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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33418
Docket No. MW-32335
99-3-95-3-172

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
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (J.M.G. Excavating Co.) to perform Maintenance of Way work (removing ballast and soil for the main line) in the vicinity of Mile Posts 48.5 and 46 on the Philadelphia Division beginning November 8, 1993 and continuing (System Docket MW-3298).
- (2) As a consequence of the violations referred to in Part (1) above, Messrs. P. Hackenberg, G. Berrier, C. Falcao, T. Smallwood, J. Steele, B. Stefano, W. Benninger, J. Caswell and R. Rodak shall each be allowed ten (10) hours' pay, at their respective straight time rates, for each day (Monday through Thursday) and all overtime worked by the contractors forces, at their respective time and one-half rates, beginning November 8, 1993 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 were given due notice of hearing thereon.

The dispute at bar centers upon whether or not the Carrier's actions in contracting out excavation work near Skillman, New Jersey, violated the Agreement.

The Organization argues that beginning November 8, 1993, the Carrier contracted out Scope protected work without notification and without cause to employees foreign to the Agreement. Specifically, although the Carrier discussed the intent to contract out on an "as needed basis" for a large number of trucks and equipment due to non availability, the equipment was available. Further, although the Carrier discussed the need for a large amount of equipment, it actually utilized only five dump trucks, one bulldozer and two excavators on the project. As for employees, there were sufficient and qualified employees available, including those listed in the claim.

The Carrier denies any violation of the Agreement. It makes numerous arguments about Scope, availability of equipment, qualifications of employees and most importantly about the extent of the project. This was a three way, multi-state, project to provide clearance for the movement of double-stack container cars to the Port of Philadelphia and to northern New Jersey. This claim involved but one of over 120 separate locations that needed to be modified for double-stack operation. The Carrier further argues that it could not obtain the full compliment of trucks required without drivers and did not have the qualified drivers available. Although it acted in good faith, attempted to provide as much work as possible to the employees, the sheer "magnitude of [the] project" required the contracting out.

The record reflects that the Carrier did notify the Organization of an extensive project and the rental of equipment covering the "Pennsylvania and Hagerstown to Oak Island Clearance Projects." The evidence of record documents that this larger project encompassed time constraints, untold miles of track on the Philadelphia and New Jersey Seniority Districts and not just the single area around Mile Post 48.5 near Skillman. The Carrier noted in correspondence that the project would require "up to 40 trucks, 2 three quarter Excavators and D4 or larger Bulldozers, on an as needed basis..."

The evidence is that the full project commenced pursuant to Notice, conferences and numerous discussions that had begun as early as March 1993. The Organization has not persuaded the Board with the evidence of record of its position in the whole of this claim. There is a lack of proof that Danella Rental Systems or any other possessed the equipment necessary and without operators, as suggested. Nor is there sufficient proof that the list of hundreds of rostered employees on the Philadelphia and New Jersey Division rosters included qualified employees.

Most importantly, this claim rests on whether or not the Carrier was required in this instance to "piecemeal" a small part of a very large project. While there are instances in which this Board has upheld such, the facts are distinct from the facts at bar. There is nothing in the claim before us to demonstrate that this work was clearly distinct from and apart from the overall project, as has been shown in other claims involving preparatory work (Third Division Award 28998), or work where a contractor subcontracted out a part of its project (Third Division Award 29722).

This dispute involves the Organization's claim over a very small part of trackage encompassing approximately two and a half miles around Skillman, New Jersey. The factual record of Carrier notification and discussion indicates that this work was over hundreds of necessary changes and miles of track for which it argued that it lacked certified vehicle operators with proper qualifications, as well as the large number of trucks and equipment when needed. Under these conditions, the above cited sustaining piecemeal decisions are not on point. This Board does not find sufficient cause within the existing probative evidence to conclude that a non-disputed "massive" project covering miles of track across two states should be piecemealed and require the Carrier to find for a single, separate and distinct area around Skillman that it must break its entire project to rent trucks for this one area.

The Board reaches its conclusion with full note that the Organization has correctly pointed out that Carrier arguments of exclusivity miss the mark. The record indicates that this type of work has been customarily and traditionally performed by the employees. What has not been proven are assertions that this was a distinct project, that there were qualified employees or that sufficient equipment was available. For all of these reasons, the claim must fail.

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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 July 1999.