Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32184
Docket No. MW-31904
97-3-94-3-232

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned an outside contractor (Damon Pursell Construction Company) to perform Roadway Equipment and Track Subdepartment work of operating two (2) Terex Dump Trucks, three (3) Koehring Cranes, one (1) Terex Bulldozer, one (1) Komatsu Bulldozer and two (2) Terex End Loaders to scale and remove rock, rock cut widening and drainage improvement on the Galesburg Seventh Subdivision near Mile Post 170 near Thiehoff, Missouri beginning December 5, 1991 and continuing (System File C-92-C100-20/MWA 92-4-15A).

(2) As a consequence of the violation referred to in Part (1) above, the three (3) senior seasonal Group 1 Operators, four (4) senior seasonal Group 2 Operators and two (2) senior seasonal truck drivers shall each be allowed pay at their respective rates of pay for all time worked by the outside contractor."

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 were given due notice of hearing thereon.

This dispute arose during the summer of 1991 after ongoing work by the employees was halted at an area near mile post 170, Thiehoff, Missouri. The employees had been excavating rock which included, widening and removing of large quantities of limestone and shale. During the project, the Assistant Chairman was concerned with the safety of the work and complained to OSHA. Thereafter, the Carrier halted the project and by letter dated September 30, 1991 notified the Organization of its intent to contract out the work. Subsequently, after conference, the work was contracted out.

The Organization filed claim dated January 30, 1992 alleging that the Carrier violated the Agreement when it failed to perform the work with the employees, rather than use an outside contractor. The Organization alleges that the Carrier did not act in good faith and within the guidelines of Rule 55. The Organization presented evidence from a consulting firm that it argues demonstrates that employees could have performed the work in compliance with OSHA. The Organization argues that the Carrier did not make a good faith effort to procure the necessary equipment and by contracting out the work, violated the Scope Rule. In essence, Organization argues the Carrier retaliated against the Organization for contacting OSHA due to unsafe conditions by removing work from the employees without compliance with the Note to Rule 55.

The Carrier's arguments are based on maintaining that it fully complied with the Agreement. The Carrier argued throughout the on-property claim that subsequent to the OSHA complaint, it had been prohibited from performing the work with its employees. The Carrier maintained that it lacked the necessary equipment and expertise to perform the required work. The work involved special equipment and blasting for which the employees did not possess the requisite skills. The Carrier also provides documentation asserting that the evidence presented by the Organization lacks relevance. The Carrier points out that the consulting firm's evaluator lacked relevant knowledge and expertise.

This Board has carefully reviewed all of the issues and arguments of record. The burden of proof lies with the Organization to demonstrate that the work performed was customarily and traditionally that of the employees. The Organization must provide probative evidence that the Carrier's actions violated the Agreement, particularly the Note to Rule 55 and Appendix Y.

The Board has fully reviewed the evidence. Certainly we are cognizant that the employees began the work. There is no probative evidence that after the Carrier switched to an alternative rock excavation strategy, the Organization was capable of performing the work or had customarily or traditionally done so. The method did involve blasting. A study of the Organization's consulting statement does not sufficiently prove that the disputed work could have been safely performed by the employees, even with hydraulic breaking hammers. We find no proof that the employees are qualified to utilize said equipment.

Most importantly, throughout this claim the Carrier asserted that it was prohibited from continuing with the project and utilizing its employees. As example, by letter dated May 12, 1996, the Organization was told that "OSHA and FRA advised that the Carrier could not comply with their regulations using BN employees to do the work." The Carrier asserted this position numerous times on the property. The Board's review finds the Organization stating:

> "Your argument as it applies to OSHA and FRA has not been substantiated in any form. You have failed to identify any specific language in the regulations. Therefore your argument is totally false and groundless."

Nowhere is there substantial challenge to the Carrier's assertions that "Between OSHA and FRA we were told we could not comply with their regulations with our own people performing the work." The Carrier noted that the FRA's Regional Track Engineer Hunter requested the Carrier to cease operations. The Organization didn't challenge that OSHA had moved to stop the project. The Organization didn't assert that Mr. Hunter had not ordered the Carrier to cease operations.

The Board must reject the claim in that the burden of proof has not been met. The Organization has asserted without adequate evidence that the Carrier's alternate method of completing the project violated the Agreement. There is a lack of proof that

special equipment and expertise was available. The Carrier pointed out without rebuttal that the outside consultants "qualifications do not imply expert status in either OSHA or FRA regulations..." The Organization's evidence that equipment from a local Caterpillar dealer existed does not prove that the employees were capable of the alternate non-blasting method. Nor is there sufficient proof that the hydraulic hammer was available or the employees had the skills to perform the alternate method. Considering that the Carrier refuted all these arguments, the Board concludes that 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 13th day of August 1997.