Award No. 13161
Docket No. MW-13355

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Arnold Zack, 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 the Agreement when it assigned or otherwise permitted employes of the Nottingham Septic Tank Company to perform the work of installing two (2) septic tanks and 200 feet of lateral to serve the section quarters at Thousand Palms.

(2) Water Service Sub-department employes W. F. Doyle, James A. May, P. H. Fitzgerald, I. H. Smestad, Michele Demico, H. L. Sanner, John W. Sauer, G. B. Kealey, H. J. Van Burkleo and W. R. Cusick each be allowed pay at their respective straight-time rates for an equal proportionate share of the total number of man hours consumed in the performance of the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Claimants have established and hold seniority in their respective classes within the Water Service Sub-department on the Los Angeles Division, Southern Pacific Company. They are assigned to Water Service Gang No. 2 with headquarters at the Los Angeles General Shops, Los Angeles, California. Their seniority dates are as follows:

Name	Position	Seniority Date
W. F. Doyle	Water Service Foreman	12/26/42
	Assistant Foreman	12/26/42
	Mechanic	2/16/37
	Helper	3/14/35
James A. May	Water Service Mechanic	8/17/42
	Helper	8/17/42
P. H. Fitzgerald	Mechanic	4/ 1/43
	Helper	3/ 3/43

III. CONCLUSION

Carrier respectfully requests that the claim be either dismissed or denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Late in 1960, the Carrier contracted with M. C. Nottingham Company for the manufacture, delivery and installation of two septic tanks and a drainage system for section forces at Thousand Palms, California. On January 6, 1961 employes of the contractor delivered the equipment and installed it in two 6x6x10 ft. holes and a 200 ft. trench that they had previously dug using the contractors own equipment. They then backfilled the holes and trench in accordance with the requirements of their contract with the Carrier.

The instant claim was filed on behalf of Water Service Sub-department employes W. F. Doyle, James A. May, P. H. Fitzgerald, I. H. Smestad, Michele Demico, H. L. Sanner, John W. Sauer, G. B. Kealey, H. J. Van Burkleo and W. R. Cusick who it is asserted, were entitled to perform the digging, installing, and backfilling, and thus should be compensated for the work denied them by the Carrier's action. The Employes argue that this work is of the character normally and traditionally performed by the Claimants under the Scope Rule in water service and that they possessed the skill, ability and availability to do the disputed work in the instant case. They contend that the Carrier acknowledged the Employes exclusive right to do this work by failing to raise a challenge to the contrary when the case was being processed on the property. Accordingly, the Employes continue, the Carrier has the burden of proving that it acted properly in contracting out work which otherwise could have been performed by its own employes. They assert that the Carrier has not met this burden with its arguments of a "unit" contract, complete warrany and the requirements of local construction codes. Employes therefore request compensation to the Claimants for earnings lost due to the Carrier's improper action in contracting out said work.

The Carrier argues that it acted properly in contracting out the disputed work to the M. C. Nottingham Company. It acknowledges that the parties' Scope Rule expressly gives the positions of water supply and plumbing to its own employes, but argues that this is not an exclusive grant of jurisdiction over all work performed in these categories. Claiming many instances when work such as that currently in dispute was performed by non-bargaining unit personnel. It asserts that in the absence of proof by the Employes that they did, in fact, have exclusive jurisdiction to such work either by specific language of the Agreement or by evidence of exclusive performance of such work in past practice, it must be held that the Carrier acted properly. This it concludes was particularly true in the light of the uniqueness of the units installed, the necessity of meeting local codes, the guarantees provided by the contractor and the fact that this had to be negotiated as a "package" or "unit" contract complete with installation.

Two issues are raised by this case. The first concerns the scope of jurisdiction granted to Water Service Sub-department employes by the parties' Agreement and by their past practice. If it is found that the Claimants did in fact possess the right to do the protested digging, installation and backfill in this instance, then the Board must proceed to a determination of the Carrier's justification in taking such work away from its own employes and contracting it out to non-covered individuals.

Turning to the first issue, that of the scope of the employes jurisdiction over this type of work, the Employes raise the threshold question of whether the exclusive rights of the Employes were in fact discussed by the parties when the case was considered on the property or whether this issue is now newly raised. The correspondence between the parties prior to submission of this dispute to the Board makes frequent reference to the contractual right of the employes to perform this work, and the fact that such work had been contracted out on prior occasions. In addition the Employes in their letter of April 17, Carrier's Exhibit C, Page 3, claim this work:

> ". . . has always in the past many years been assigned to and performed by employes holding seniority within that Sub-department."

They also allude to it as "reserved" (page 4) and point out (page 5) that:

> "It is our contention that the Carrier is obligated under the provisions of the Agreement to assign all work covered under the Scope of the Maintenance of Way Agreement. . . . (to covered employes)."

In view of the foregoing, the Board finds that the question of the exclusive right of the employes to perform this work was raised in timely fashion on the property and is now properly before us.

On the merits of the first issue, we are concerned with a Scope Rule which in general terms outlines the various classifications of employes coming thereunder. This Board in the past has properly characterized it as a general Scope Rule which does not per se reserve specific tasks to bargaining unit personnel. Such an exclusive reservation must come from a specific listing of the tasks to be performed within the Scope Rule itself as is sometimes done in other Agreements or by demonstration that the parties in their day to day operations have actually reserved the performance of certain tasks to certain classifications of employes. (11581, 11846, 12694.)

There is evidence in this case that the Employes unsuccessfully sought to obtain such an exclusive right to perform all work in their department through negotiations in 1947 and again in 1957. Accordingly the language of the Scope Rule, itself would permit the Carrier to assign work of this type to non-covered individuals.

Insofar as the practice of the parties is concerned, it is unquestioned that covered employes have done digging, placement of certain equipment, and backfilling as part of their water supply job. But mere performance of such tasks is not the sole determinant of exclusive jurisdiction over all such work (11846). What is required is a showing that this work was usually and traditionally performed by classes of employes to whom it is reserved (7806). In this the burden is upon the Petitioner to show exclusive past practice. (10715, 11846, 12694.)

This Board has read the record and is convinced that the disputed work has also been performed by outside contractors on many occasions without challenge by the Petitioner. Accordingly, we are of the opinion that the Petitioner has not met the burden of proving exclusive jurisdiction over the disputed tasks. Indeed in the absence of Employes evidence to the contrary, it appears that the contracting out of such digging, placement and backfill work has been a normal unchallenged procedure when sewage work has been handled by independent contractors.

Inasmuch as the Employes have failed to meet the burden of proving their exclusive right to the disputed work, there is no need to pursue the second issue, noted above: the propriety of the "unit" contract.

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 14th day of December 1964.