Award No. 7439
Docket No. MW-6056

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dwyer W. Shugrue, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SEABOARD AIR LINE RAILROAD COMPANY

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

(1) The Carrier violated the effective agreement when it assigned the work of building the concrete foundation for a stationary crane at West Jacksonville Shops to employes holding no seniority under the effective agreement;

(2) That Bridge and Building Foreman DuPree, Bridge and Building Foreman Chairs and all members of their respective gangs be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours consumed by Mechanical Department employes in performing the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: In connection with the erection of a stationary crane at the Carrier's West Jacksonville Shops, a concrete sub-structure was constructed to which the stationary crane was subsequently attached.

The construction of the concrete sub-structure involved the proper excavation of earth, the building of wooden concrete forms into which liquid concrete was poured, the setting of the necessary bolts to which the crane would eventually be fastened, removal of the wooden concrete forms after the concrete had set and the backfilling and grading with earth.

The work was assigned to the Mechanical Department employes by the Carrier. Bridge and Building employes usually and customarily construct all structures and other concrete works.

The agreement in effect between the two parties to this dispute dated July 1, 1941 and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 1 of the effective agreement reads in part as follows:

"SCOPE:

These rules cover the working conditions of employes of the classes in the Maintenance of Way Department, represented by the

The case here in question appears identical to that involved in Award 5120 (Third Division). In that case claim was made by B&B Department employes because of certain work being performed by carmen, in the Reclamation Plant of the carrier. In the opinion in that case it is stated—"it is clear that the agreement provisions here involved do not propose to define the work of B&B employes * * *".—the respondent carrier holds that the same is true of the provisions of the agreement here involved. The opinion in Third Division Award 5120 states further—"Neither group has performed or claimed the work exclusively for the past 31 years."—and that is likewise true in the instant case. As hereinbefore stated there have been occasions when this type of work was performed by B&B employes, and on other occasions it has been performed by shop crafts' employes, but on the whole such work has in a majority of cases been performed by the latter (shop craft) class of employes. The opinion in Third Division Award 5120 states further—"Each has performed some of it and each has acquiesced in such performance by the other."—and that likewise applies four-square to the instant case.

The opinion in Award 5120 further states—"The parties * * * have recognized the right of each to perform the work and, likewise, they have recognized that neither group has the exclusive right to (such work)." That is exactly the position of the respondent carrier in this case. We do not concede that either of the employe groups involved in this claim and in this work have the exclusive right to such work, and past practice in the performance of this work supports this position. Respondent carrier fully realizes that no amount of past practice squarely in conflict with the provisions of a specific rule can serve to nullify such rule, BUT, directs attention to the fact that it has been held that when a practice now complained of is one of long standing and during its continuance there have been revisions of the agreement, without correction, if correction be needed, of the practice, that is persuasive that the employes themselves have not considered it as a violation of their contract, and respectfully submits that this case falls also into that category.

The claimants were—while the work made the basis of claim was in progress—engaged in other work at West Jacksonville, and were so engaged prior and subsequent thereto, and suffered no wage loss by reason of shop craft employes performing the work in question.

Actually, in building the foundation for this stationary jib crane the major item of the work was the digging of a pit 10 feet wide, 10 feet long and 5½ feet in depth. The concrete to form the foundation was purchased ready-mixed and delivered and poured from the delivering truck into the pit, the small amount of work required in shaping and smoothing the concrete mixture performed by carman, helper and the two laborers.

In view of all of which the respondent carrier finds no basis in fact for the claim as filed, and urges that your Honorable Board so hold.

Carrier affirmatively states that all data contained herein has been made known to or discussed with representatives of the Brotherhood of Maintenance of Way Employes.

OPINION OF BOARD: In 1951 carrier undertook the erection of a stationary crane for use by its shop employes which necessitated the construction of a concrete foundation to which the crane was subsequently attached. For the purpose of construction of the foundation, which involved excavation of earth, building of wooden concrete forms, pouring of mixed cement, setting of necessary bolts for anchoring crane, removal of wooden forms and backfilling and grading carrier assigned four Shop Craft employes (carman, carman helper and two laborers) who worked a total of 96 hours. The employes here charge violation of the effective agreement in assigning employes having no seniority under it.

Employes contend that the concrete foundation was a structure within the applicable section of their Scope Rule quoted below and is work that is customarily and traditionally performed by Bridge and Building employes. Also that they usually and customarily construct any and all concrete foundations required by the carrier.

"2. BRIDGE AND BUILDING:

B&B Foremen, Assistant B&B Foremen, Carpenters, Carpenter Helpers, Painters, Painter Helpers, Bridgemen, Bridgemen Helpers, (and laborers when on gangs in excess of 10 men), engaged in construction or maintenance of buildings or other structures under the jurisdiction of the Maintenance of Way Department."

The carrier defends its position on the ground that work such as is involved here does not belong exclusively to employes represented by the Shop Craft or those represented by the Brotherhood of Maintenance of Way Employes. It contends that the crane was not a "structure(s) under jurisdiction of the Maintenance of Way Department." Carrier admits that there have been occasions when maintenance of waymen have performed such work but that when such performance took place in shop areas it has in the majority of cases been performed by Shop Craft employes. Three specific examples of similar work having been performed by Shop Craft employes are set forth. Reliance is also placed on Rule 120 of the agreement between this carrier and its Shop Craft employes, covering "Classification of Work"—Carmen's Special Rules, in pertinent part as follows:

"Carmen's work shall consist of building, maintaining, dismantling (except all-wood freight-train cars), painting, upholstering and inspecting all passenger and freight cars, both wood and steel, planing mill, cabinet and bench carpenter work, pattern and flask making and all other carpenter work in shops and yards, except work generally recognized as bridge and building department work; * * *"

For the employes to sustain their position it seems to us that they must establish, as they assert, that they usually and customarily construct any and all concrete foundations and structures and that they have an exclusive right to perform such work.

During panel argument employes call our attention to Awards 6199 and 6200 of this Division, involving the same parties, adopted after the record in the instant dispute was closed. In sustaining the claim the Board held (Award 6199) that the carrier could not contract out work to independent contractors which was historically and customarily performed by waymen without first negotiating with the organization representing its employes.

We do not here take issue with the result reached. However, in an endeavor to answer, for the purpose of this decision, as to whether or not the employes enjoyed the exclusive right to perform the work above described, we are constrained to point out certain relevant statements made by the same employes that we believe will be helpful in answering our question.

The carrier, at pages 19 and 20 of docket number MW-6122 (Award 6199), with respect to Item 3, Sanitary Sewers and Storm Drains, made the following statement:

"Work Included

Such work as excavation, laying and caulking of pipe, backfilling, tamping, construction of masonry manholes, construction of forms for concrete, placing of reinforcing steel, setting of anchor bolts, pouring of concrete, installing of pumps."

Again, at page 21 of the same docket, with respect to Item 5, Diesel Fuel Oil and Water Facilities:

"Work Included

Such work as excavation, construction of concrete forms, placing of reinforcement, pouring and finishing of concrete, welding and pipe fitting."

The employes reply to Items 3 and 5, as set forth in their oral argument at page 38 of the same docket:

"3. Sanitary Sewers and Storm Drains. This work is covered by the Scope Rule of the Shop Craft Agreements on this property."

"5. Diesel Fuel Oil and Water Facilities. This work is covered by the Shop Craft Agreements on this property."

We believe the statements made by the employes destroy their contentions made in the instant case that they held the exclusive right to any and all concrete work on carrier's property. They must have recognized that the primary purpose for Items 3 and 5 above was connected with and an integral part of shop work. We hold the same to be true in the instant case. Neither the foundation for, nor the completed crane were "under the jurisdiction of the Maintenance of Way Agreement." There is no basis for an affirmative award.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of November, 1956.