Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30516
Docket No. MW-30162
94-3-91-3-601

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company
((Eastern Lines)

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

(1) The Agreement was violated when the Carrier assigned an outside concern (Culver Moving Company) to perform equipment moving work transporting Carrier property from San Antonio Passenger Depot to East Yard, San Antonio beginning July 23 through 27, 1990, August 6, 7, 8 and September 7, 1990 (System File MW-90-134/497-1-A SPE).

(2) The Agreement was further violated when the Carrier entered into a contracting transaction without giving the General Chairman at least fifteen (15) days' advance written notice of its plan to contract out as set forth in Article 36.

(3) As a consequence of the violations referred to in either Part (1) and/or Part (2) above, B&B Foreman A. Diaz, Assistant B&B Foreman R.R. Colmenero and B&B Carpenters M.W. Woytasczyk, L.N. Ward and J.D. Ebner shall each be allowed pay for seventy-two (72) hours at their respective straight time rates of pay."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On June 7, 1990, the Carrier sold its San Antonio Depot to the City of San Antonio. Certain physical assets of the Carrier, described as "Excluded Personalty" in the Bill of Sale for the property, were to remain under the ownership of the Carrier. Subsequently thereto, the Carrier used its own forces to move and relocate specialized equipment excluded from the terms of the sale, such as signal items at the freight and passenger depot, along with all communication equipment.

During the week of July 23 through 27, on August 6, 7 and 8, and on September 7, 1990, employees of an outside contractor, Culver Moving Company, pursuant to a contract with the City of San Antonio, were utilized to move certain items of office equipment, also excluded from the terms of the sale, from the San Antonio Depot to East Yard, San Antonio.

On September 21, 1990, the Organization filed a time claim on behalf of five members of the Organization, alleging that the Carrier violated the Agreement by assigning or otherwise allowing outside forces to move the items of office equipment, work which the Organization alleges has been historically performed exclusively by members of the Organization. The Organization alleges that the Carrier violated the following Articles of the Agreement: Article 2, Seniority Rules; Article 6, Seniority Rosters; Article 8, Promotions and Filling of Vacancies; Article 16, General Rules; and Article 36, Contracting Out. In support of its position, the Organization furnished letters from seven B&B employees in which they stated that they have always performed this kind of work.

The Carrier initially contended that B&B employees are not entitled to this work, since they have not demonstrated that they have historically and customarily performed this work exclusively on a system-wide basis, and that in any event all of the grievants were fully employed when the disputed work was performed. In its declination letter of March 26, 1991, the Carrier raised the following additional defenses:

"During conference you were advised that the passenger and freight depot were no longer Southern Pacific property after June 7, 1990, and in the condition of sale of the passenger and freight depot in San Antonio, the City of San Antonio would pay for the relocation of said premises. The City required that bids be received and accepted by them to assure the most equitable means be found for the move because the taxpayer was to burden the cost. Inasmuch as the City was paying the bills, the Carrier was only acting as an agent to supervise the move.

The City approved the use of Southern Pacific labor to move material and equipment that required special handling such as all signal items at the freight and passenger depot along with all communication equipment. The Organization acknowledged the fact that these Claimants did move some of the office contents from the depot. However, the City would not buy the idea that office furnishings would require special skills that only SP personnel could provide. Without prejudice to our position as stated in previous correspondence, this facility was no longer owned by Southern Pacific, therefore, the disputed work was not work normally accruing to members of the BMWE. Further, Carrier did not contract out the work at issue, and no notice was required under Article 36 as you have alleged."

Article 36 of the Agreement reads in pertinent part as follows:

"ARTICLE 36

CONTRACTING OUT

In the event this carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the Organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith."

It should be noted that, contrary to the Carrier's assertion on the property, the June 7, 1990 Bill of Sale for the San Antonio Depot is silent on the question of which party was to be responsible for moving those of the Carrier's physical assets which had been excluded from the sale.

What is uncontroverted is that, at the time the disputed work was performed, the City of San Antonio was the owner of the San Antonio Depot and therefore had control over the premises and all property located thereon, there being no contrary provision in the Bill of Sale. While it opted to allow the Carrier to use its own forces to remove certain physical assets, such as signal items and communication equipment, it also opted, for reasons which are unclear from the record, to expend taxpayer funds on various dates over a three-month period to move certain office equipment which had been excluded from the terms of the sale.

Since the Carrier had no control over the City's decision as to which forces were to perform the work in dispute, the Board must conclude, based on well-established precedent, that the Carrier did not violate the Agreement in this instance.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 9th day of November 1994.