Award No. 11525
Docket No. MW-10660

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, 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, on or about January 14, 1957, it assigned the work of constructing two small outdoor toilet buildings and the excavation and backfilling work necessary to the installation of sanitary facilities at John Sevier Yard, Knoxville, Tennessee to a General Contractor whose employes hold no seniority rights under the provisions of this Agreement.

(2) B&B Foreman G. E. Cline, B&B Mechanics W. C. Barrett, M. D. Harris, W. T. Mitchell, B&B Helpers F. O. Masingill, I. W. Fowler, W. M. McIlreath, B&B Apprentices J. W. Graham and E. Talley each be allowed pay at his respective straight time rate for 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: Commencing on or about January 14, 1957, the Carrier assigned a General Contractor to perform the usual and customary work of its B&B employes at John Sevier Yard in Knoxville, Tennessee. Specifically, the work consisted of the construction of two outdoor toilet buildings which are six feet by eight feet in dimension, and the excavation and backfilling work necessary to the installation of 650 feet of terra cotta sewerage line running from the sewer to the buildings. The buildings were of frame construction and had concrete slab floors.

Approximately ten days' time was required to complete the work and the contractor used an average of four employes on each day in the performance thereof.

Claim as herein presented was filed, the Carrier declining same on the allegation that, "the complained of work constituted new construction as distinguished from maintenance or repair work."

the category of that not embraced in the Maintenance of Way Agreement in evidence. No right to the work is granted the employes by the specific terms of the effective Maintenance of Way Agreement.

While the contractor furnished all materials to do the work and constructed the foundations, the buildings, furnished and installed the commodes, urinals, wash basins, and electric heaters, furnished and installed the Orangeburg pipe used for the sewer lines, and did a complete job by using carpenters, electricians, plumbers, machine operators, and common laborers, claim here presented to the Board involves but a portion of the work contracted. It involves only "the work of constructing two small outdoor toilet buildings and the excavation and backfilling work necessary to the installation of sanitary facilities." Under principles of the above referred to awards, the work to be contracted out is to be considered as a whole and may not be subdivided for the purpose of determining whether some of it could be performed by employes of the Carrier. Several awards to this effect above cited so interpret the very contract here in evidence. Moreover, these same awards have heretofore recognized the management's unrestricted right to contract work of the character here involved. Without question, these awards have denied claims identical in principle.

CONCLUSION:

Carrier respectfully submits that:

(a) The effective agreement was not violated as alleged, and claim is not supported by any rule contained in such agreement.

(b) Work was not of the character usually, customarily or traditionally performed by maintenance of way employes.

(c) Prior Board awards interpreting the agreement in evidence have denied claims identical in principle.

(d) Rule 49 of the agreement in evidence definitely negatives the claim, as it is one for compensation for work not performed.

Claim being without any basis and unsupported by any provision contained in the Maintenance of Way Agreement in evidence and having heretofore been denied in principle by prior Board decisions, the Board cannot do other than make a denial award.

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 after doing so to make appropriate response thereto and present such other information as is essential for the protection of its interests.

(Exhibits not reproduced.)

OPINION OF BOARD: On or about January 14, 1957, Carrier contracted with H. R. Boatman Construction Company to build two toilet buildings six feet by eight feet, on concrete foundations near car repair tracks close to Knoxville, Tennessee. The contractor furnished all materials and labor, which included the installation of sewers, plumbing equipment and elec-

trical work. The work was completed in about ten days during which time the contractor used an average of four employes on each of the days. The claim is only for a portion of the contracted work. Employes say: "We claim only the work of building the structure which houses the toilet facilities."

Employes contend that the work claimed belongs to Carrier's Maintenance of Way employes under the Scope Rule. This Rule does not define the work to be performed by the employes listed therein. It only lists the employes who are covered by the terms and conditions of the Agreement.

This Division has consistently held, in numerous Awards, that where the Scope Rule only lists the employes or the job classifications and not their work, it is necessary to determine whether the work claimed is historically and customarily performed by such employes. Awards 11128 (Boyd), 10715 (Harwood), 10931 (Miller), 10585 (Russell), 9625 (Begley), 7861 (Shugrue), 7806 (Carey) and others.

Employes emphasize our findings in Awards 4491 (Wenke) and 11139 (Moore). In Award 4491 Carmen built and painted five First Aid Buildings instead of Maintenance of Way employes. The record shows that Rule 149 of the Shop Crafts' Agreement with the same Carrier provided that Carmen may be used only to make repairs to shop equipment, foundations, floors, windows, work benches, etc., and "other repairs not enumerated herein when volume of job or jobs in combination is not sufficient." The interpretation of Rule 149 is contained in a letter dated September 3, 1926 from that Carrier's Assistant to Vice-President to all of the Shop Crafts and the Maintenance of Way General Chairman. This specifically established the fact that Carmen had no right to build the five First Aid Stations. Since the Carmen were not eligible to perform that work, and no evidence was presented that this work was historically and customarily performed by other crafts or by contractors, we sustained the claim. This is not the situation in the instant case.

Award 11139 is rather vague and uncertain. No clear indication is given in the opinion upon what basis the claim was sustained other than the general quote from Award 4920 (Boyd). Perhaps it was because the work contracted to be performed was for the remodeling the Diesel Shop Building. We did find that the work did not "constitute a specialized job." For all of these reasons we do not believe that this Award is applicable or is a precedent to the dispute now before us.

Was the work as claimed customarily and historically performed by Maintenance of Way employes? Employes have presented no evidence to support this fact. The Statement of Claim alone is not evidence. Award 7350 (Coffey). A mere assertion is not proof. Award 11118 (Sheridan). The burden of proving the history, custom and practice is upon the Employes. Awards 11128 and 11129 (Boyd), 11118 (Sheridan), 10931 (Miller). This they have failed to do.

There is no categorical denial by Employes to Carrier's statement that: "The matter of contracting work has been one of much discussion between management and employes and their representatives from time to time throughout the years. In each such discussion management has assured employes and their representatives that it had no intention of changing its past practice under which it has not let to contractors maintenance work necessary to the daily operation of the railroad which has been performed year in and year out by maintenance of way employes."

"At page 11, the Carrier repeats another of its stock, routine, pat dissertations, this one dealing with the question of discussion of the matter of contracting work. The carrier's dissertation adds nothing but volume to the record and we shall not comment thereon except to categorically and unequivocally deny the carrier's charge that it has been a practice of many years for the carrier to contract new construction work of the character here involved and that such alleged practice has been acquiesced in by the employes and their representatives. In fact, the record in the case decided by Award 4491 should definitely disclose that it has never been a practice to contract for the construction of small buildings of the size involved in this case and involved in the case decided by Award 4491."

This statement does not prove that new construction work, as claimed, was historically, customarily and traditionally performed by Maintenance of Way employes. We have already discussed Award 4491. It does not "definitely disclose that it has never been the practice to contract for the construction of small buildings of the size involved in this case."

The work here involved was new construction. The contractor furnished all tools, materials and labor. This was not a maintenance or repair job. Similar structures were installed by contractors at Birmingham, Chattanooga, Atlanta and other location. Employes have not denied this. They say only: "We have no knowledge of work of building construction having been performed by contract at Birmingham, Chattanooga, Atlanta and other locations."

Since the Scope Rule by itself does not determine the issue, we need not consider Rules 3 and 4(a) dealing with seniority.

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 Carrier did not violate the Agreement.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

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