

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34041
Docket No. MW-34701
00-3-98-3-358**

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe Railway 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 (Hensley Construction Company) to perform Maintenance of Way work using scrapers, motor graders, dozers, compactor, tractor with disc and a water truck to do dirt work for a new switch and crossover track on the Arvard Subdivision between Mile Posts 507.9 and 508.2 on July 1 through 23, 1996 (System File B-2367-15/MWC 96-10-24AA SLF).**
- (2) As a consequence of the violation referred to in Part (1) above, the twelve (12) Claimants* listed below shall each be compensated at their respective rates of pay for an equal proportionate share of the one thousand forty (1,040) hours expended by the outside forces in the performance of the work in question.**

*T. G. Spicer	H. D. Bennett
E. A. Sconyers	R. E. Perkins
D. R. Sconyers	W. L. Lewis
G. D. Wakefield	D. W. Posey
L. W. Trekell	W. L. Grider
R. J. Thatcher	J. D. Parks”

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.

On May 23, 1996, the Carrier advised the Organization as follows:

“As information, the Carrier plans to perform the following construction project at Perry, Oklahoma. As has been customarily done in the past, it is proposed that the work will be performed by contractors who are properly equipped and possess the necessary expertise to perform all aspects of the work. A general description of the work is as follows:

Construction of 420 TF including 1 #20 power turnout as BN portion of 1098 Track Foot crossover.

The project will consist of approximately 3,396 CY of excavation, 952 Square Yards of lime stabilization, 0.4 Acres of seeding.

The type and work in the above project is such that it is customarily performed by outside contract forces. The Company possesses neither the specialized equipment or special skills required. It is anticipated that this project on June 15, 1996.”

The notice was conferenced on May 31, 1996 without reaching an accord. The actual track work, ties and resurfacing would be done by Maintenance of Way forces, but the dirt work, the preparation of the ground for the eventual laying of the track would be done by a contractor due to skills and equipment requirements.

The Carrier proceeded to do what it had informed the Organization it would do. Not unexpectedly, the Organization filed claim contending each of the named Claimants was skilled in the operation of the machines brought in by the contractor and the Carrier was in violation of Agreements referred to only by the date of each Agreement, and Rule 99 of the August 1975 Agreement.

The Organization's position for the remainder of the on-property handling remained as outlined above, whereas the Carrier pointed out it contracted similar dirt work in the past.

In Third Division Award 20640, involving the parties in this dispute, the Board spelled out in clear, succinct language what the Organization must do to sustain its position. Note the following excerpt from Third Division Award 20640:

"In order to sustain the Organization's position on Claim (1), the Organization must show that the Agreement clearly reserves to the employees an exclusive right to the work in question, or, if not, then it must show by probative evidence that the work in question has been exclusively reserved to the employees by custom, practice and tradition, system wide."

In Third Division Award 20920 the Board again laid out the format the Organization must follow to be successful in achieving Board support for the claim it were asserting.

In both Awards, the advice given, reduced to its lowest denominator, is that the burden of proof is forever on the shoulders of the petitioner to show that a specific Rule or set of Rules has been violated by the Carrier.

For the first time in the handling of this dispute, the Scope Rule was cited in the Organization's Submission before the Board as reserving this work to the named Claimants, but the Board is precluded by Circular No. 1 from considering same as Rule 1 had never been cited by the Organization in the on-property handling.

The Organization failed to establish a prima facie case of a rules violation.

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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 25th day of May, 2000.