

Award No. 6305
Docket No. MW-6240

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Livingston Smith, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE DELAWARE AND HUDSON RAILROAD CORPORATION**

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

(1) The Carrier violated the effective agreement when it assigned individuals having no seniority in the Maintenance of Way Department to install a culvert south of Valcour, subsequent to June 1, 1950;

(2) The Bridge and Building Department employees in the Maintenance of Way Department holding seniority on the territory where the culvert was installed and who are customarily engaged in work of this type, be paid at their respective straight time rate of pay for an equal proportionate share of the hours consumed by the Contractor's employees who were assigned to install the culvert.

EMPLOYEES' STATEMENT OF FACTS: On or about June 10, 1950, the Carrier assigned the installation of a culvert underneath its single track between Valcour and Port Kent, New York, to parties holding no seniority under the effective agreement.

The culvert consisted of 18-inch sections of corrugated steel, four feet in diameter, which was installed by the "jacking" method, or in other words, by forcing it through the embankment by use of pressure.

In connection with the above installation, the contractor who was assigned the installation work was permitted to use acetylene torches and tanks which were assigned to a Carrier Bridge and Building Gang.

The Contractor employed four men and one foreman on the project and consumed approximately twelve working days in completing the work.

The Carrier's Bridge and Building forces have performed similar work in the past. One instance of similar work performed by the Carrier's forces was the culvert installation at Whitehall, New York, by Bridge and Building Foreman Louis Fountain and his crew.

July 1945—Washington Branch, consisting of 70 feet of 42 inch Armco pipe.

August 1945—Washington Branch, consisting of 84 feet of 42 inch Armco pipe and 74 feet of 42 inch Armco pipe.

August 1945—Rutland Branch, consisting of 66 feet of 45½ inch and 62 feet of 42 inch Armco pipe.

October 1945—Greenwich and Johnsonville Branch, consisting of 121 feet of 45½ inch Armco multi-plate.

October 1945—Washington Branch, consisting of 99 feet of 49½ inch Armco multi-plate.

November 1945—Greenwich and Johnsonville Branch, consisting of 93.5 feet of 45½ inch Armco multi-plate.

November 1945—Washington Branch, consisting of 71 feet of 45½ inch Armco multi-plate.

May 1946—Washington Branch, consisting of 100.5 feet of 45½ inch Armco multi-plate.

June 1946—Greenwich and Johnsonville Branch, consisting of 111 feet of 45½ inch Armco multi-plate.

During 1939 at Mile Post 113 (main line) culvert was installed by Armco Drainage and Metal Products, Inc.

No protest was entered and no claims were presented for Bridge and Building employees in connection with any of the contract work listed above.

The scope and seniority rules of agreement on which claim is based do not support a claim for work requiring special skills which Bridge and Building employees do not have and special tools and equipment which are not available.

The claim is not supported by agreement rules and practice thereunder and Carrier respectfully requests that it be denied.

Management affirmatively states that all matters referred to herein have been discussed with Committee and made a part of the particular question in dispute.

OPINION OF BOARD: At issue is the propriety of the Carrier's action in engaging a contractor to lay a culvert under its tracks near Valcour, New York, in alleged violation of rules contained in the effective Agreement.

The respondent contends that the work in question was of a special kind requiring skills and experience which claimants did not possess and the use of equipment which was not owned by them; and further that this construction work was of a type that the employees had never performed but had in truth and in fact been done by outside contractors over a period of years.

Except in two particulars there exists no conflicts in the record (1) as to whether a "jacking" or "tunneling" process was used in installing the culvert, and (2) whether three or four men were used to complete the project in 12 working days. We conclude a "tunneling" method, using tunnel liners, was the process adopted and that a superintendent and three other employees performed the work in question.

This Division has in numerous prior awards laid down the principle that a carrier cannot contract with outsiders for the performance of work

which is of a kind and character covered by the effective collective bargaining agreement, Award 757. Likewise it is fundamental that the employees coming under the Agreement are entitled to all of the work covered thereby, save and except that which is specially excepted from coverage of the Scope Rule. In Award 4701, this Board held:

"The burden of establishing an exception to the rule is on the Carrier and we do not believe it has met that burden. . . . In Award 757 this Board held that mere practice alone is not enough to establish exceptions to work clearly embraced in Scope Rule."

Or as even more aptly put in Award 757:

"Mere practice alone is not sufficient, for as often held, repeated violations of a contract do not modify it."

The Scope Rule here does not enumerate the various types or kinds of work which fall within the Agreement. Needless to say, some work was reserved to the Maintenance of Way employees, otherwise the need or necessity for a contract would not exist. We are of the opinion and so find and hold that there being no specified exception to the work covered by the rule, the work which was here contracted out was of the kind and character of work properly classified as Maintenance of Way work, belonging to Maintenance of Way employees.

This Board has so previously determined in Awards 5136 and 5090 as well as others cited therein. The claim here is valid.

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 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 6th day of August, 1953.

DISSENTING OPINION TO AWARD 6305, DOCKET MW-6240

The majority herein rely upon an incompetent construction of four prior Awards involving other Carriers and in complete disregard of five other prior Awards involving the same parties as the instant case, thus creating chaos insofar as this Carrier is concerned.

First, they quote excerpts out of context from Award 757, overlooking entirely that the majority therein cited exceptions to the abstract principle quoted, and overlooking entirely that the decision therein remanded the case to the parties because the Board was "wholly without facts to warrant a determination as to whether the work here let is being let in violation of the Maintenance of Way contract, or whether due to some peculiar condition it is legitimately entitled to be regarded as excluded therefrom".

Next, the majority herein cite Award 4701, the Opinion of which indicates that the decision would have been different if the Carrier had met the burden of establishing an exception, based on practice, to the general rule that brick work belongs to bricklayers.

In the instant case, the majority recognized —

"The Scope Rule here does not enumerate the various types or kinds of work which fall within the Agreement. * * * We are of the opinion and so find and hold that there being no specified exception to the work covered by the rule, the work which was here contracted out was of the kind and character of work properly classified as Maintenance of Way work, belonging to Maintenance of Way employees."

In the first place, it is ludicrous to hold that there could be exceptions to unenumerated types or kinds of work.

In the second place, two questions at issue herein are left unanswered by the majority, viz., the class of B&B Department employees for whom the claim is made and whether or not, as the Carrier denies, any class thereof was qualified to perform the work. The Carrier stated, and the Organization did not deny or refute it, that the employees have never made such an installation and were not qualified by skill or experience to perform the work.

Based on the showing of the Carrier in the instant case, the presumption is clear that the authors of Awards 757 and 4701 would have denied the claims herein.

The majority also cite Awards 5090 and 5136 involving cases on another Carrier in which the Scope Rule of the Agreement differs in material respects from the Scope Rule in the instant case in that it not only enumerates types and kinds of work, in broad and general language, but also specifies certain exceptions thereto. However, in Awards 6299 and 6300, Referee Shake, involving the same parties, this Division overruled the interpretation placed upon the Scope Rule, supra, involved in Awards 5090 and 5136, and held that because of the "broad and general language" of the rule "the confronting question cannot be answered by reference to the language of the Scope Rule of the Agreement alone." Accordingly, they denied the claims on the basis of practice as shown by the Carrier which should have been done in the instant case.

For the above reasons we dissent.

/s/ W. H. Castle

/s/ R. M. Butler

/s/ E. T. Horsley

/s/ C. P. Dugan

/s/ J. E. Kemp

Serial No. 135

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 6305
DOCKET NO. MW-6240

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employees.

NAME OF CARRIER: The Delaware and Hudson Railroad Corporation.

Upon application of the Carrier, to which the Organization has made reply, that this Division interpret the above Award in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

Respondent here requests interpretation of this Award on the premise that no named claimants or class of employees as such were designated recipients of any monies due and payable under the sustaining Award.

The Organization in reply to the request for interpretation denies that the Award is ambiguous and asserts that no difficulty should arise in determining which employees in the seniority district customarily performed the type of work here involved.

The Award is clear wherein it was found that this work was of a kind and character properly classified as Maintenance of Way work belonging to Maintenance of Way employees.

In essence it was found that the Scope Rule of the effective Agreement had been violated. Penalties are required where Agreements are violated if future violations are to be restrained. Claims for or in behalf of particular individuals or groups thereof are incidental to the violation.

The Respondent draws a proper conclusion when it states that it has been found that these employees were qualified to perform the work. It follows by necessary implication that these same employees had the required fitness and ability. We are of the opinion that the parties hereto can and should determine which employees, if any, had the fitness and ability to perform the work involved. However, in any event, if the Organization were to designate individuals who had the required fitness and ability, and claims were paid on the basis thereof, the Carrier would be fully protected for it would never be required to pay more than one group for the same claim under such designation.

Referee Livingston Smith, who sat with the Division as a member when Award No. 6305 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of September, 1953.

[13001]