argument, has provided numerous Awards, which support the **conclusions** stated in the preceding paragraph.

Included are Awards Nos.:

4077; 15893; 1314; 10871; 11752; 12785; 17523;
4921; 14371; 16009; 16430; 18500; 19924; 20412.

But it is to be noted that in all of the above **cases**, the Boards sustained the positions of the Organization, because the work under consideration was identified with the bargaining unit, and could, without significant difficulty for **the Carrier**, be continued to be **performed** by the bargaining unit. Yet, in the face of such considerations, the work had been assigned to others.

In the instant case, however, the Organization has not at all **proved** that its **members** have ever performed the specific work at issue on a system-wide basis, to the exclusion of others. But it **is well** established that in order to prevail in subcontracting cases, 'probative evidence **must** be produced by the Petitioner that the disputed work was performed by claimants to the complete exclusion of others. That proposition has been accepted **in** the Third Division Awards Nos. 9565, 11054, 12774, 12972, 13161, 14022, **19761, and 20421.**

It is also well known **that** in deciding these kinds of cases past practice should be given considerable weight. Thus, there are Awards holding **that** when a history of subcontracting work is found, such work may not exclusively belong to the bargaining unit **employees**. For example, see **Third Division Awards** Nos. 10560, 14229 **and** 2679.

The applicability of the above Awards to the present situation is clear: for **over** 20 years neither the existence of a paint gang, nor a practice of B & B **employees** doing sand blasting or spray painting has been **shown**. Instead, the evidence **says that** such work has been consistently subcontracted. It is also clear that in the aggregate, the sand blasting and spray painting of four bridges is not a "small job," which should be handled by expensive or antiquated methods.

In addition to all of the above, the Board would note that claims such as here presented **must** be viewed in **common** sense terms. An Organization properly resists the subcontracting of work when either jobs in their entirety, or the steady work of the employees are in jeopardy. But the evidence here is that the B & B employees were not deprived of work or job security.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 30th day of March 1979.