Award No. 6299
Docket No. MW-6182

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

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

(1) That the Carrier violated the provisions of the effective agreement when it assigned the work of constructing a Passenger Station building and platform at Lake Benton, Minnesota, to the Spee Dee Construction Company, whose employes hold no seniority under the scope of the effective agreement;

(2) That the Bridge and Building employes holding seniority on the Dakota Division, be paid at their respective straight time rates of pay for an equal proportionate share of the total man-hours consumed by the employes of the Spee Dee Construction Company, while engaged in the performance of the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: A news item appearing in a local newspaper on July 30, 1950, revealed that the Chicago and North Western Railway Company was contemplating the construction of a new passenger station building and platform at Lake Benton, Minnesota.

It further disclosed that the building would be 22 by 44 feet in dimensions and would be constructed of concrete blocks. A concrete platform would also be constructed.

The news item further revealed that the Carrier had advertised for bids on the construction of the building and platform and that the contract would be awarded soon by the Carrier's Chicago office.

On August 2, 1950 General Chairman J. F. Schultz wrote the Carrier's Engineer of Maintenance, Mr. L. R. Lamport at Chicago, Illinois, as follows:

"August 2, 1950

Mr. L. R. Lamport
400 West Madison St.
Chicago, Illinois

Dear Sir:

Just recently I received information that the Chicago & North Western Railway Company is planning on erecting a depot at Lake

If the Board holds it does have jurisdiction in this case, it is the request of the Carrier that an oral hearing be held before the Board in order that the Carrier may, if deemed necessary, submit further argument in support of its position.

(Exhibits not reproduced).

OPINION OF BOARD: This claim grows out of the fact that in 1950 the Carrier awarded a contract to a construction firm for the erection of a new passenger station at Lake Benton, Minn. The building was of concrete block construction, 22 by 44 feet in size, with plumbing, heating and lighting facilities and cost approximately $15,000.

On August 2, 1950, the Organization's General Chairman addressed a letter to the Carrier's Engineer of Maintenance advising that it had been learned that the Carrier proposed to erect a new depot at Lake Benton and concluding:

> "If the information I have is correct and the Railway Company permits the employes of a contractor to perform the work * * * it is our intention to make claim for our B&B forces on the Division due to the fact that work of this nature is covered by the scope of the Maintenance agreement."

On September 19, the Engineer of Maintenance replied:

> "Your information is correct that these new buildings are to be constructed by contract work as this type of construction work has always been so handled."

The quoted correspondence clearly identifies the issues which this Board is called upon to decide, namely, whether the work incident to the construction of the building referred to was covered by the scope of the Maintenance of Way Agreement, and whether construction work of the type here involved has heretofore been handled by contract with the acquiescence of the Organization.

We shall first consider the Scope Rule of the effective Agreement. The Preamble to the Agreement reads:

> "The following agreement will govern hours of service and working conditions of employes of the Chicago and North Western Railway Company enumerated in the scope rule and will supersede all previous agreements and rulings thereon in conflict herewith."

The Preamble is immediately followed by what may be deemed to be a Scope Rule:

> "Scope. Employes (not including supervisory officers above the rank of foreman) engaged in or assigned to building, repairs, reconstruction and operation in the Maintenance of Way Department."

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. Does 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,

> "It, therefore, becomes necessary to ascertain the definition or definitions (as to what work comes within the scope of this main-

tenance of way agreement) from usage, custom, tradition and the disclosed facts bearing on the subject."

It follows, therefore, that the confronting question cannot be answered by reference to the language of the Scope Rule of the Agreement alone.

The Organization has asserted that if it is contended by the Carrier that past practices have had the effect of taking the particular work out from under the Scope Rule, the burden is on the Carrier to establish that such past practices existed, while the Carrier contends that the obligation is reserved, and that it is incumbent on the Organization to establish that work of the character here involved has heretofore been considered by the parties as belonging to the maintenance of way employes.

In the record we find a showing made by the Carrier that between November 1, 1941 and November 1, 1951, it contracted out work of the character here involved in 29 instances. The effective Agreement bears date of January 1, 1947, and part of the 29 construction contracts were awarded before and part after that Agreement was negotiated. The Carrier also makes the positive statement that for thirty years it has been its uniform practice to contract for the construction of new facilities as it did in this case, without any protest whatever 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 takes 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.

This Board is obliged to find the facts of a case in the record that is brought to it. On the meager showing here made by the Organization to meet the facts asserted by the Carrier we feel compelled to hold that the erection of the new passenger station at Lake Benton by contract under the circumstances shown was neither prohibited by the express provisions of the Scope Rule or contrary to what the parties have long recognized as a proper practice. The following language taken from Award 1397 would, therefore, appear to be pertinent:

> "The practice complained of is one of long standing. During its continuance there have been revisions of the contract, without correction, if correction be needed, of this practice. This is persuasive that, for eleven years or more, the employes themselves had not regarded it as a violation of their contract."

Our conclusion does not seem inequitable in the light of the admitted fact that the employes on whose behalf the claim is asserted enjoyed full-time employment during the period that the new station was under construction.

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 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 evidence does not establish a violation of the Agreement.

AWARD

Claim denied.

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.