Award No. 13638
Docket No. MW-12717

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when, on or about September 1, 1959, it assigned the work of erecting a prefabricated steel building at Sterling, Colorado to a General Contractor whose employes hold no seniority rights under the provisions of this Agreement.

(2) Each of the following named Bridge and Building employes 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.

H. M. Nordquist	H. A. Lane	E. White
V. J. Burke	D. L. Schleeman	L. H. Inman
M. D. Williams	P. J. Deines	R. J. Covey
G. B. Hanway	L. C. Hassenplug	J. W. Ralph

EMPLOYES' STATEMENT OF FACTS: In 1959 the Carrier arranged to have a new prefabricated steel building 22½ feet in width by 54 feet in length erected at Sterling, Colorado.

The work of constructing the foundation and floor, as well as the plumbing work, was assigned to and performed by the Carrier's Maintenance of Way and Structures Department employes.

On or about September 1, 1959, the work of erecting the prefabricated steel building and other work incidental thereto was assigned to and performed by Allen Yost Construction Company, whose employes hold no seniority rights under this Agreement.

The instant claim was presented and progressed in the usual and customary manner; but was declined at all stages of the appeals procedure.

2. Both parties, by their conduct for more than thirty-eight years, during which five spearate agreements were negotiated, have recognized that the work herein under discussion is excluded from the purview of the Agreement.

3. Awards cited herein, particularly Awards 5521 and 7600 involving contracted work on this property, clearly sustain Carrier's position that the claim is totally without merit.

4. The disposition of claims involving all types of contracting work subsequent to the date of Award 7600, as shown in Carrier's Exhibits 6 to 13 inclusive, including erection of 4 similar metal buildings, proves conclusively that both parties recognize such work as being excluded from the agreement.

5. The action of Petitioner in serving Section 6 notice, immediately subsequent to the date of Award 7600, requesting a rule to cover contracting out work, and President Carroll's explanation before a Senate Subcommittee of the purpose of the proposed rule, clearly bears out the fact that no prohibition against contracting out any work exists in the current agreement.

6. Petitioner not only admits, but states in writing that claimants positively are incapable of performing the work in dispute. (See Carrier's Exhibits Nos. 2, 3 and 4.)

8. The Federal Court decision identified as Carrier's Exhibit No. 14 holds that unless the employer expressly agrees with the union not to contract out work, it does not violate the collective agreement to have the work performed by outside contractors. That no such expression can be found in the agreement here is evidenced by Item 5 above.

With these irrefutable facts before it, the Board must deny the claim in its entirety for lack of merit.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim arose from the assignment of the work of the erection of a prefabricated steel building at Sterling, Colorado, to a contractor whose employes are not covered by the Agreement. The B & B named employes make claim that Carrier violated the Agreement, particularly Rules 1 and 2. They point out that since the Scope Rule covers all employes in the Maintenance of Way and Structures Department except for those expressly excluded, it is a rule of inclusion and exclusion and thus reserves the right to perform this work to employes covered by this Agreement and precludes any other employes from doing it. Claimants argue that since the work of constructing buildings is designated in Rule 2 and is reserved to the employes grouped under the B & B Sub-department, the work of erecting the prefabricated steel structure is work that clearly belongs to them.

Carrier denies that the Agreement gives the Maintenance of Way employes the exclusive right to this work and emphasizes that for the past thirty-eight years it has maintained the practice of giving work of this nature to outside contractors.

The Scope Rule, as Claimants point out, does exclude some employes from this Agreement but it is, nevertheless, a general one that does not specify the work to be performed. We also note that Rule 2 refers to construction work but the language in Rule 2 (b) "employes assigned to constructing, repairing and maintaining buildings . . ." is used for the purpose of classification and allocation of work rather than for the purpose of reserving work. This Rule is not an expansion of the Scope. It includes only that construction work contemplated in the Agreement.

The record indicates that for a period of thirty-eight years Carrier consistently contracted out construction work of the type involved in the case at bar. Although the Agreement was renegotiated five different times, this practice persisted. The Brotherhood's acquiescence in the policy of contracting out this work over many years is recognition that it is excluded from the Agreement. We find that this practice which was not altered when new agreements were negotiated reflects the intent of the parties as to the type of construction work contemplated by the Agreement.

Disputes of the nature of the instant case have been considered by this Board on a number of occasions. In 1957, Award 7600 disposed of a similar dispute involving the same parties. More recently, Awards 10937 and 11716 also considered a similar dispute and reviewed Award 7600. These Awards reaffirm the principal set forth in Award 7600 and hold that the long history of contracting out the new construction work was a recognition by the parties that such work is outside of the Scope of the Agreement and hence, the Agreement was not violated. We do not find these Awards palpably erroneous and also hold that the work of erecting the steel prefabricated structure was not covered by the Agreement.

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

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 28th day of May 1965.