Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34212
Docket No. MW-33303
00-3-96-3-800

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern and Santa Fe Railway Company
(former 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 outside forces (Hansen Construction Company) to perform Maintenance of Way work (build the grade for a siding) near Fremont, Nebraska, beginning October 11, 1993, and continuing. (System File C-94-C100-15/MWA 94-3-2AA BNR).

(2) As a consequence of the aforesaid violation, the Claimants listed below shall each be compensated at their respective rates of pay for all man-hours expended by the outside forces in the performance of the work in question beginning October 11, 1993, and continuing until the violation ceased.

T. D. Staiert
M. J. Jakoubek
L. D. Keifer
T. Q. Lyons
J. B. Lyons
J. S. Buelt
M. M. Kropp"
C. W. Roth
G. T. Fabian
P. J. Espinosa
R. L. Ayer
J. E. Werger
A. D. August

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.

During the period February through May 1992, the Organization employees began preparing the sub-grade for a one and one-half mile siding at Fremont, Nebraska.

On March 15, 1993, the Carrier notified the Organization of its plans to utilize outside forces, Hansen Construction Company, to build the grade for a siding being built South of Fremont, Nebraska, based on HWS Technologies' performance test results of the Organization employees' initial work. The Hansen Construction Company began work on October 11, 1993.

On December 5, 1993, the Organization filed the instant claim, arguing that the Carrier violated Rules 1, 2, 5, 55, Note to Rule 55, and Appendix Y, when it hired the Hansen Construction Company to perform the work of Organization employees. The Organization argues that the Claimants suffered a lost work opportunity since the work performed, that of grading and new track construction, has been performed by Organization employees in the past as was evidenced by written statements, photographs, claim settlement letters, job bulletins, and videotape presented to the Carrier during the handling of the instant dispute. The Organization contends that the Carrier allowed an outside force which is not covered under the parties' Agreement to perform work which has historically and traditionally been done by Organization employees. The Organization argues that the Claimants were fully qualified, available, and willing to perform the work in question. The Organization maintains that Organization employees could have performed the work involved using Carrier-owned equipment or equipment obtainable through rental/leasing arrangements. In fact, the

Organization argues that the very same equipment used by the outside contractor was used by Organization employees the previous year when they began the project. The Organization argues that the Carrier did not give notice of the work and violated the Claimants' seniority. In addition, the Organization argues that the Carrier failed to present any written notification in connection with its plan to contract out the subject work within the Scope of the applicable schedule Agreement. The Organization also argues that the Carrier failed to make a good-faith effort to reduce the incidence of subcontracting and increase the use of Organization employees.

The Carrier denied the claim contending that it notified the Organization that the work in question would be performed by a contractor and a meeting was held wherein the proposed work was discussed. The Carrier argues that the Scope Rule is general and did not specifically reserve the work in question to Organization employees. The Carrier maintains that the work at issue is not customarily performed by Organization employees and that the Carrier has a long history of contracting out large dirt projects such as the building of the road bed in this instance. The Carrier argues that the Organization failed to show that there exists a system-wide exclusive practice that Organization employees have a contractual right to the performance of the work in question. In addition, the Carrier contends that the Claimants did not possess the expertise nor was the Carrier adequately equipped to compact the road bed and perform the compaction quickly, efficiently, and to Carrier standards, which was proven by the consulting company's test results of the Organization employees' initial work at the site in question. Also, the Carrier argues that it gave Organization employees additional time to place the fill and compact the materials before it hired the outside contractor, but that the work continued to fail to meet Carrier standards. The Carrier argues that once the outside contractor finished preparing the roadbed, Organization employees completed the job by installing ties and rail on the siding and completed the track installation to the Carrier standards. The Carrier also argues that the Claimants worked and were compensated during the period covered by the claim and did not suffer any loss of earnings.

The parties being unable to resolve the issues at hand, this matter came before this Board.

This Board has reviewed the record in this case, and we find that there is sufficient evidence in the record to support the Carrier's position that its own forces did not have the skill and expertise to properly compact the material. The record reveals

that the Carrier gave the BMWE employees an opportunity to perform the work, and the Carrier was simply not satisfied with the results. It was only after several opportunities were given to the Carrier forces that the Carrier made the decision to subcontract the work.

The Organization bears the burden of proof of showing that the Carrier violated the Agreement by subcontracting the work at issue. The Board has reviewed the Agreement, and we find that there is no Rule in the Agreement that requires the Carrier to assign all fill, compaction, and grading work to BMWE-represented employees. The Rule does not discuss grading or compaction, and it does not indicate any particular task that must be assigned to the employees of the Carrier. Moreover, the Board agrees with the Carrier that the Organization has not provided sufficient evidence that the work that was performed near Fremont had been performed by Organization-represented employees in the past. Similarly, there is no showing that the Organization-represented employees have performed the work customarily or exclusively in the past.

Since the work that was initially performed by the Organization-represented employees was not up to the standards, the Board finds that the Carrier did not violate any section of the Agreement when it subcontracted the work to an outside company. The Organization has not met its burden of proof of demonstrating that Organization-represented employees had successfully constructed a compacted grade for track, nor has there been a sufficient showing that grade work had been customarily performed by BMWE employees on the Carrier's property.

Since the Organization bears the burden of proof in cases of this kind and it has failed to meet that burden, the Board finds 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 23rd day of August, 2000.