Award No. 11846
Docket No. MW-9996

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Martin I. Rose, 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 its Agreement with its Brotherhood of Maintenance of Way Employes beginning on or about September 14, 1956 when it assigned the work of scaling the side of a cut at M.P. 159.5 on the Sacramento Division to the Morrison-Knuteson Company, whose employes hold no seniority under the aforesaid Agreement.

(2) Each employe holding seniority in CLASS 1 — Engineers in the Work Equipment Sub-Department, as reflected by the System Seniority Roster dated January 1, 1956, be allowed pay at their respective straight-time rates for an equal proportionate share of the total number of man-hours consumed by the contractor's forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The facts in this dispute are exactly as they were presented in both the letter in which this claim was initially presented and in the letter of appeal; the truth or accuracy of which has been neither denied nor refuted. Said facts were presented as follows:

"**EMPLOYES' STATEMENT OF FACTS:** On or about September 14, 1956, the Carrier assigned employes of the Morrison-Knuteson Company to the work of scaling the side of a cut at M.P. 159.5, on the Sacramento Division. The equipment used by the contractor's forces consisted of one Northwest Shovel of 1½ yard capacity, which the contractor leased from M. P. McCaffrey, Inc.; one Caterpillar Tractor with bulldozer blade attached to the front end and two rooters attached to the rear end; two Dump Trucks of about ten yard capacity each; and one Hough Payloader, Model H.M. The Payloader is the same equipment classified as Utility Tractor in our Agreement.

As will be noted, that rule merely names the classes of employes whose rates of pay, hours of service, and working conditions, are governed by the rules of the current agreement. It does not make any reference to work or to the specific duties that may be required by those classes of employes, nor does it set forth the duties that will be reserved to or that will be exclusively performed by the classes of employes named. As a matter of fact, **throughout the life of the current agreement and preceding agreements, work of the magnitude and character here involved has never been considered exclusively reserved by the Scope Rule to employes covered by the current agreement.** As evidence thereof there is attached as Carrier's Exhibit "C" a statement showing a partial list of grading and bridge work performed by contract during the years 1951 to and including a portion of 1955, to which no exception was taken by petitioner.

CONCLUSION

The claim in this docket is entirely lacking in either merit or agreement support and therefore carrier requests that said claim, if not dismissed, be denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute. The carrier reserves the right, if and when it is furnished with the submission which has been or will be filed ex parte by the petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in such submission, which cannot be forecast by the carrier at this time and have not been answered in this, the carrier's initial submission.

(Exhibits not reproduced.)

OPINION OF BOARD: Because of its conclusion that relocation of tracks at MP 159.5 away from the embankment on the downhill side was necessary on the Sacramento Division, the Carrier decided to cut into a mountain to provide space for the tracks. About September 14, 1956, the Carrier contracted out the work. The work performed by the contractor's forces is described by the Employes, without dispute, as scaling the side of a cut and utilizing the material obtained for widening of a fill, a short distance away. The Employes assert, also without contradiction, that the equipment used in the work consisted of a 1½ yard shovel, one Caterpillar tractor with bulldozer blade, two rooters, two dump trucks and one Hough Payloader.

To support the claim that Carrier violated the parties' Agreement by contracting out such work, the Employes rely on the scope rule of the Agreement and contend that the work performed by the contractor's forces "is of the nature and character that has been usually and traditionally performed by the Carrier's employes and that it is definitely encompassed within the scope of the agreement."

Carrier defends on the grounds that first, the claim is invalid under Article V of the 1954 National Agreement because it is for unnamed claimants, second, the work in dispute "has never been performed exclusively by Company forces," and third, "the time within which it was necessary that the work be performed as related to available Company

forces and equipment, made it necessary that the project be performed by contract." The record shows that these objections were asserted during the handling of the claim on the property.

The scope rule of the parties' Agreement states the classes of employes covered by its terms but does not specify the work reserved to such employes. In Award 11581, involving the parties here and the same scope rule, the Board said:

> "Where the Scope Rule 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."

This Division has also held that to sustain such burden of proof more must be shown than that the employes have performed similar work. In Award 10515, the Division said:

> "It is not enough that the Organization show that employes covered by the Agreement have performed similar work. The Organization must show that such employes have exclusively performed such work."

We are unable to conclude on the record here that the Employes have sustained the burden of proving that the disputed work has been performed exclusively by Carrier's forces so as to fall within the scope rule of the Agreement under the custom and tradition doctrine. The assertion that the disputed work "was exactly the same kind of work performed by the Carrier's regular forces almost every working day of the year" does not alone establish the exclusive right to such work where, as here, it has also been asserted that such work "has never been performed exclusively by Company forces." See Awards 10515, 10529, 11280.

Awards 6629 and 7805, involving the parties here, are cited in support of the claim. We do not find them apposite. In each of those cases, the Board determined only the validity of the specific defense asserted by the Carrier. No determination was made by the Board in either case as to whether the employes had the exclusive right to the work involved. Award 6629 sustained the Carrier's defense that it was necessary to contract for use of certain equipment and the services of the operator. Award 7805 sustained the Carrier's defense that emergency conditions required contracting out the work.

In view of our conclusion that the record does not sustain the contention on which the claim is predicated, it is unnecessary to discuss the other defenses asserted by the Carrier.

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 evidence does not establish that the Agreement was violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of November 1963.