Award No. 11465
Docket No. MW-10769

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION
(Supplemental)

Martin I. Rose, Referee

PARTIES TO DISPUTE:
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

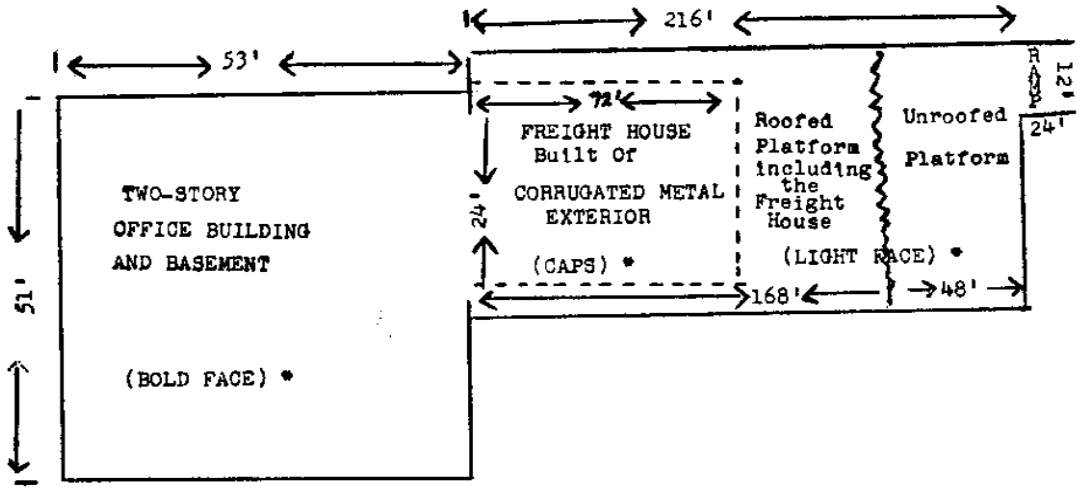
STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when, on or about November 9, 1956, it assigned the work of constructing a combination Yard Office and Freight House at Baker Yard, Terre Haute, Indiana, to a General Contractor whose employes hold no seniority rights under the Agreement.

(2) Each employe holding seniority in the Bridge and Building and in the Equipment and Water Maintenance Departments 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 assigned the work of constructing a combination Yard Office and Freight House building at Terre Haute, Indiana to General Contractor E. H. Montgomery without benefit of negotiations and agreement with the Employes. The contractor started construction work on or about November 9, 1956.

The following sketch (not drawn to any scale) illustrates the general outline and dimensions of the structure in question.



Petitioner's claim is based upon the premise that new construction work of the nature here involved is reserved to the employes covered by the scope of the controlling agreement. This premise is at odds with the language of the agreement relied upon and the unvarying practice thereunder.

The scope of the agreement is limited to employes in the Maintenance of Way and Structures Department. The Carrier asserts that the primary function of the employes in this department, as indicated by the title, is one of maintenance. It is further asserted that it has been the unvarying practice to contract construction work of the nature here involved to general construction contractors, and that it has never been the practice to utilize the employes of the Maintenance Department for projects of this nature. These statements are affirmed by citation of comparable projects handled by outside contractors over the years and the limitations imposed by Seniority Rule 20.

The facts of record, applied to the agreement rules here controlling, necessitate a conclusion that:

1. The claim as presented does not comply with the provisions of the time limit rule in that the employes on behalf of whom the claim is filed are not named, and

2. The performance of new construction work of the nature here involved is not reserved to the employes covered by the scope of the agreement and the contracting of such work to qualified building contractors is not in violation thereof.

A denial award is required.

All data contained herein has been handled with the representatives of the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: In connection with a modernization program at Terre Haute, Indiana, Carrier contracted out to a general contractor the construction of a new office building and freight house designed to hold all the clerical forces at that location. Construction began in September 1956 and completed in July 1957.

The building is a two story masonry and concrete structure with basement and adjoining concrete platform which is partially covered. The freight house is built on a portion of this platform and has a corrugated metal exterior. The building is fully air conditioned and included a yard office, freight office, dormitory, wash and locker facilities, lounge, recreation room and full kitchen facilities. The interior walls of the wash, locker and kitchen areas are faced with glazed tile.

Petitioner contends that the contracting out of the work of constructing a combination Yard Office and Freight House violated the Scope Rule of the applicable agreement, that such work was the usual and customary work of the positions embraced within the scope of the agreement, and that the parties jointly expressed recognition that "all work of **constructing** or maintaining of **buildings**, structures, track, water service or other work within the Maintenance of Way Department on the property belongs to employes coming within the scope of this Agreement." Carrier defends on these alleged

grounds: The claim is defective under the requirements of the August 21, 1954 Agreement; the disputed work is not the type of work reserved exclusively to the employes either by the scope of the agreement or custom and practice; and the disputed work required the use of city licensed crafts.

The "unknown claimants" defense under Article V of the August 21, 1954 Agreement was not raised on the property. Consequently, in accordance with now settled policy, it is barred. See Awards 10963, 10034, 10075, 10684.

With respect to the merits of the dispute, the Scope Rule of the applicable agreement relied upon by the Petitioner states the employes covered by its terms without specifying the work reserved to them. The effect of such a Scope Rule is that Petitioner has the burden of proving that work of the kind in dispute here is reserved to these employes by reason of custom, tradition or practice. See Awards 10715, 11231, 11242.

Petitioner's contention that all building construction work was jointly recognized by the parties as the work of employes covered by the agree- and the General Chairman, copies of which were sent by the writers to Carrier's then Vice-President-Personnel, Vice-President and General Manager, and Engineer-Maintenance, and the fact that the Carrier representatives did not respond. Chief Engineer Moore's letter dated September 22, 1952 to the General Chairman read:

> "It may be of some interest to you to know the A. F. of L. Building Trades Council met in New York about a week ago. A brief write-up of the transactions of this meeting brought out a very interesting thing to the railroad industry.
>
> "I quote from the Engineering News-Record of September 18, 1952, a paragraph from the A.F. of L. building trades forge policies:
>
> > 'That the agreement, made in 1943 giving the Brotherhood of Railway Maintenance-of-Way employes the right to construct on railroad property should be rescinded. The ever-present fear of the encroachment of maintenance crews into the building field was evident in the passage of this resolution.'
>
> "While this resolution may not be of any serious effect on the railroad industry as a whole, it is my thought that you should be aware of what the A.F. of L. are trying to do to the railroad maintenance of way employes. I certainly feel that you will want to look into this situation and protect your interests in the best way possible.
>
> "As you know, we will certainly not want to concede that any one else has a contract with us for constructing tracks on our own property."

The General Chairman replied by letter dated October 7, 1952 which stated:

> "This will acknowledge receipt of your letter of September 22, 1952, in which you direct my attention to a news item appearing in the September 18th issue of 'Engineering News-Record', relative to certain action taken by the A.F. of L. Building Trades council at a recent meeting in New York.

"I appreciate your thoughtfulness in furnishing me with the above referred to information and you can rest assured that we shall not concede that any organization other than ours has a contract and/or right to any construction and/or maintenance work on buildings, structures, track, water service or other work within the Maintenance of Way Department on the property.

"You are further assured of our fullest cooperation in resisting any effort of encroachment upon any construction or maintenance work on buildings, structures, tracks, water service and similar construction and repair work such as is embodied within our Scope Rule. We have exclusively performed all such work in the past and we have no intention of waiving our right to continue performance of such work.

"I am confident that with your sincere cooperation, we shall successfully resist any effort of other crafts to encroach upon our work and thus avoid the necessity of initiating and progressing time claims and grievances which would necessarily result if such work was contracted to outside parties."

There was no response to this letter.

It is clear that the Chief Engineer's letter did not express approval or recognition of the view now asserted by Petitioner. Nor can his letter be construed as a suggestion or offer to enter into an agreement or mutual understanding on any matter. The General Chairman's letter was directed to the news item quoted by the Chief Engineer and did not on its face, or in the circumstances in which it was evoked, necessarily call for a response. Both letters show that they were not related to or concerned with any then existing dispute between the parties involving a subject matter similar to the present controversy. Carrier's failure to respond to the self-serving statements contained in the General Chairman's letter does not furnish a basis for or support the inference of approval and recognition presently urged by Petitioner. Manifestly, the scope of an agreement cannot be regarded as mutually settled by the method proposed by Petitioner's contention.

Petitioner also relies on three photographs of structures which are objected to by Carrier on the grounds that they were not submitted and discussed on the property and are not of probative value because the structures photographed are not identified as to location, date of construction, size, use, interior detail and facilities. It is sufficient to observe that even if the structures depicted are regarded as comparable to the structure involved here, and on visual comparison with photographs of the letter, which were also submitted by Petitioner, we cannot say that they are, the three disputed photographs do not tend to demonstrate that the work in question was reserved exclusively by reason of custom, tradition or practice.

The record shows that Petitioner has not sustained the burden of establishing that the employes embraced within the scope of the agreement have customarily and traditionally or by practice performed the work in question so as to warrant a finding that such work was reserved exclusively to them. Award 10963, cited in support of the claim, did not involve the type of construction work claimed here.

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 that the Agreement was violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of May 1963.