Award No. 11837
Docket No. MW-11033

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when, on December 26, 1957, it assigned other than Bridge and Building employes to remove drift from around the sub-structure of Bridge No. 99.0 on the Chattanooga Division.

(2) B&B Foreman J. T. Johnson, Jr., Carpenters H. C. Lankford and E. L. Ricketts, Helpers W. L. Earls and W. O. Yarbrough and Laborers D. G. Yarbrough and L. E. Whitfield each be allowed eight hours' pay at their respective straight time rates because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Claimants have established and hold seniority in the Bridge and Building Sub-department on the Carrier's Chattanooga Division.

On December 27, 1957, a Bridge and Building gang, under the supervision of B&B Foreman Crisp was instructed by the Carrier to remove an accumulation of drift from around the sub-structure of Bridge No. 99.0 which constituted a hazard to its safe use.

Upon arrival at the bridge, these B&B employes found that a section gang, consisting of six section laborers under the supervision of Section Foreman J. H. Grider, had, upon instructions from the Track Supervisor, removed most of the drift from around this bridge on December 26, 1957 and had just completed the task at the time the B&B gang arrived on December 27. A total of fifty-six man hours was consumed by the section gang in the performance of this work.

The Agreement violation was protested and the instant claim was filed in behalf of the claimants. The claim was handled in the usual manner on the property and declined at all stages of the appeals procedure.

The Agreement in effect between the two parties to this dispute dated September 1, 1949, together with supplements, amendments and interpretations is by reference made a part of this Statement of Facts.

it, this Board cannot interpret an agreement to mean the contrary of what the parties by their past conduct have attributed to it. See Award 1609 . . ."

The provisions of Rule 33 of the agreement, revised to November 1, 1947, were identical to those of Rule 33 of the current agreement which became effective September 1, 1949.

In Award 4086 this Division held:

". . . When a contract is negotiated and long existing practices are not abrogated or changed by its terms, such practices are deemed to have been within the contemplation of the parties and approved. Indeed, there is sound precedent for giving them the same force and effect as if they had been incorporated within the terms of the contract itself. See Awards 2436, 1397, 1252, 507. What has just been stated is all the more true when—as here—in addition to long continued acquiescence prior to the filing of a claim the parties have since revised the working Agreement, then in force and effect, without abrogating or doing away with the practices of which they then and now complain."

and in Award 5747:

"When a contract is negotiated and existing practices are not abrogated or changed by its terms such practices are enforceable to the same extent as the provisions of the contract itself."

Carrier submits it is therefore obvious that the practice of using section gang employes, where practical, to clean drift from around and under bridges, which has been in effect for years, was not changed in the revision of the current agreement.

It is, therefore, apparent that the employes' claim and contention is not supported by the agreement or the interpretative practice, for which reason the claim should be denied.

For the Board to rule otherwise would be tantamount to writing something into the agreement which currently does not exist.

All matters referred to herein have been presented in substance, by the carrier to the general chairman of the organization representing the employes, either in conference or correspondence.

OPINION OF BOARD: On December 21, 1957 the Track Supervisor requested that the Division Engineer notify the Building and Bridge employes to remove an accumulation of drift underneath Bridge No. 99.0. When the Building and Bridge gang arrived at the bridge to perform this work on December 27, 1957, it found that a Section Gang had begun the removal of the debris on December 26, 1957. The Building and Bridge employes took over the assignment and completed the clearance of the drift.

The Building and Bridge employes claim that Carrier violated Rule 33 of the agreement when it used Track Sub-department employes who hold no seniority in the Building and Bridge Department to remove the drift on December 26, 1957. They contend that this work is maintenance and should, under Rule 33, be performed exclusively by employes in the Building and

Bridge Department. They further assert that the two exceptions in the rule which permit the use of workers other than Building and Bridge employes do not apply. This was not a situation where the work was assigned by the railway to Construction Sub-department employes nor was it an emergency.

Carrier takes the position that the work performed "did not constitute construction, maintenance, or repairs as contemplated in Rule 33." It argues that it had been the practice on the N.C. & St. Louis District for many years to use Section Gang employes to remove drift from around bridges and it refers to Rules and Instructions for the Government of Maintenance of Way Employes as the basis for this practice.

We do not accept Claimants' contention that Rule 33(a) gives them exclusive rights to perform the work in question. Although this rule designated that the general work of maintenance, construction, and repair of bridges when done by company forces be performed by employes in the Building and Bridge Sub-department, it does not in explicit language confer the specific work under consideration upon the Building and Bridge workers. By omitting the grant of exclusiveness in the provisions of the agreement the parties acknowledged approval of the practice in which Track forces performed this work.

We hold that Carrier did not violate the agreement and claim for compensation for the named employes is denied.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 8th day of November, 1963.