

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22367  
Docket Number MW-22262

Nathan Lipson, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(The Kansas City Southern 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 painting Bridges A-326, C-326, A-328 and A-331 to outside forces beginning June 14, 1976 (System File 013.31.178).

(2) B&B Employes D. G. Brown, N. Maggard, H. N. Tucker, J. W. Randolph, T. Forsee and J. McKay each be allowed pay at their respective rates for an equal proportionate share of the total number of hours expended by outside forces in performing the work described in Part (1) hereof."

OPINION OF BOARD: The instant claim was precipitated by a letter dated April 9, 1976 from the Carrier to the Organization advising that 4 steel bridges in the Poteau, Oklahoma area had deteriorated to the point that sand blasting was required to remove old paint, dirt, grease and rust, prior to said bridges being painted. The letter went on to advise that some of the deck girders consisted of 4 girders per span, rather than the usual 2 that are found, which, in the opinion of the Carrier, compounded the surface preparation and painting problem. Their letter finally stated "Such sandblasting and painting requires equipment and supervision not possessed by us, and in addition our forces are fully occupied and have not performed such work in the past 20 years." The letter concluded with a statement of the Carrier's decision to contract the work out.

The record contains un rebutted evidence from the Carrier that there has not been a "paint gang" among the employes for over 20 years, and that even when there was a crew regularly assigned to painting, only brushes were used. None of the Bridge and Building Gang employes have had experience in either sand blasting or spray painting with commercial equipment, nor was any evidence offered

that said employees had the qualifications to do the work. In addition, the Carrier does not possess sand blasting or spray painting equipment, nor are the supervisors familiar with such work. It is, however, quite clear that the involved employees have frequently painted, using brushes, and that such painting has included work on bridges, and presumably, the preparation of surfaces to be painted.

On the other hand, the Carrier presented substantial evidence that on many instances, over a period of many years, maintenance of bridges, including painting, was contracted out, and that this has long been accepted by the Organization. The Organization's position in said regard is that the contracting out of large projects of this nature is not in dispute, but that none of the bridges involved in the instant claim is more than fifty feet long. Such bridges, in the opinion of the Organization, are "small jobs" which could well be handled by the employees, using existing methods. In any event, the Organization feels that the contract preserves work for the employees, and the equipment used is irrelevant --- i.e., the Carrier can acquire additional equipment if necessary to meet its obligations to the employees.

The following contractual provisions have been asserted by the Organization as applicable to the instant claim:

"RULE 1

Scope

These rules govern the hours of service, working conditions, and rates of pay of employees in the Maintenance of Way & Structures Department in the sub-departments shown below:

(a) Bridge and Building sub-departments:

- (1) Bridge and Building Gangs
- (2) Scale Gangs
- (3) Water Service Gangs"

\* \* \*

"RULE 2

Seniority

2-3. Seniority rights of employees to new positions and vacancies as set forth in Rule 11 shall be restricted to their respective sub-departments and territories."

\* \* \*

"RULE 4

Seniority Rosters

4-1. Seniority rosters of employees for each classification and territory as set forth in Rule 2-5 will be separately compiled, and will show names and seniority dates."

There can be no doubt that the Rule provisions set forth above have at least the implied effect of establishing the rights of the employees covered to their traditional work assignments. When the Carrier and Organization entered into a collective bargaining agreement, that fact alone demonstrated their mutual recognition of the bargaining unit and implied an understanding that said bargaining unit would not be undermined.

When the parties further adopted Rules on Scope, Seniority and Seniority Rosters, they added weight to the idea that the affected employees' jobs would be protected. Thus, when Bridge and Building Gangs are set forth in a Scope Rule, it has been held that said employees were entitled to the work involved, and further that "--- Bridge and Building work consists of the construction, repairing, maintaining or dismantling of bridges." (Award No. 4077 - emphasis added). Accordingly there can be no doubt that if the work at issue were the traditional work of the Bridge and Building Gangs, the instant claim would have to be granted.

The Organization, both in its submission of the dispute to this Board, and in the course of oral argument, has provided numerous Awards, which support the conclusions stated in the preceding paragraph.

Included are Awards Nos.:

4077; 15893; 1314; 10871; 11752; 12785; 17523;  
4921; 14371; 16009; 16430; 18500; 19924; 20412.

But it is to be noted that in all of the above cases, the Boards sustained the positions of the Organization, because the work under consideration was identified with the bargaining unit, and could, without significant difficulty for the Carrier, be continued to be performed by the bargaining unit. Yet, in the face of such considerations, the work had been assigned to others.

In the instant case, however, the Organization has not at all proved that its members have ever performed the specific work at issue on a system-wide basis, to the exclusion of others. But it is well established that in order to prevail in subcontracting cases, probative evidence must be produced by the Petitioner that the disputed work was performed by claimants to the complete exclusion of others. That proposition has been accepted in the Third Division Awards Nos. 9565, 11054, 12774, 12972, 13161, 14022, 19761, and 20421.

It is also well known that in deciding these kinds of cases past practice should be given considerable weight. Thus, there are Awards holding that when a history of subcontracting work is found, such work may not exclusively belong to the bargaining unit employees. For example, see Third Division Awards Nos. 10560, 14229 and 2679.

The applicability of the above Awards to the present situation is clear: for over 20 years neither the existence of a paint gang, nor a practice of B & B employees doing sand blasting or spray painting has been shown. Instead, the evidence says that such work has been consistently subcontracted. It is also clear that in the aggregate, the sand blasting and spray painting of four bridges is not a "small job," which should be handled by expensive or antiquated methods.

In addition to all of the above, the Board would note that claims such as here presented must be viewed in common sense terms. An Organization properly resists the subcontracting of work when either jobs in their entirety, or the steady work of the employees are in jeopardy. But the evidence here is that the B & B employees were not deprived of work or job security.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A.W. Paulsen  
Executive Secretary

Dated at Chicago, Illinois, this 30th day of March 1979.