Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31615
Docket No. MW-31164
96-3-93-3-65

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Railroad Company (former
(St. Louis-San Francisco Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned outside forces (Herzog) to unload ties from Mile Posts 208 to 249 and assigned a trackman to work with said forces instead of assigning a special equipment operator thereto, beginning on February 10, 1992 and continuing (System File B-2142-1/8MWC 92-03-20G SLF).

2. As a consequence of the violation referred to in Part (1) above, Special Equipment Operator D. Lathrom shall be allowed pay at the applicable special equipment operator's rate of pay for an equal proportionate share of the total number of straight time and overtime hours spent by the trackman in the performance of the work in question beginning February 10, 1992 and continuing."

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 January 20, 1992, Carrier gave the General Chairman notice of its intent to contract out the unloading of ties during 1992. The work in question began on February 10, 1992. Carrier used a trackman to assist the contractor.

The Organization contends that Carrier acted contrary to an established past practice whereby the Organization would consent to the use of an outside contractor to unload ties and Carrier would agree to assign a Special Equipment Operator to assist the contractor. The Organization points to such agreements for unloading ties in 1989 and 1990.

Carrier contends that its right to contract out the unloading of ties was upheld in Public Law Board No. 3460, Award 63 involving a 1982 claim. Carrier contends that the Organization has failed to prove that Special Equipment Operators have performed the work in question exclusively. Carrier argues that there is no clear past practice and that there was no Agreement to use a Special Equipment Operator to assist the contractor. Carrier further avers that the contractor used a special machine to unload the ties, a gantry crane, and a P811 machine, neither of which are listed in the Agreement's listing of equipment that a Special Equipment Operator operates. The Organization responds that Carrier's notice of its intent to contract out listed the equipment to be used as a back hoe and a tie unloader.

The Organization's claim does not attack the contracting out of the unloading of ties. Rather, the essence of the claim is that Carrier was obligated to assign a Special Equipment Operator, rather than a Trackman, to assist the contractor.

The Organization maintains that, in accordance with past practice, there was an Agreement to assign a Special Equipment Operator. The Organization has the burden of proving the existence of such an agreement or practice. Our review of the record developed on the property convinces us that the Organization has failed to carry its burden of proof.

Although the record contains a copy of Carrier's January 20. 1992, notice of its intent to contract out tie unloading for 1992, there is no documentation of any Agreement to use a Special Equipment Operator to assist the contractor in 1992. The only documentation consists of agreements to use a Special Equipment Operator to assist the contractor with tie unloading in 1989 and 1990. There is no evidence of what, if anything, was done prior to 1989, or of what, if anything was done in 1991. The

agreements for 1989 and 1990, standing alone as they do, are insufficient to establish a long-standing and consistent past practice from which one might infer an agreement to use a Special Equipment Operator in 1992. There being no other evidence of such an agreement, the claim must be denied.

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 29th day of August 1996.