Award No. 7806
Docket No. MW-7422

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

James P. Carey Jr., Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY (Pacific Lines)

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

(1) The Carrier violated the effective Agreement when it contracted with Contractor Ray Lacounde and with Contractor B. Hart for the performance of bulldozer operation work in connection with the plowing of fire lanes on May 6, 1953, and on various dates subsequent thereto;

(2) Bulldozer Operators J. L. Hood and J. Botil each be allowed pay at their respective straight-time rates for an equal proportionate share of the total man-hours consumed by outside forces in performing the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: J. L. Hood and J. Botil hold seniority as bulldozer operators on the Coast Division and were working as such on May 6, 1953, and on dates subsequent thereto.

Under date of May 6, 1953, and on dates subsequent thereto, fire lanes were plowed on and near the right-of-way in the vicinity of Mile Post 195 and westward on the Coast Division, by Mr. Ray Lacounde of San Ardo, California, an individual who holds no seniority under the effective Agreement. The plowing of these fire lanes was accomplished through the operation and use of a bulldozer.

On May 25, 1953, and on dates subsequent thereto, Mr. B. Hart of Hollister, California operated a bulldozer while plowing fire lanes on the right-of-way and adjacent thereto on the Coast Division. Mr. Hart holds no seniority under the effective Agreement.

The instant claim was presented and handled and progressed in the usual manner on the property; Carrier declining to allow the claim.

The agreement in effect between the two parties to this dispute dated January 1, 1953, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Scope of the Effective Agreement reads as follows:

"(f) Foremen and assistant foremen of terminal, section extra gang, yard, construction, work train, gravel pit, quarry and powder gangs, and all employes coming under the supervision of such foremen.

"(g) Crossing watchmen, crossing flagmen, tunnel watchmen, bridge watchmen, miscellaneous watchmen, and lamptenders.

"(h) Track welders, girder operators, and their helpers.

"(i) Employes in Timber and Tie Treating Plants except stationary engineers and stationary firemen."

That rule, as will be noted, merely names the classes of employes whose rates of pay, hours of service and working conditions are governed by the rules of the current agreement. It does not make any reference to work or to the specific duties that may be required by those classes of employes, nor does it set forth fully the duties that will be reserved to or that will be exclusively performed by the classes of employes named. Obviously, the Scope Rule does not support the claim presented in this case.

CONCLUSION

Carrier asserts that it has conclusively established that the claim in this docket is entirely lacking in either merit or agreement support; therefore, requests that said claim, if not dismissed, be denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

The carrier reserves the right, if and when it is furnished with the submision which has been or will be filed ex parte by the petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in such submission, which cannot be forecast by the carrier at this time and have not been answered in this, the carrier's initial submission.

OPINION OF BOARD: During May and June 1953, fire lanes on and adjacent to parts of the right of way of Carrier's Coast Division were plowed by outside contractors with the use of bull dozers. The employes claim that by virtue of the Scope Rule of the Maintenance of Way Agreement this work belonged to bulldozer operators in Carrier's Track Sub-Department. The Carrier asserts that this is seasonal work which must be completed in a limited time after the last spring rains and before the dry summer season; that due to the magnitude of the work it has been necessary and customary to contract out such portions of it as is was unable to perform by use of its own available equipment with due regards for the demands of its usual and ordinary maintenance of way requirements.

While the Scope Rule does not specify the work covered by the Agreement, the principle has been firmly established by prior awards of this Division that in the absence of a specification of the classes of work reserved by a collective agreement, all of the work usually and traditionally performed by the class of employes who are parties to it is reserved to them. Awards 6101, 6068, 5872, 2701.

The question for determination here is, has the work of plowing fire guards usually and traditionally been performed by the Carrier's bulldozer operators? The evidence of record clearly shows that for more than 30 years prior to the effective date of the applicable agreement, viz., January 1, 1953, and on numerous occasions since that date, the practice on this property has been to contract out the work of plowing fire guards when the company's regular equipment was not available for handling it and it was necessary

that such work be done. It appears that at the time the instant claim arose, the Carrier owned 35 tractor bulldozers of various sizes which were spread out over the entire system and otherwise engaged in essential maintenance which could not be deferred.

It is plain that the employes have never had the exclusive right to plow fire lanes, and while this claim is based on the principle that such work is covered exclusively by the Maintenance of Way Agreement, the evidence to the contrary is clear and convincing. See Awards 4585 and 4889. In the absence of clear and unmistakable language requiring it, this Board cannot interpret an agreement to mean the contrary of what the parties by their past conduct have attributed to it. See Award 1609. The Organization is chargeable with knowledge of the past practice shown of record, and where a contract is negotiated and existing practices not abrogated by its terms, such practices are, in the absence of clearly inconsistent provisions, deemed to have been incorporated in the new instrument and enforceable to the same extent as its other provisions. Awards 5404 and 4086. We conclude the the Carrier did not violate the Agreemnt as charged.

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 22nd day of March, 1957.