

**Award No. 13822**

**Docket No. MW-13905**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**(Supplemental)**

**Nathan Englestein, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**CHICAGO AND NORTH WESTERN RAILWAY COMPANY**

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

(1) The Carrier violated the Agreement when it assigned the work of constructing a yard office building and a tool house at Pierre, South Dakota to forces outside the scope of this Carrier's agreement with the Brotherhood of Maintenance of Way Employees.

(2) B&B foremen J. I. Christianson and Lincoln F. Bruess; Assistant B&B foremen A. H. Sande, Harold Bergerson and John Hoveland; B&B mechanics Alvin Bergerson, Forrest D. King, D. M. Justice, E. H. Palbicki, George A. Sneesby, D. J. Wadewitz and G. D. Frank each be allowed pay at his respective straight time rate for an equal proportionate share of the total number of man hours consumed by outside forces in performing the work referred to in Part (1) of this claim.

**EMPLOYEES' STATEMENT OF FACTS:** On September 21, 1961, the Carrier advised the General Chairman that the work of constructing a Yard Office at Pierre, South Dakota would be contracted. This decision was made by the Carrier without prior negotiation or agreement with the General Chairman. In the aforesaid letter, no reference whatsoever was made to the construction of a tool house at the same location, but it was subsequently learned that the Carrier also assigned the work of erecting said tool house to outside forces.

Employees of the Barrett Construction Company of Pierre, South Dakota, who hold no seniority under the Agreement, commenced work on the Yard Office on October 23, 1961, and completed work on February 7, 1962. Approximately 115 man-hours were consumed by the outside forces in performing B&B work on said building. The dimensions of this building are 24 feet by 72 feet.

- "1) Your claim for all labor paid the contractor for construction of the above mentioned facility is not valid since a good part of the work being done by the contractor is of a class that could not be considered properly B&B work;
- "2) We do not have a sufficient number of men qualified for all the finishing and other fine work required to be carried out in this facility;
- "3) All of the B&B men who are willing and able to work at the present time, are employed by the Railway Company on B&B work, and we do not have sufficient B&B men to carry out the above work, together with other work being performed by B&B men, within the time limit required;
- "4) On October 23, 1961 under our Bulletin No. 63, we bulletined five carpenter positions. We only received bids on three of the positions. Qualified men were not available for these positions."

Furthermore, even if the contracting in this case would have prior to October 7, 1959 violated the agreement between the C&NW and the Brotherhood of Maintenance of Way Employees, said contracting subsequent to October 7, 1959 was permissible under the agreement of October 7, 1959 between the railroads represented by the Eastern, Western and Southeastern Carriers' Conference Committees and the employees of such railroads represented by the Brotherhood of Maintenance of Way Employees, Article I of that agreement provides, in part:

"In the event a carrier decides to effect a material change in work methods involving employees covered by the rules of the collective agreement of the organization party hereto, said carrier will notify the General Chairman thereof as far in advance of the effectuation of such change as is practicable and in any event not less than fifteen (15) days prior to such effectuation. If the General Chairman or his representative is available prior to the date set for effectuation of the change, the representative of the carrier and the General Chairman or his representative shall meet for the purpose of discussing the manner in which and the extent to which employees represented by the organization may be affected by such change, the application of existing rules such as seniority rules, placement and displacement rules and other pertinent rules, with a view to avoiding grievances arising out of the terms of the existing collective agreement and minimizing adverse effects upon the employees involved.

Therefore, even if this were a material change in work methods, it was permissible under the October 7, 1959 agreement.

The carrier submits that the claim in this case is not supported by provisions of schedule rules, and must therefore of necessity be denied in its entirety.

(Exhibits not reproduced.)

**OPINION OF BOARD:** Carrier contracted with the Barrett Construction Company to erect a combination depot-yard office building 24 x 75 feet and a tool house 24 x 75 feet at Pierre, South Dakota. The work on these pre-

fabricated steel structures was begun October 23, 1961 and was completed February 7, 1962.

Two B & B Foremen, three Assistant B & B Foremen, and seven B & B Mechanics claim compensation for an equal proportionate share of the man hours put in by the construction company workers. They argue that the Scope Rule encompasses all the work of building, repairs, reconstruction, and operation in the Maintenance of Way Department, and since the work at issue is that of building in the Maintenance of Way Department, its performance by others was a violation of the Agreement. They assert furthermore that they had the requisite skill and ability to do the job.

Carrier's denial includes the arguments that the Scope Rule does not reserve this work exclusively to B & B employees, that it has been Carrier's practice to contract out this type of work, and that the number of B & B employees available was insufficient to do the work.

The Scope refers to "Employees . . . engaged in or assigned to building, repairs, reconstruction, and operation in the Maintenance of Way Department." Hence Maintenance of Way employees involved in building work are under this Agreement. However, under the language of the Agreement all building work is not exclusively reserved to Maintenance of Way employees.

Following a well recognized principle of this Board, Claimants must therefore establish their right to this work by custom, tradition, and practice. The record does not disclose such proof. On the contrary, Carrier indicates that there has been a past practice of contracting building construction to outside firms. Furthermore, this practice was continued after the negotiation of a new Agreement in 1961.

Awards both in support of and against claims arising from contracting work to outside firms, involving the same Scope Rule, have been cited by the parties. If any underlying principle is discernible in these awards which have been cited, it is that the nature of the construction work is the controlling factor in the determination of the issue. Generally, claims were denied in which construction of a new structure was involved, while those which involved repairs to or improvement of existing construction including such work as tuckpointing, blacktopping, and roofing were sustained. The instant dispute involved the construction of new buildings which was customarily awarded to outside contractors by Carrier.

In the correspondence between Organization and Carrier at an earlier stage in the handling of this dispute on the property, only part of the work was disputed; later Organization asserted that all the work involved in constructing these buildings was covered by the Agreement. We find, however, that the construction of the building must be considered as an integral project, since it is not practicable and feasible to subdivide it.

For the foregoing reasons the Agreement was not violated and claim is 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 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

The Agreement of the parties 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 6th day of August 1965.