Award No. 11581
Docket No. MW-10962

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, 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, on October 1, 1957, it assigned the Macco Construction Company, whose employes hold no seniority under the provisions of this Agreement, to perform the necessary work in the elimination of Tunnel No. 14;

(2) Each equipment operator holding seniority within the System Work Equipment Sub-department be allowed pay at his respective straight time rate for an equal proportionate share of the total man-hours consumed by the contractor's employe in performing the System Work Equipment Sub-department work referred to in Part (1) of this claim;

(3) Each employe holding seniority within the various classes of Powder Gangs on the Shasta Division be allowed pay at his respective straight time rate for an equal proportionate share of the total man hours consumed by the contractor's employes in performing the powder work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On October 1, 1957, and on dates subsequent thereto, all work necessary in the elimination of Tunnel No. 14 was assigned to and performed by the Macco Construction Company whose employes hold no seniority rights under the provisions of the Agreement between the parties.

In performing the subject work, the Contractor's employes were used to operate caterpillar tractors, bull-dozers, carry-alls, and shovels, and to do the necessary blasting which is work that has been customarily and traditionally assigned to and performed by employes holding seniority within the scope of this Agreement.

The work consisted of blasting for the excavation of the cut and the use of the material to make a fill and a channel change in the Sacramento River

OPINION OF BOARD: It is Claimant's contention that on October 1, 1957, and on dates subsequent thereto all work in the elimination of Tunnel No. 14 was assigned to and performed by the Macco Construction Company whose employes held no seniority rights under the provisions of the Agreement between the parties; that the Contractor's employes were used to operate tractors, bull dozers, carry-all and shovels, and do the necessary blasting which was work customarily and traditionally assigned to and performed by employes holding seniority within the Scope of the Agreement; that the work consisted of blasting for the excavation of the cut and the use of material to make and fill a channel change in order to eliminate Tunnel No. 14; that all equipment used in performing this work was comparable to equipment owned by Carrier; that the Claimant employes were available and qualified to perform work necessary in connection with this project.

The Scope Rule involved is, as follows:

> "These rules govern rates of pay, hours of service, and working conditions of employes in all sub-departments of the Maintenance of Way and Structures Department (not including supervisory employes above the rank of foreman) represented by the Brotherhood of Maintenance of Way Employes, such as:
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> "(b) Pile driver, ditching, hoisting engineers, steam crane operators (other than those employed in the Mechanical Department), steam shovel engineers, cranemen, firemen, and miscellaneous equipment operators.
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> "(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."

Carrier, on the other hand, contends that Carrier entered into a contract with the Macco Corporation whereby that company undertook to perform excavation and grading which involved moving approximately 180,000 cubic yards of soil and rock and changing the channel of the Sacramento River in order to create a new roadbed. Carrier asserts that during the years before the first Agreement between Carrier and its employes, and at all times thereafter it has been Carrier's practice to engage private contractors to perform work of the type involved in this claim when in Carrier's judgment it has not had the appropriate equipment and manpower readily available; that the Carrier had neither the necessary equipment nor the skilled employes available to perform the work involved; that Shasta Division has only one powder gang which for years has consisted of four men; that this gang and the operators of the System Work Equipment Sub-department were otherwise fully engaged when the work involved in this claim was being done.

Where the Scope Rules 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 covered by a collective agreement, all of the work usually and traditionally performed by classes of employes who are parties to it is reserved to them. Award 7806.

Petitioners have the burden of proving that work of the type involved here was traditionally performed by the class of employes named. In behalf of the Petitioners there is the bare assertion "that the subject work is of the nature and character that has been usually and traditionally performed by carrier's employes and such work is definitely encompassed within the Scope of the Agreement." It is not enough that the Petitioner show that employes covered by the Agreement have performed similar work. There should have been some evidence that the employes had performed work on a project of the magnitude involved here. See Award 10515.

In a letter to the General Chairman from the Assistant Manager of Personnel while the claim was being progressed on the property we note the following:

> ". . . Also, your attention was directed to the fact that in the past years, both before and subsequent to the last revision of the current agreement, the Company has consistently asserted its right to have work of this magnitude and character performed by independent contractors and your organization has tacitly conceded that right; and your attention was directed to the long list of instances in which the Company has performed comparable work by independent contractors without protest of any kind from the organization or individual employes."

In Carrier's first submission there is contained a list of instances, 1225 in number, extending from the year 1920 to the year 1957, where work had been contracted out by the Carrier. There was no denial by the Petitioner that this was the list produced by Carrier on the property. There is no satisfactory evidence that Petitioner had protested these practices until the year 1953. The general statement was made that they had surely protested every instance of which they had knowledge. It was admitted there had been no protest of record.

There is no provision in the current Agreement that requires the Organization's permission before contracting out work.

The Carrier's contracting out of work is of such long duration and so frequent, it would seem such practice can only be eliminated or reduced by collective bargaining.

In view of all the facts and circumstances in this case—because of the customs and practices prevailing openly and abundantly of contracting out work to others not covered by the Agreement, we do not believe that Organization has established traditionally its right to the work involved here. This case is similar in fact to Award 7806 which involved the same parties and the same Agreement and is controlling here.

Having determined this matter on the merits we find it unnecessary to consider whether the Claimants were unnamed or unidentified in the Statement of Claim.

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 re-

spectively 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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1963.