Award No. 12694
Docket No. MW-12437

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, 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 effective Agreement when it assigned the work of installing glass in new window frames and the painting of the window frames and of the outside of the old Stationery and Electric Buildings on Bay Street, West Oakland, California to J. D. Tucker, a tuckpointing contractor.

(2) Paint Foreman L. E. Moody, Painters M. W. Garcia, R. C. Smith, A. F. Vasconellos, J. A. Carrille, D. Gray, E. Francis and M. J. Mroczkowski each be allowed pay at his respective straight time rate for an equal proportionate share of the total number of man-hours consumed by the contractor's forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Carrier assigned the work of installing glass in new window frames, the painting of the window frames and the painting of the exterior of the old Stationery and Electric Buildings on Bay Street, West Oakland, California to Contractor J. D. Tucker.

Contractor Tucker sub-contracted the glass installation work to another contractor, but used his employes to perform the work of painting the window frames and the exterior of these buildings.

The work of replacing defective glass in other than the new window frames, together with the work of painting the interior surface of these buildings was assigned to and performed by the Carrier's B&B Painters.

The work assigned to contract was started on September 8, 1959 and was completed on November 30, 1959. The Contractor's forces consumed 56 man-hours in installing the glass, 212 man-hours in painting the window frames and 558 man-hours in painting the exterior of the buildings.

The claimants, who were assigned to B&B Paint Gang No. 1 with head-

II

DECISIONS OF THE FEDERAL AND STATE COURTS SUSTAINING CARRIER'S INTERPRETATION OF THE CURRENT AGREEMENT

An extensive annotation reviewing the important court decisions dealing with the right of an employer to contract out work sometimes performed by employes who are protected by a collective labor agreement appears in 57 American Law Reports, Annotated, commencing at page 1394. At page 1400 the general rule laid down by the cases is stated as follows:

> "§2. **Contracts containing no express prohibition of subcontracting.**
>
> "It has been generally held, that, at least in the absence of bad faith on the part of the employer, a collective labor contract which contains no express prohibition against an employer's hiring an independent contractor for the performance of work formerly done by employes covered by the contract does not preclude the employer from hiring an independent contractor to do such work. This rule is applicable, irrespective of whether the contract contains, or does not contain, a clause defining the prerogative of management."

Among the many cases cited as authority for the above-quoted statement on the law is **Amalgamated Asso., S.E.R.M.C.E.** v. **Greyhound Corp.** (1956, CA5th Fla.) 231 F2d 585, 57 ALR2d 1394.

Under the rule thus clearly laid down by the courts, carrier's right to contract out work which might otherwise be performed by carrier's MofW employes remains unimpaired to the extent that it has not been specifically restricted by agreement with those employes. The facts discussed above indicate in the clearest way possible that the current agreement contains no such limitation or restriction upon carrier insofar as the work involved in this claim is concerned.

Other decisions of the courts which should be observed in this case are those holding that rights of railroad employes under railway-collective bargaining agreements are governed by the ordinary rules of contract law—a principle which this and the other Divisions of the NRAB have repeatedly recognized. This principle is stated as follows by the District Court for the Northern District of New York in **Crowley** v. **Delaware & H. R. Corporation,** 63 F. Supp. 164:

> "[1] The plaintiff by this action seeks the legal determination that the award made is in accordance with his legal rights. Washington Terminal Co. v. Boswell, 75 U.S. App. D.C. 1, at page 10, 124 F. 2d 235, at page 240. **Such legal rights must be determined in accordance with the law of contracts.** (System Federation No. 59, etc., v. Louisiana & A.R. Co., D.C., 30 F. Supp. 909, affirmed 5 Cir., 119 F. 2d 509), **and to recover here plaintiff must establish that the bargaining agreement of June 24, 1940, has been breached by the defendant."** (Emphasis ours).

III

CONCLUSION

Carrier respectfully requests that the claim be either dismissed or denied. (Exhibits not reproduced).

OPINION OF BOARD: The Carrier in the instant case engaged the services of an Independent Contractor to do a certain type of repair and mainte-

nance work on two of its buildings. Generally speaking, the work insofar as the Contractor was concerned, consisted of waterproofing the buildings, installing glass in new window frames, painting of the window frames and the exterior of the buildings. The glass installation work was subcontracted to another Contractor and the work of replacing defective glass in other than the new window panes, together with the work of painting the interior of the buildings was performed by the Carrier's B&B Painters.

The issue to be resolved in this case, succinctly stated, is whether or not, as the Organization maintains, it has the exclusive right under the Scope Rule, to perform the work done by the Contractor. An examination of this rule leads to the conclusion that it is general in nature, merely listing the various categories of employes covered by its terms. We are unable to find a clear, precise delineation of the work to be performed by the employes involved in this dispute. In the absence of such specificity, the Petitioner has the burden of proving that work performed was of a type historically, and traditionally done by him. (See Awards 11846, 11847, 11581, 7806.) The Petitioner has failed to present a preponderance of evidence to sustain his claim. On the other hand, the Carrier has pleaded the defense of long established practice and has presented the Board with a voluminous list of exhibits to strengthen its position. The exhibits show that the Carrier long before the adoption of the current agreement, as well as subsequent to it, engaged independent Contractors for the type of work involved in this case.

The principle that the onus is on the Petitioner to present a preponderance of proof to sustain his claim when invoking a Scope Rule, which lacks a descriptive specificity of the work to be performed, has been recognized in many awards emanating from this Board. The same principle involved in this case, was applied in awards previously mentioned, and we are unable to distinguish these cases from the instant one; more so since they involved the same parties and the same Scope Rule. We therefore must deny the claim.

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 30th day of June, 1964.