

Award No. 11598

Docket No. MW-10166

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 it assigned the work of installing corrugated metal culverts underneath Trestles Nos. 240-8N, 240-4N, 160-4N, 46-7M&B and at Mile Posts 32-1 MB, 1-8M&B and 64-4P to a General Contractor whose employees hold no seniority rights under the provisions of the Agreement.

(2) The Carrier violated the Agreement when it assigned the work of filling Trestles Nos. 240-8N, 240-4N, 46-7M&B and 160-4N to a General Contractor whose employees hold no seniority rights under the provisions of the Agreement.

(3) B&B Foreman H. K. Gaddy, B&B Mechanics W. K. Gaddy and Sam Moore, B&B Helpers W. J. Hobbs and J. J. Mabin and B&B Apprentices W. C. Walker and J. W. Hicks each be allowed pay at their respective straight time rates 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.

(4) Bulldozer Operator A. E. Tyler be allowed pay at his straight time rate for a number of hours equal to the number of hours consumed by the Contractor's forces in performing the work referred to in Part (2) of this claim.

EMPLOYES' STATEMENT OF FACTS: Subsequent to June 1, 1956, the work of installing corrugated metal culverts underneath the following trestles and at the following Mile Post locations

Trestle No.	Dimensions
240-8N	66 in. x 74 in. x 80 ft.
240-4N	66 in. x 74 in. x 90 ft.
160-4N	64 in. x 74 in. x 108 ft.
46-7M&B	64 in. x 74 in. x 108 ft.

Carrier, not having seen the Brotherhood's submission, reserves the right after doing so to make response thereto.

(Exhibits not reproduced.)

OPINION OF BOARD: Sometime in 1956 Carrier contracted with Armco Drainage and Metal Products, Inc., "to furnish all material, fabricate and install in place corrugated pipe culverts at certain locations on Carrier's Mobile Division." Carrier also contracted with Ellard Contracting Company "to construct earth fills over certain of the metal pipe culverts installed under the trestles by Armco." This work was started about May 14, 1956 and completed July 21, 1956.

Petitioner contends that this work should have been performed by Claimants; that Carrier violated the Scope Rule of the Agreement when it contracted out this work; that by custom and practice this work belonged to the employees covered by the Agreement.

The Scope Rule of the Agreement does not define the work to be performed by the employees listed therein. It contains no job descriptions.

In Award 11525, with the same Referee, involving the same parties and the same Agreement, we said:

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

It is also a well established principle of this Division that under such a Scope Rule the facts must show that such work was historically and customarily performed exclusively by such employees. The burden of proving such exclusive historical and customary practice is upon Claimants. Awards 11128 (Boyd), 10636 (LaBelle), 11118 (Sheridan) and 10950 (Ray).

Petitioner has submitted in the record ten affidavits which purport to support its position "that a practice and custom of long standing supported the assignment of this work to employees assigned to this Carrier's Maintenance of Way Department and covered by the Agreement in effect between this Carrier and its Maintenance of Way Department employees."

A careful reading of these affidavits shows that such employees had from time to time performed some or all of the work involved. They also show that this work was not historically and customarily performed exclusively by such employees. One affidavit says: "It is my personal knowledge that work of this type was done by the employees in the maintenance of way department." This is, undoubtedly, true. But, it does not say that such work was done exclusively by Maintenance of Way employees. Another says: "I have been employed on the Mobile Division since January, 1918 and didn't know of any contract work until the last few years, when they began to use Armco Pipe." Still another dated November 22, 1957 says: "This was the practice until about 1953, then the Railway Company began contracting some of this class of work, which was protested by the Maintenance of Way Employees." One affidavit says that this work was done by Maintenance of Way employees "up until the last six or seven years." Seven of the ten affidavits, all dated the latter part

of November, 1957, say that work of this kind had been done by outside contractors during the previous two to seven years.

Carrier shows in the record that such work had been done by subcontractors since 1935. From 1935 through 1957 subcontractors furnished the material and performed such work forty-three times at various locations.

In addition, Carrier has submitted fifty-nine affidavits which show similar work performed by subcontractors at many of the Carrier's locations over a long period of years.

Petitioner attacks the validity of the affidavits submitted by Carrier. It says that "these so-called statements were never made a particular part of this dispute during the handling thereof on the property and was not discussed with the Employees during the handling of this dispute on the property."

The record does not contain copies of correspondence between the parties relating to the handling of the claim on the property. We assume that the parties complied with provisions of the Railway Labor Act and had a conference before the claim was presented to the Board. At that conference the parties undoubtedly discussed their respective positions. We assume that the Carrier's position was no different then than as it later set out in its Ex Parte Submission. Presumably the specific 59 affidavits were not discussed. But the general position of the Carrier with respect to the application of the Scope Rule and the historical and customary practice was, unquestionably, discussed. These affidavits merely support Carrier's position. They were sent to Petitioner about two weeks before Petitioner's Ex Parte Submission was received by the Board. Under similar circumstances, we have held that such evidence attached to the original submission can be considered by the Board. Awards 10385 (Dugan) and 8755 (Sempliner).

Even without Carrier's affidavits, Petitioner has failed to show that the work involved was historically and customarily performed exclusively by Maintenance of Way employees.

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 Employees involved in this dispute are respectively Carrier and Employees 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 12th day of July 1963.