Award No. 12670
Docket No. MW-12154

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, 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 it assigned the work of cleaning station loading landings and cribbing between the ties of main line track at passenger station landings on the Washington Division to forces holding no seniority within the scope of the Agreement between the two parties to this dispute.

(2) Tractor Operator H. L. Gibson and Laborer H. L. Thomas each be allowed eight hours' pay at his respective straight time rate for each day such outside forces were assigned to perform the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On February 16, 17, 18, 19, 20, 24, 25, 26 and 27 and on March 2, 3, 4, 5, 6, 9, 10 and 11, 1959, and on dates subsequent thereto, the Carrier assigned forces holding no seniority rights under the provisions of this Agreement to perform the work of operating a tractor equipped with a back hoe and front end loaded and of operating a highway dump truck used in cleaning station loading landings at Orrington, Virginia, and in cleaning and/or removing old cribbing (ballast) material from between the ties of main line track at the passenger station landing at Monroe, Virginia.

The Claimants, who have established and hold seniority respectively as a Tractor Operator and as a Laborer, were available, fully qualified and could have expeditiously performed the Tractor Operator's work and Laborer's work (truck driving) which was assigned to outside forces.

The Agreement violation was protested and the instant claim filed in behalf of the Claimants. The claim was declined as well as all subsequent appeals.

The Agreement in effect between the two parties to this dispute dated August 1, 1947, together with supplements, amendments, and interpretations thereto, is by reference made a part of this Statement of Facts.

Claim, being barred, should be dismissed by the Board for want of jurisdiction. However, if despite this fact, the Board assumes jurisdiction, it cannot do other than make a denial award, for to do otherwise would be contrary to the terms of the agreements in evidence.

OPINION OF BOARD: The essential facts in this dispute are not in issue. Preparatory to the installation of a drainage system at the terminal in Monroe, Virginia, the Carrier contracted with the C. C. & T. Construction Company for the use of a small tractor equipped with a back hoe and a dump truck, with the contractor's employes as operators thereof, to dig out oil-soaked material from between ties in the track, load it into the dump truck and haul said material away and dispose of it. This work was started on February 16, 1959, and continued until the project was completed.

On one occasion, the contractor used the small back hoe to clean pulpwood bark from the team track at Arrington, Virginia (18.4 miles north of Monroe), and in the same manner, hauled the pulpwood bark away and disposed of it.

Petitioner contends that this work was reserved by the Scope Rules of the two Agreements here involved to the Carrier's Maintenance of Way employes, in this instance, holding seniority as tractor operators and laborers. This is another case between these parties concerning the "contracting out" of work allegedly belonging exclusively to employes covered by Scope Rules which do not define the work to be performed by the employes listed therein. The rules list positions covered, but contain no job descriptions.

In the first instance, Carrier objects to the Board's consideration of the merits of the case on grounds that the claim is so general and vague as to the extent of the damages sought, it is barred. We do not agree. The Claimants are named and the measure of the damages claimed can readily be ascertained from the records of the Carrier.

It is well established on this Division in claims of this kind that the work contracted "out" must be of the type which employes under the controlling Agreements have traditionally and customarily performed. Awards 12317, 11128, 7861 and others. The burden of establishing the fact of exclusive performance must be carried by the Petitioner through competent evidence of past practice. Awards 11598, 11128, 10636 and others. Mere assertions are not proof. In determining the specific question before the Board which is whether or not the work involved is reserved exclusively by the Scope Rules of the Agreements, we are limited to the record and the facts stated therein as are properly before us.

The Petitioner has included in its submission a number of statements from Maintenance of Way employes in support of its assertion that the work described herein is of the character which has been customarily and traditionally performed by the Carrier's Maintenance of Way and Structure Department. The Carrier contends that such statements were not submitted to it when the dispute was being handled on the property, and, therefore, are not admissible here under Board Circular No. 1. We find no evidence in the record to refute the Carrier's statement that the data had not been presented to it on the premises and have concluded that such statements submitted by the Organization must be excluded from our consideration. Award 11128.

The Carrier denies that the disputed work falls within the scope of the two Agreements as such work has not historically or customarily b-

formed by Maintenance of Way employes. The Carrier asserts that the "outside" contractor used a specially equipped tractor necessary for the performance of the work of a type never owned by the Carrier or operated by its employes. In further support of its position, the Carrier cites a number of our awards arising out of previous disputes between the same parties concerning the application of the Scope Rules contained in these Agreements to the question of Management's right to contract work out to third parties.

This leaves the record on the question of custom and practice with only the assertion by the Organization that the work here described belongs to Carrier's Maintenance of Way employes holding seniority as track operators and laborers and the assertion by the Carrier that such work has not, historically or customarily been performed by such employes. The Board has no alternative but to find that the Petitioner has not sustained the burden of clearly establishing, by evidence of probative value, the essential fact that the Claimants, historically and customarily performed the same kind of work on this property as is here involved. Therefore, the claim will be 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 26th day of June 1964.