



Award No. 17711

Docket No. MW-18222

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Ellis, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE TEXAS AND PACIFIC RAILWAY COMPANY**

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

(1) The Agreement was violated when the work of driving piling at Mile Posts B-130, Pole 12 and Mile Post 138, Pole 1/2 was assigned to outside forces (System file K 310-23).

(2) The decision by General Manager K. D. Hestes dated January 2, 1968, was not in conformance with the provisions of Rule 12, Section 2(a) of the Agreement.

(3) Because of the violations referred to in Parts (1) and (2) of this Statement of Claim, the claim * as presented by Assistant General Chairman T. G. Hawkes, Jr. within a letter dated October 10, 1967, be allowed as presented.

* "... time is being claimed by and in behalf of the following employes on the Texas and Pacific Railway Company, holding and maintaining seniority rights thereon, as follows:

	Sen. Date
Douglas Devillier, B&B Foreman	4- 9-1943
J. J. Richardson, P. D. Engineer	12- 6-1944
M. M. Faulkner, Burro Crane Operator	4- 7-30
P. H. Pearce, B&B Helper	6-22-1946
J. A. Brown, B&B Mechanic	11- 3-1958

Time claimed for the above T/P employes as follows:

Sept. 9, 1967, 11:00 A.M. to 7:30 P.M., time and one-half rate

Sept. 10, 1967, 7:30 A.M. to 12:50 P.M., time and one-half rate

Sept. 18, 1967, 12:30 P.M. to 5:00 P.M., straight-time rate."

EMPLOYES' STATEMENT OF FACTS: The claimants are regularly assigned to their respective positions, with a work week extending from Monday through Friday.

A government flood control project required the driving of piling for false work for a stop gap in the Atchafalaya floodway levee at Mile Post B-130, Pole 12, near Melville, Louisiana, and at Mile Post 138, Pole 1/2 near Palmetto, Louisiana. The Carrier assigned the aforescribed work to outside forces who do not have any seniority within the Maintenance of Way

out that the General Manager had obviously adopted the reasons set forth by the Superintendent's letter dated November 1, 1967.

OPINION OF BOARD: The Carrier contracted some pile driving work near Melville, Louisiana to outside forces who do not have any seniority within the Maintenance of Way department.

We comprehend the controlling question to be whether the issue of Carrier's right to contract this work out is properly before this Board and if so, who has the burden of proof.

The Organization contends that Carrier had admitted that the work involved is covered by the Scope Agreement but has relied upon a past practice of contracting out this work which it has the burden of proving. This contention is based upon the only statement made on the property which tended to raise the issue of contracting out.

That was the statement made in the letter of the Director of Labor Relations dated March 4, 1963 wherein it was stated:

"* * * There has been a long established practice on this property on contracting work and especially so when the Carrier did not have the equipment available to perform the work required, as in the instant dispute."

Organization says that this statement amounts to an admission that the employees have the right to perform the work in question and in avoidance of liability the Carrier asserts an affirmative defense which is the Carrier's burden to prove.

On the other hand the Carrier says that it has raised the following issue, i.e.: In the absence of any language in the Scope Rule which would grant exclusivity of work to M of W employees, the employees must show by competent evidence that they have had exclusive right to the performance of certain work by practice, history, custom or tradition. On this issue the Carrier contends that the Organization has the burden of proving that Carrier does NOT have the right to contract out.

The statement in question is not a clear and comprehensive declaration of the issue of contracting out. It does however, provide the organization with notice that the Carrier will rely upon its right to contract out as a defense to this claim. The source of this right (i.e. the Scope rule which does not grant exclusivity of work to the claimants) is not made known to the Organization but that it not a prerequisite to raising the issue before this Board.

Organization attempts to limit Carrier's use of this issue by characterizing it as an affirmative defense which Carrier must prove. To sustain the Organization on this point would be to give undue weight to a technical rule of procedure. Carrier's right to contract the subject work to outside forces is before this Board for all relevant purposes.

The Carrier has cited a line of cases involving the same parties and substantially the same contractual provision and we see no reason to depart from the holdings of those cases. The latest such case is Award No. 17538 which held:

"Examination of the Scope Rule herein shows that it is a general Scope Rule, and this Board, in a long line of awards, has therefor consistently held that the burden is upon the Petitioners herein to

prove that the work in question has been exclusively performed by B&B Department Employees, system wide, by practice, custom and tradition.

also see Awards No. 10585; 14362; 16459; and 16460.

The Organization has not satisfied the burden of proof required of it to prevail in this claim.

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 Carrier did not violate the Agreement.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of February 1970.