

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24508  
Docket Number MW-24520

Edward L. Suntrup, Referee

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way **Employees**  
(Western Pacific Railroad Company)

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

(1) The Carrier violated the Agreement when it assigned ballast loading work at Oroville, California on September 23, 25, 28 and October 2, 1980 to outside forces (Carrier's File GM Case No. 12676-1981 BMW).

(2) **The** Carrier also violated Article IV of the May 17, 1968 National Agreement when it did not give the **General** Chairman advance written notice of its intention to contract said work.

(3) As a consequence of the aforesaid violations, Equipment Operator D. R. Edwards shall be allowed forty (40) hours of pay at the front-end loader operator's straight-time rate."

**OPINION OF BOARD:** In its claim to the Carrier, by letter dated November 17, 1980, it is the **contention** of the Organization that the Carrier was in violation of Current Agreement when it permitted the loading of ballast into railroad cars by a sub-contractor on September 23, 25, 28, 1980 and October 2, 1980 at Oroville, California. Carrier response to this claim, by letter dated November 26, 1980 was that "ballast at Oroville is made under contract with a private contractor and as part of his contract, he is obligated to load **our** ballast cars when spotted. This work is an extension of that operation . . .".

With respect to the record before it, the Board is in accord with Organization position concerning the inappropriateness of Carrier Exhibits "G" through "S" as part of that record. Although the Carrier does make reference to a number of these Exhibits in its letter to the Organization of March 5, 1981, there is no evidence that the Carrier actually made them a part of the record on property. **In accordance** with Board precedent no new materials can be introduced before the Board which have not been made part of the record on property (Third Division Awards 20178; 20841; 21463; 22054).

A review of the record, however, fails to produce sufficient substantial evidence of contract violation. Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (**Consol. Ed. Co. vs Labor Board**, 305 U.S. 197, 229). **That** the work in question was in fact subcontracted out is not at issue. The Board finds deficient, however, Organization claim that either the Scope Rules of the contract or Article IV of the National Agreement of May 17, 1968 were **violated**.

It is well established tradition of the Board, stated so often that it need not be referenced here, that the burden of substantiating a claim falls on the party stating such. A search of the record fails to produce evidence of probative value that the loading of ballast at the locale in question exclusively by the Organization members falls under the title of past practice. That a Carrier End Loader, with an Organization member as Operator, was doing such work at the Oroville facility for a short period of time prior to the filing of the instant claim is not denied, in the record, by the Carrier. The fact of such does not, however, in itself establish Organization claim to exclusivity. Further. Organization claim of Carrier violation of Article IV of the National Agreement of May 17, 1968 is dismissed under the estoppel doctrine, by reference only to the most recent Carrier contract with a subcontractor to do the work in question (Bee Bee Contractors), which contract is part of the record, and not by reference to other contracts which have been eliminated from the record before the Board as stated in the foregoing.

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

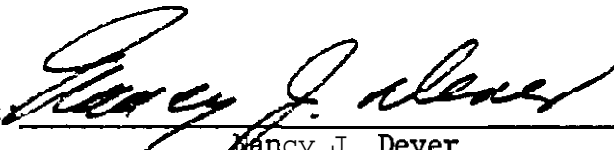
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONALRAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever  
Executive Secretary

Dated at Chicago, Illinois, this 30th day of August 1983.

