Award No. 13874
Docket No. MW-13702

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, 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 effective Agreement when, beginning on August 14, 1961, it assigned the work of loading, hauling and piling rails to a contractor whose employes hold no seniority rights under this Agreement.

(2) The Carrier violated the effective Agreement when, on December 1, 2, 4, 5, 6, 7 and 8, 1961, it again assigned the work of loading, hauling and piling rails to a contractor whose employes hold no seniority rights under this Agreement.

(3) 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 straight-time 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.

(4) 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 and R. R. Hammack each be allowed 28–4/11 hours' pay at their respective straight time rates because of the violation referred to in Part (2) of this claim.

EMPLOYES' STATEMENT OF FACTS: The facts in this dispute were fully set forth in the respective letters of presentation dated October 11, 1961 and December 29, 1961, as follows:

"On August 14, 1961, the Roscoe, Snyder & Pacific employed Mr. Bob Downs to load and truck rail from points on its main line to storage yards in Roscoe, Texas. Mr. Downs employed four laborers and consumed twenty days in the performance of the referred to work. This is work that has been performed exclusively by section forces in the past on the RS&P Railway."

are now working under was signed and Article 1 was left unchanged except for the addition of the following paragraph:

> "The expressions 'positions' and 'work' used in this agreement refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of the individual employes."

At no place in either the 1944 Agreement or the 1949 Agreement is there any mention made of our practice of contracting out our hauling of materials. If the Brotherhood desired to take issue with this longstanding custom, they should have made it an item of negotiation.

There is no contention in this case that any of our regular maintenance forces were deprived of work by our contracting out the moving of our material to a central yard. All the potential claimants were regularly employed at the time. There is no claim here by a furloughed man.

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, among others.

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

> **"Contracting Work Out**
>
> 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 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 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 the case. In this particular case there was no intent to harm our employes. The Railroad did not own suitable conveyances to undertake the complete move. Our equipment could have performed part of the job, but, inasmuch as our employes were otherwise engaged, we felt it expedient to contract out the entire move.

(Exhibits not reproduced.)

OPINION OF BOARD: On a number of days, beginning August 14, 1961, Carrier used an independent contractor to load, haul and pile rails in connection with the consolidation of material in one central yard at Roscoe, Texas. The present claim is based on the contention that that work belongs to employes covered by the Maintenance of Way Agreement.

The Scope Rule in question is of a general character and does not mention the disputed work. Loading, hauling and moving rails is a variety of unskilled labor that might well belong to Maintenance of Way employes.

However, Carrier denies that it belongs to them and has submitted evidence of past practice in support of its position.

In this setting, where the matter has been put in issue, it is incumbent upon Petitioner to produce at least some facts to show that the work in question is covered by the Agreement. Mere contention and assumption are not the equivalent of the necessary proof.

As we had occasion to point out in Award 10067:

> "The requirement of proof exists for the protection of both parties as well as by the Board. Properly viewed, it is not unreasonable or unduly burdensome. If a claim is sufficiently important to warrant this Board's consideration and critical facts are in dispute, it is certainly incumbent upon the claimant to produce sufficient evidence to support his version of the facts on which he relies."

Also see, among others, Awards 13466, 13283 and 12317.

The record contains no facts or evidence that substantiate Petitioner's contentions, and since it has the burden of proof, the claim must be denied.

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 breached.

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 September 1965.