

Award No. 12075
Docket No. MW-11739

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
NORFOLK AND WESTERN RAILWAY COMPANY**

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

(1) The Carrier violated the effective Agreement when it assigned or otherwise permitted other than employees holding seniority under the Agreement to perform the work of constructing a four-foot by six-foot stone box culvert at Porter's Run, a sixteen-foot concrete arch culvert at Lick Creek and a twenty-foot concrete arch culvert at Saladay Creek.

(2) Each employe named in the attachment to the letter dated September 16, 1958 addressed to Mr. L. C. Cantwell, Supervisor B&B, by General Chairman R. R. Painter be allowed pay at the rate indicated opposite his specific name, plus any wage increases occurring during the period of this violation, for an equal proportionate share of the total man-hours consumed by outside forces in performing the work referred to in Part (1) of this claim retroactive sixty (60) days from September 15, 1958.

EMPLOYEES' STATEMENT OF FACTS: The factual situation involved here is set forth in the letter of claim presentation, without the Carrier taking any exception thereto, which reads:

"September 16, 1958

Mr. L. C. Cantwell, Supervisor B&B
Norfolk & Western Railway Company
Portsmouth, Ohio

Re: Contract work being performed on
the Norfolk & Western Railway —

Dear Sir:

My attention has been invited to the fact that this Carrier has engaged and assigned outside contractors to perform Bridge and Building work on this property. It is my information that an outside contractor has been assigned to perform the work of constructing a four foot by six foot stone box culvert at Porter's Run at Mile Post N 576 plus 1906.7 ft. and that another contractor has been assigned

tion and application of the Scope Rule of the parties. "The mere filing of a claim in conflict with the Agreement is not enough." (First Division Award 9560.) "Such an interpretation by the responsible parties under the Agreement is subject to change only by Agreement and not by unilateral appeal to this Board." (Third Division Awards 6043 and 6159.)

The Carrier's position as set forth in this submission clearly proves there is no merit whatever to the Employees' claim in this case. In support of its position the Carrier cites the following additional Third Division Awards:

3254	6300	6930	7804
3255	6329	7031	7806
3839	6422	7400	7910
5489	6549	7401	7953
5747	6592	7402	7955
5840	6817	7424	8658
6251	6929	7765	

Also the following Second Division Awards: 1110, 1808 and 2250.

The Carrier desires to respectfully point out that the jurisdiction of the Third Division, National Railroad Adjustment Board, is limited to the matter of interpretation or application of Agreements and that such Division has no jurisdiction whatsoever to write any agreement or to read any non-existent rule into an agreement, which it would be doing if it sustained the instant claim.

It is the position of the Carrier that the Employees did not have exclusive rights to the work involved in the instant case, and also that it was not a violation of the Brotherhood of Maintenance of Way Employees' Agreement for the Carrier to have such work performed by contractors.

Denial of the claim in its entirety is respectfully requested.

All material used in this submission was presented to or was known by the Employees while this claim was being progressed on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: At the outset, it is necessary to consider two procedural questions first raised by Petitioner in its rebuttal submission. Petitioner contends that:

"(a) Carrier's submission to the Board presents issues and holdings not presented in the handling of the claim on the property.

(b) No reason was given for denial of the claim at any stage of handling on the property."

Under item (a), Petitioner argues that Carrier's Exhibits B and C may not be considered because the issue of past practice was raised for the first time in Carrier's Ex Parte Submission. Carrier's Exhibit B is a stenographic report of a conference had on June 16, 1941, on the issue of past practice

with respect to contracting out of maintenance of way work. It is signed by the representatives of the Carrier and Petitioner and it interprets the meaning and intent of the Scope Rule of the Agreement. Since the Agreement is before us, interpretations agreed to by the parties are part of that Agreement, and may be properly presented in the record at any stage of the outlined procedures. In its Ex Parte Submission, Petitioner agreed that interpretations of the Agreement are before the Board when it said:

“The Agreement in effect between the parties to this dispute dated December 16, 1954, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.”

Exhibit C lists dates and places when Carrier contracted for maintenance of way work. This refers to and substantiates the Agreement interpretation in Exhibit B. We find that there is no merit to the contention that Carrier presented “issues and holdings not presented in the handling of the claim on the property.”

Under (b), Petitioner argues that Carrier gave no reasons for the disallowance of the claim as required in Section 1(a) of Article V of the National Agreement dated August 21, 1954. In a letter dated September 16, 1958, Petitioner wrote Carrier’s Supervisor that “Carrier has engaged and assigned outside contractors to perform Bridge and Building work on this property.” Carrier replied on November 4, 1958, as follows:

“Yours of September 16, 1958 above subject.

We note that you have cited no Agreement rule as supporting this claim, and this claim in my opinion, is not supported by any Agreement rule and it is therefore declined.”

After more correspondence between the parties along similar lines, a conference was held on January 6, 1959. On January 16, 1959, Carrier wrote Petitioner, in part, as follows:

“This case was fully discussed with you in conference. While you did not cite any Agreement rule in support of the claim when it was filed, we understood in conference your position is that the claim is supported particularly by Rule 1 and the seniority rules of the M.W. Agreement.

In our opinion, the claim is not supported by any rule in the M.W. Agreement and it is declined.”

On the basis of Petitioner’s presentation of the claim on the property, Carrier’s disallowance of the claim was within the requirements of Section 1(a) of Article V of the National Agreement of August 21, 1954.

The Scope Rule of the Agreement does not define the work to be performed by the employes listed therein. It is a well established principle of this Division of the Board “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.” Awards 11525, 11784, 11831, 11832, 11128, 10931 and many others.

The record conclusively shows that the type of work involved in this claim was not historically and customarily performed exclusively by Claimants and

employees covered by the Agreement. It shows that over the years Carrier had contracted for the performance of similar work. The mere fact that maintenance of way employees had, on some occasions, done such work does not establish the fact that such work was historically and customarily performed exclusively by such employees. Petitioner has failed to meet the burden of proof.

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 13th day of January 1964.