

Award No. 11645

Docket No. MW-10827

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 March 4, 1957, it assigned the work of excavating a drainage ditch between Mile Posts 76 and 78 on the Washington Division to a General Contractor, whose employes hold no seniority rights under the provisions of this Agreement.

(2) Mr. A. L. Hartman be allowed the difference between what he received as a Crawler Crane Operator (\$376.71 per month) and that of a Power Shovel Operator (\$404.97 per month) for March 4, 1957 and for each day thereafter that the contractor's forces were engaged in the performance of the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Commencing on March 4, 1957, the work of excavating a drainage ditch between Mile Posts 76 and 78 on the Carrier's Washington Division was assigned to and performed by a General Contractor whose employes hold no seniority rights under the provisions of this Agreement.

The work consisted of the operation of a power shovel in excavating the drainage ditch to the desired depth and width and the placing of the material therefrom on the existing roadway embankment.

The Carrier owned a power shovel (similar to that used by the contractor) which was standing idle, loaded on a flat car, in its Charlotte yard, which had theretofore been operated by its employes in the performance of work of the character described above.

The Claimant, who was a qualified power shovel operator, but who was then working as a crawler crane operator, a lower rated position, was available, ready and willing to perform the power shovel operator's work here involved, had the carrier so desired.

The agreement violation was protested and the claim as set forth herein was filed in behalf of the claimant.

rier and the employes of the carrier could have no possible claim to its performance."

It has been shown that the work of digging the drainage ditch here involved was not embraced in the scope of the agreement in evidence, and that the agreement applies only when operators of machines are utilized. Furthermore, it was not work of the character exclusively performed under an established practice, although it is recognized that in some situations the Carrier has utilized operators in digging ditches when machinery was available for that purpose. In the instant case, though, no such machinery was available and the job was too big to have done by laborers using picks and shovels. A considerable undertaking was therefore involved. There was also a time element involved, in that it was desirable to have the work performed as expeditiously as possible.

It is therefore clear that prior awards of the Board, several of which interpret the agreement here in evidence, have denied claims identical in principle.

CONCLUSION

Carrier respectfully submits that:

(a) Claim which the Brotherhood here attempts to assert is vague and indefinite and amounts to nothing more than a monetary demand for no specific amount on no specified dates other than March 4, 1957, and no work was performed on that date.

(b) The effective agreement was not violated and the monetary demand is not supported by it.

(c) Prior Board awards have denied claims identical in principle, several of which interpret the agreement here in evidence.

The claim and demand being without any basis and unsupported by the plain, unambiguous language of the agreement in evidence, the Board cannot do other than make a denial award.

All evidence submitted in support of Carrier's position is known to employe representatives.

Carrier, not having seen the Brotherhood's submission, reserves the right, after doing so, to make response thereto and submit any other evidence necessary for the protection of its interests.

OPINION OF BOARD: Carrier entered into a contract with William B. Hopke to dig a drainage ditch "at the toe of the fill carrying Carrier's tracks between Mile Posts 76 and 78 on the Washington Division. . . ." The work was urgent "because a very slight fall was available from the ponded area to the point of discharge." The contractor furnished the heavy ditch digging machinery as well as all other necessary equipment, tools and labor.

Employes contend this work belongs to Maintenance of Way Employes under the Scope Rule. In Award 11525, with the same Referee, involving the same parties, the same Agreement and a similar claim involving contracting of work, we said:

"This Rule does not define the work to be performed by the employees listed therein. It only lists the employees 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 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."

This principle is enunciated in Awards 11128 (Boyd), 10715 (Harwood), 10931 (Miller), 10585 (Russell), 9625 (Begley), 7861 (Shugrue), 7806 (Carey) and others.

Employees have presented no evidence that the work claimed was customarily and historically performed by Maintenance of Way employees. The burden of proving the history, custom and practice is upon the Employees. A mere assertion and the Statement of Claim is not evidence and is not proof of that fact. Awards 11128 and 11129 (Boyd), 11118 (Sheridan) and 10931 (Miller).

Carrier's claim that, in the past, such work had been contracted out to subcontractors, is nowhere denied by the 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 26th day of July 1963.