Award No. 11139
Docket No. MW-10635

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when it assigned repair and remodeling work on its Diesel Shop Building at Ernest Norris Yard, Birmingham, Alabama to a General Contractor whose employes hold no seniority rights under the provisions of this Agreement.

(2) B&B Foreman C. L. Hammack, B&B Mechanics A. W. Butts, Till Chandler, B&B Helpers E. V. Rector, J. A. Hutchinson, B&B Apprentices L. A. Burnell and Jack Faulkner, each be allowed pay at his respective straight time rate for an equal proportionate share of the total man hours consumed by the contractor's forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Carrier contracted with the H. H. Robertson Company of Birmingham, Alabama to perform repair and remodeling work on its Diesel Shop Building in Ernest Norris Yard at Birmingham, Alabama.

The work consisted of installing channel girts and applying corrugated asbestos sheets thereto on two sides of the room housing the lye vat; the installation of two ventilators on the roof of the lye vat and the installation of six old ventilators on the roof of the old assembly room.

All of the material used in said work is readily available for purchase on the open market and the subject work did not require skills, tools or equipment beyond that available to the Carrier from its Maintenance of Way and Structures Department employes.

Vice Chairman Norwood made a personal investigation of the work being performed and reported to the General Chairman in part as follows:

All relevant facts and arguments involved in the dispute have heretofore been made known to employe representatives.

Carrier, not having seen the Brotherhood's submission, reserves the right to make appropriate response thereto and submit any additional evidence which may be necessary for the protection of its interests.

OPINION OF BOARD: This is a dispute between The Brotherhood of Maintenance of Way Employes and The Southern Railway Company.

The Carrier contracted with the H. H. Robertson Company of Birmingham to perform remodeling work on its Diesel Shop Building in Ernest Norris Yard at Birmingham, Alabama. The work consisted of installing channel girts and applying corrugated asbestos sheets thereto on two sides of the room housing the lye vat; the installation of eight ventilators on the roof of the old assembly room.

The Carrier contends that "the work constituted a specialized job". There is no evidence to support the allegation, therefore it is without merit.

The principles applicable to this dispute are well settled. As a general rule the Carrier cannot contract out work which is covered by its collective bargaining agreements. The work was performed on a structure owned by the Carrier and used by it in the operation of its railroad. This work is more nearly in the nature of remodeling, than the erection of a new structure.

Award 4920 by Referee Boyd holds, and properly so, that where the work belongs to a class of employes, it is not necessary to show "practice and custom."

> "The work described in the submission of installing acoustical tile ceiling, tile floors, plywood wainscoating and painting is clearly the work of carpenters and painters and having been performed upon a structure of the Carrier is work intended to be embraced within the scope and classification provisions of the Maintenance of Way Agreement. (See Articles I, X and XV)."

The work involved herein is work that is clearly defined to be embraced within the scope and classification provisions of the Agreement. Surely this is the type of work envisioned to be performed by Bridge and Building Subdepartment Mechanics. Consequently it is not necessary to resort to past practice to determine if the work belongs to the Organization.

For the foregoing reasons we believe the Agreement was violated.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of February 1963.

CARRIER MEMBERS' DISSENT TO AWARD 11139 — DOCKET MW-10635

This award is palpably wrong. It misconstrues the provisions of the effective agreement and flagrantly disregards the fundamental principles which this Division has applied to similar disputes in many prior awards.

In Rule 61 of the agreement effective August 1, 1947, the parties specified that the agreement "does not alter past, accepted and agreed to practices not in conflict herewith."

Awards 3839, 5304, 5563, 5747, 6112, 6492, 6499, 10592, 10715, and 10931 denied similar disputes between these same parties. In these and numerous other Third Division awards, the Board has correctly held that where the applicable agreement is of the general type which does not purport to describe or define the work belonging to employes covered by its terms, the Board must then determine from the evidence whether or not the work in dispute is reserved to claimants through historical practice, custom and tradition on the property.

We fully agree that "the principles applicable to this dispute are well settled." But at this point in the opinion the majority throws away the basic yardstick and erroneously concludes that the work here in dispute is covered by the agreement, "consequently it is not necessary to resort to past practice to determine whether the work belongs to claimants." Denial awards involving similar disputes arising under the same agreement between these same parties are not distinguished or even mentioned. The only award cited (Award 4920, which involved a carrier in the far northwest some 2,000 miles removed from the lines of Southern Railway) does not support the conclusions reached in this case. The dispute in that case was obviously based on the rules and practices in effect **on that property**, and it is significant that the work there in dispute was of an entirely different type and character from the particular work involved in this Docket MW-10635. However, it was similar to the work involved in denial **Award 3839 (MW/Southern Railway)** wherein the Board said:

> "The work here involved is not repair work of fixtures, as contended by the Brotherhood, which type of work the record establishes his always been done by the employes of the Maintenance of Way Department. We find it to be the replacement of fixtures by the construction and installation thereof. The Carrier has established that this latter type of **work has not been customarily per-**

> **formed by Maintenance of Way employes but it has been customarily contracted for, as was done in the instant case. Under the facts we do not think this work, in view of our holdings, is within the scope of the Brotherhood's Agreement** and, consequently, the Carrier did not violate the Agreement by contracting for its performance by the City Lumber Company." (Emphasis added.)

Moreover, nine of the awards between these parties, involving various types of work, were issued subsequent to Award 4920. This very clearly demonstrates that the well-settled principles of the Board are applied in each case to the particular type and character of work in dispute.

Even if any proof existed that the work is of a type to be embraced within the scope and classification provisions of the agreement, or envisioned to be performed by claimants — and no such proof exists — the project most certainly constituted special construction work, requiring special equipment and tools, and special skills not required of or customarily performed by claimants. As evidenced in the record, it was necessary for considerable electric welding to be done as well as electrical work. Claimants are not welders nor are any welders employed in the bridge and building sub-department, nor are electrical workers employed in that department. Carrier was under no obligation to parcel out the project by using claimants on that part of the work they could have done and contracting the remaining work. The evidence of record plainly showed that the project itself was an unusual one and of a type and character not previously required of or performed by claimants. It was construction and installation of a special type, **not** maintenance or repair work.

Although the claim is vague and indefinite as to time elements, carrier pointed out that the work was performed on dates when the named claimants were on duty and performing the usual maintenance and repair work of their regular assignments. None of the claimants lost any work or compensation. The agreement contains no provision for the imposition of penalties. In fact, it expressly stipulates that "except as provided in these rules, no compensation will be allowed for work not performed." (See **Award 10963.**) Here the award imposes a penalty and, in addition, expects the carrier to develop the claims and the extent of the penalty compensation to be allowed claimants for work not performed by them.

For the reasons stated, we dissent.

/s/ R. A. DeRossett

/s/ R. E. Black

/s/ W. F. Euker

/s/ G. L. Naylor

/s/ W. M. Roberts