Award No. 12021
Docket No. MW-11295

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO AND WESTERN INDIANA RAILROAD 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 constructing an addition to the so-called welfare building at 51st Street to Contractor Ellington Miller.

(2) Each employe holding seniority in the Bridge and Building Department be allowed pay at his respective straight time rate 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 case can best be set forth by quoting the letter of claim presentation and the response thereto, which read:

"November 19, 1957

Mr. H. J. Lieser, B&B Supervisor
Chicago and Western Indiana Railroad
8378 Vincennes Avenue
Chicago 20, Illinois

Dear Sir:

I have recently been advised that the Carrier is constructing a building for Sheet Metal Workers and Carmen of the Mechanical Department at 51st Street and that the work of constructing this building has been assigned to Ellington Miller. The building is 40 feet by 28 feet wide and is constructed on a concrete foundation and is to have a red face brick exterior.

It is my understanding that work on this building was started on October 22, 1957. Inasmuch as this Bridge and Building work was assigned to an outside contractor without agreement with or con-

To our knowledge the Employes did not cite even one such instance.

Further, the Carrier submits that the Employes in their handling of this dispute did not cite any agreement rule, provision, or other prohibition of the Carrier's action in this case, nor have they complied with the requirement of Article 5(a) of the August 21, 1954 (National) Agreement, which reads in part:

> "(a) All claims and grievances must be presented in writing by or on behalf of the employe involved * * *."

"Each employe" holding seniority in the Bridge and Building Department (Item 2 — Statement of Claim) does not identify the employe or employes who the organization claims may have been used in the construction of a building of the nature involved in this claim. In this respect at least the claim lacks the specificity required to identify the employe or employes involved.

The employes in their handling on the property have not supported their contention that the money they claim as a penalty is properly due them as a result of the Carrier's failure to meet its obligation imposed by agreement. A review of the record submitted hereto will not reveal any citation by the Employes of contract provisions requiring such penalty payments. In the absence of such provisions it must be ruled the claims are not valid.

The Carrier affirmatively asserts that all matters included in its submission have been made known to the Employes either orally or in writing and made a part of this dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier's original facilities were placed in service about 50 years ago. The Carrier began to revamp and modernize these facilities about 1954. Among other improvements was the construction, by a contractor, of the first portion of a service building for Car Department employes which was completed in March 1955. No claims or protests were filed by the M of W employes in connection with the construction of this service building by the said contractor. The instant claim involves the construction of an addition to that building for the use of Shop Crafts employes. The work here involved was new construction; the contractor furnished all tools, material and labor.

The Carrier's ex parte submission contains the uncontroverted statement that from 1939 to 1953 there were 145 instances of contracting work, on all types of projects, without one instance of a protest by the Petitioner.

The language of the Scope Rule in the instant case is general in nature. The Rule does not define the work to be performed by the employes listed but only contains lists of the employes who are covered by the terms and conditions of the Agreement. The only circumstances under which it could be found that the claim could be sustained would be if the work in question was historically and customarily performed by the Petitioner's members. In such event the burden of proving such a history, custom and practice would have to be sustained by the Petitioner.

The facts in the instant case demonstrate that from 1939 to 1953 in 145 instances this type of work was performed by contractors without protest

by the Petitioner. This past practice shows that historically and customarily the work in question was performed by contractors. The Carrier did not violate its Agreement. For this reason the claim must be denied and having been denied it becomes unnecessary to pass on the other points raised by the parties in their ex parte submissions.

This Division has consistently held, in numerous decisions, that where the Scope Rule only lists the employes or the job classifications and not their work, it is necessary to determine whether the work claimed is historically and customarily performed by such employes. In support of this proposition see Awards 11128, 10715, 10931, 10585, 9625, 7861 and 7806. The burden of proving the history, custom and practice is upon the Employes. See Awards 11128 and 11129, 11118 and 10931. The Board also cites with approval Award No. 11525 for a case which, on its facts, is strongly analogous to the instant matter. We are familiar with the recent Award No. 11938 (Dorsey) but find no difficulty in distinguishing that case from the instant claim. There the work of erecting a steel fabricated shed was not novel and the Carrier had in the past constructed similar metal buildings with its own forces and the Claimants were fully qualified to perform this work. These facts are entirely different from the case at bar.

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 Carrier did not violate the Agreement.

AWARD

The Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December 1963.