# Award No. 7791
# Docket No. MW-7537

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**Livingston Smith, Referee**

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## PARTIES TO DISPUTE:

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

## READING 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 constructing a parking lot and wooden footwalk at Oreland, Pennsylvania, to contractors whose employes hold no seniority under the effective Agreement;

(2) Each employe holding seniority as a Carpenter Foreman, Carpenter and/or Carpenter Helper on the seniority district of which Oreland is a part be allowed pay at their respective straight-time rates for an equal proportionate share of the total man-hours consumed by the contractor's forces in performing carpentry work and other work incidental thereto in the construction of the parking lot and the wooden footwalk at Oreland;

(3) The Section Foreman and Section Laborers assigned to and holding seniority rights on the section territory on which the parking lot at Oreland was constructed each be allowed pay at their respective straight-time rates for an equal proportionate share of the total man-hours consumed by the contractor's forces in performing all of the work referred to in part (1) of this claim except for that covered by part (2) of this statement of claim.

**JOINT STATEMENT OF FACTS:** The Carrier engaged the services of two contractors for the construction of an automobile parking lot and the construction of a wooden foot walk at Oreland, Pennsylvania.

One contractor was assigned the work of grading and paving the automobile parking lot. The second contractor installed timber curbing and wooden supporting posts and constructed a wooden foot walk between the parking space and the driveway leading to the passenger station at Oreland.

On August 27 and 28, 1953, the section forces assigned to the Glenside Section were assigned to assist the contractor's employes in completing the parking space by assisting in the digging of holes and disposing of the excess timber.

The parking lot was constructed of a six inch base of graded stone clay topped with an application of oil and covered with screenings, requiring 1800

by contractors' forces. For the information of the Board, Carrier attaches hereto, identified as Carrier's Exhibit C-1, a list of contracts awarded since 1943 to various construction firms for work involving the building, repairing and surfacing of parking facilities at stations in or near Philadelphia. Carrier maintains that it is evident from this list of contracts that the grading and paving of parking areas has never been considered the exclusive work of Maintenance of Way employes on this property.

The Organization has also protested the installation of timber curbing, supporting posts and wooden footwalk by the forces of the Fern Rock Paving Company, with respect to which Carrier desires to point out that Fern Rock Paving Company has been performing services for Carrier in and around the Philadelphia area for over twenty years, and are Carrier's primary force for paving work in this area. Fern Rock Paving forces work five days per week for the Carrier under the direction of Carrier's Bridge and Building Paving Inspector, a position under the scope of the Maintenance of Way Agreement. Carrier attaches hereto, identified as Carrier's Exhibit C-2, a list showing miscellaneous work performed by the Fern Rock Paving Company from August, 1943, to September, 1954. From this exhibit it will be noted that the Fern Rock Paving Company has done considerable work similar to that involved in the instant docket.

The Brotherhood of Maintenance of Way Employes have negotiated agreements with the Carrier effective January 15, 1936 and January 1, 1944, corrected October 1, 1951. The Brotherhood has known of the long past practice of contracting work in connection with parking lots as set out in Carrier's Exhibits C-1 and C-2. However, when these agreements were negotiated, existing practices were not abrogated or changed by their terms and Carrier maintains that such practices are enforceable to the same extent as the provisions of the contract itself.

Carrier has shown that work on this property in connection with parking lots has never been considered the exclusive duties of Carrier's bridge and building employes and section forces, and such work has been performed by contractors' forces in the past and Carrier submits that this practice was not abrogated by agreements subsequently negotiated. Further, since bridge and building and section forces were fully employed at the time of construction of the parking lot, the claim as submitted is for penalty only and Carrier submits that it is a well established principle that penalties cannot be awarded under a contract unless specifically provided for therein.

Under the facts and evidence set forth hereinbefore, it is the Carrier's position that the claim as here advanced by the Brotherhood of Maintenance of Way employes is without merit and not supported by rules of agreement or past practice in effect for many years and respectfully requests the Board to deny the claim in its entirety.

This case was discussed in conference and handled by correspondence with representatives of the Brotherhood of Maintenance of Way Employes.

(Exhibits not reproduced)

**OPINION OF BOARD:** This claim is made in behalf of employes classified as Carpenter Foremen, Carpenters, Carpenter Helpers, and Section Laborers for their proportionate share of the man-hours consumed, bearing compensation at their respective hourly rates account of using outside forces, in constructing a parking lot at the Oreland, Pennsylvania Station.

The Organization asserts that the Respondent improperly assigned the work here to employes not covered by the effective Agreement. It was asserted that the construction of parking lots came within the purview of the Scope Rule of the effective Agreement, that such work (including a parking lot at this station) had been performed in the past, that employes covered by the

Agreement were available and that both material and equipment were likewise readily available. In connection with prior instances of contracting out work it was asserted (1) that it had been done only after negotiation and agreement with the Organization, or (2) over the immediate protest of the Organization, thus negating the possibility of a contrary custom and practice.

The Respondent took the position that the Scope Rule of the effective Agreement could not be construed to include the exclusive right to construct parking lots, and absent this condition, it was necessary for the petitioners to show that this type of work was by custom and tradition performed by Maintenance of Way personnel to the exclusion of all others. While admitting that Maintenance of Way forces had, at times been utilized in this type of work it was asserted the amount was minor and that past practice on this property had been to contract out this work, such practice existing prior to the effective date of the Agreement.

Once again we are confronted with a dispute concerning the "contracting out" of work. The work in question concerns the construction of a parking lot at Oreland, Pennsylvania, and is presented to this Board by joint submission by the parties, with the further agreement that disputes concerning like work at three other stations will be disposed of in accordance with the decision herein.

The Scope Rule is ambiguous. It does not specifically detail the work coming thereunder. This Board has held under similar circumstances that the correct interpretation and application thereof is to reserve to those covered by the agreement all work usually and traditionally performed by them.

The work here was contracted out to two different firms, with the grading, filling and topping being done by one firm, and the curbing, support posts, and sidewalk all of wood being done by the other. In essence the Organization contends that the first type belonged to, and should have been performed by, section laborers, with the latter properly assignable to carpenters.

The record here is voluminous, with exhibits and copies of correspondence between the parties concerning many instances of contracting out various types of work. An examination of the correspondence indicates that they were concerned with other types of work than here present, and that in many instances agreements relating thereto were entered into. Insofar as this particular type of work is concerned the record reveals that, excepting the three locations either directly or indirectly involved here, Maintenance of Way forces have constructed four parking lots while some 23 such projects, over a period of 20 years, have been contracted out. The record reveals that on some of the projects contracted out Maintenance of Way forces performed a part of the work.

We are of the opinion that this diversity of methods has existed for a sufficient number of years as to preclude a finding of a continuous practice either of assigning this work to the Maintenance of Way forces or to contract out such work.

We are of the further opinion that on the basis of this record the type of work that is the subject of claim 3 above is not the type of work usually and traditionally performed by section laborers to the exclusion of all others but that the work complained of in claim 2 is the type of work that Carpenters have usually and traditionally been known to perform and as such should be assigned to, and performed by them.

That the latter conclusion is true is evidenced by a portion of a communication, over the signature of R. A. J. Morrison, Director of Personnel, to Carl Bello, Vice Chairman, bearing date of February 15, 1954.

The pertinent part of the communication reads as follows:

"I have discussed with Mr. MacMannis the future performance of the erection of wooden posts and wooden curbing in conjunction with paving work, and it is understood that when the outside timber curbing is placed and does not involve paving around the posts in the parking area, this work will be performed in the future by maintenance of way forces."

The record is not clear whether or not the reservation of this work to the Maintenance of Way forces was intended to cover this claim, but in any event we think that all work mentioned therein that is involved in this claim, together with the construction of the wooden sidewalk here, was the type that should have been assigned to, and performed by that class of employes set out in Claim 2.

**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 Carrier violated the Agreement to the extent indicated in the above opinion.

## AWARD

That the Carrier violated the Agreement to the extent indicated in the above opinion and findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 15th day of March, 1957.