Award No. 13466
Docket No. MW-13513

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Arnold Zack, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE ROSCOE SNYDER & PACIFIC RAILWAY

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

(1) The Carrier violated the Agreement when it assigned the work of applying ballast to and surfacing of the main line between Mile Posts 0 and 21 to outside forces.

(2) Section Foremen Hubert Starnes and M. A. Hale and Section Laborers W. A. Mullen, C. B. Nance, R. C. Stewart, L. L. Bruce, A. D. Reeves, O. L. Vest, W. C. Hanes, V. M. Leatherwood, R. R. Hammack, C. M. Anderson and G. R. Anderson each be allowed pay at their respective pro rata rates for an equal proportionate share of the total man-hours consumed by the contractor's forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On or about June 12, 1961, employes of Contractor Bob Downs commenced applying ballast and surfacing the main line track between Mile Posts 0 and 21. Ninety-six (96) man-hours were consumed each day by the Contractor's forces in the performance of the aforementioned work.

The maintenance and repair of the Carrier's tracks and right-of-way has always been assigned to and performed by the Carrier's track forces.

The claimants were regularly assigned to their positions, willing and capable of efficiently performing the work assigned to contract.

The Agreement in effect between the two parties to this dispute dated September 1, 1949, together with supplements, amendments and intrepretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Article 1 reads:

"These rules govern the hours of service and working conditions of the following classes of employes:

There is no contention in this case that any of our regular maintenance forces were thrown out of work by our contracting the job in June of 1961. All potential claimants were regularly employed at the time. There is no claim here by a furloughed man. There were no furloughed maintenance-of-way men to claim it. If the work had not been contracted out, it would just not have been done.

The Board's ruling throughout the years in Awards 6422, 6492, 6541, 6644, 8083, 8148 and 8184, to mention a few, has been that the Scope Rule does not give exclusive right to work unless so stated in the agreement.

The Board has consistently held that past practices shall govern unless specifically prohibited in the basic agreement when negotiated. This is borne out in Awards 4701, 4702, 7304 and 7600.

The text on the subject of labor management relations, **Labor Relations Expediter,** has this to say regarding the case at hand:

> "**Contracting Work Out.** Transfer of work performed by the employer's own employes to another employer.
>
> > The decision whether to have work performed by the employer's own employes or to hire it done by a contractor is normally a business judgment which an employer is free to make. However, when purpose is to get rid of union employes, or otherwise to combat organization of employes, the **NLRB** and the courts regard it as a form of unlawful discrimination (NLRB v. Bank of America National Trust and Savings Association) (LR-CDI – 52.46, 54.667.)"

Many union contracts forbid the employer to contract work out, sometimes under any circumstances, and sometimes when the result is to discriminate against employes. In the absence of such an agreement, arbitrators usually hold that the employer is within his rights to contract work out. (Electro Physical Laboratories, Inc., 1947-7-LA474) (LA-CDI-2.137, 117.38.)

There have been many decisions by many boards on this question, and each case necessarily turns on a careful analysis of the facts and agreement involved in that case. In this particular case there was no intent to harm our employes; on the contrary, we feel that we were assisting our employes. No employe was damaged because of the contract. A past practice was followed which had never been made a subject of negotiation.

(Exhibits not reproduced.)

OPINION OF BOARD: On June 1, 1961, the Carrier contracted with the Rostex Corporation to place 2-inch rock screenings under ties on the roadbed between Mile Posts 0 and 21. This work consumed 96 man-hours daily, during which time the Claimants were occupied at their regularly assigned positions.

The instant claim was filed by the Organization protesting the contracting out of bargaining unit work. It asserts that the Carrier in negotiating the Scope Rule recognized that maintenance of way work would be performed by Organization employes; that the work here involved, with one exception, in 1960, has been customarily and traditionally performed by such

employes; and, that the Carrier acted improperly in depriving them of their rightful work. Accordingly, it concludes, the Claimants are entitled to compensation for the earnings thus denied them.

The Carrier asserts that the Scope Rule involved in this case is general in nature; that the past practice both prior to and since the negotiation of the Agreement has been to contract out substantial maintenance of way work; and, that the Organization has heretofore acquiesced in this practice and cannot now be heard to protest it.

The Agreement between the parties in this case contains a Scope Rule which may be characterized as general in nature and thus requires a showing of customary and traditional practice in job performance to support a claim of exclusivity. No such practice of traditional and customary performance of the disputed work by employes covered by the Scope Rule has been demonstrated. Indeed, the evidence is to the contrary. In its list of items which have been contracted out by the Carrier, both prior to and subsequent to the negotiations of the parties' Agreement, at least two instances of similar work being performed by outside contractors are noted: one in 1949, and the second to the same contractor as in the instant dispute, in 1960.

The Organization contends that oversight in knowledge of these earlier transgressions precluded timely protest. But this Board has held that despite claims of unawareness of violations, the Organization is, nonetheless, charged with such knowledge (13400); nor can absence from the property by Organization officials constitute a valid defense.

In view of the foregoing we must conclude that the Organization has not met the burden of showing that maintenance of way work of the character here involved has been traditionally performed by the Claimants so as to constitute an exclusive reservation of such work to them.

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 April 1965.