Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34213
Docket No. MW-33314
00-3-96-3-816

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 Fort Worth and Denver Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated with the Carrier assigned outside forces (Kinley Construction) to perform Maintenance of Way work (remove track and dig up dirt under and around the tracks) at the fueling station in the Fort Worth, Texas North Yard on August 7, 1995, and continuing. (System File FP-95-11/MWD951114AB FWD.)

(2) As a consequence of the violation referred to in Part (1) above, the Claimants listed below shall be compensated at their respective rates of pay for an equal proportionate share of the total number of man-hours expended by the outside forces in the performance of the work in question beginning August 7, 1995 and continuing.

R. L. Shannon	A. J. Martinez
J. E. Person	R. Valenzuela
G. A. Cody	J. W. Moss
M. R. Higgins	H. B. Young
L. L. Egerton	E. R. Young"

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 July 22, 1994, the Carrier notified the Organization of its plans to improve the fueling facility at Fort Worth, Texas, and of its intention to contract with outside forces for the performance of work.

Beginning August 7, 1995, the Carrier hired an outside contractor, Kinley Construction, to remove ballast and dirt fouled by diesel fuel from under and around the tracks at the fueling station in the North Yard at Fort Worth, Texas.

The Organization filed the instant claim arguing that the Carrier violated Rules 1, 2, 3, 4(A), and 4(B), as well as Article IV of the May 17, 1968, National Agreement and the December 11, 1981, Letter of Understanding. The Organization argues that the Carrier's reasons for contracting out the work because of lack of equipment and lack of employees with the necessary expertise were untrue and misleading. The Organization argues that the Carrier's contention of inadequate staffing is an invalid excuse to contract out Scope-covered work. The Organization also argues that the Carrier rented the same equipment used to do the work in question many times in the past for operation by its Maintenance of Way forces at the subject location. The Organization maintains that the Carrier failed to make a good-faith effort to secure the necessary equipment so that Organization forces could operate it and perform the ordinary track maintenance work. The Organization argues that the work in question is clearly reserved to the Claimants by the Scope and Classification provisions of the Agreement and that the Carrier was contractually prohibited from contracting out such work. In addition, the Organization contends that whatever training was needed could have been scheduled by the Carrier for completion by the Claimants prior to the claim period. The Organization finally argues that the Carrier's failure to do so resulted in the Claimants' loss of a significant work opportunity.

The Carrier denied the claim contending that the work in question involved the excavation of soil that was contaminated with petroleum hydrocarbons and the removal of hazardous material for which the Claimants were not trained in accordance with the rules and regulations OSHA has instituted to protect individuals. The Carrier argues that if the Claimants had performed the work that action would have endangered the Claimants as well as other employees and would have violated OSHA regulations. The Carrier contends that it has no contractual responsibility to train Maintenance of Way employees to perform environmental remediation. The Carrier contends that it is also not required to piecemeal a large project, such as the one in this situation, in order to provide some portion of the work to Carrier employees. The Carrier argues that the work in question is not work that is described in the Scope Rule of the Agreement and is not work that has customarily been assigned to the Maintenance of Way employees. The Carrier finally contends that it has generally turned to outside professionals to perform environmental cleanups and other compliance activities.

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

The Board has reviewed the record in this case, and we find that the Organization has not met its burden of proof that the Carrier violated the Agreement when it assigned outside forces to perform work at the fueling station in Fort Worth, Texas, North Yard, on August 7, 1995, and continuing. The record reveals that the Carrier did not have the equipment and that the Claimants were not qualified to perform the work that involved cleaning up hazardous materials. The Carrier took the action of subcontracting the work in question because there were federal regulation requirements that were involved in the work that had to be performed and the Carrier's own employees had not been properly trained for that type of work in those conditions.

The Carrier has shown that it has customarily hired contractors to perform environmental projects like the one involved in this case.

The Organization bears the burden of proof in cases such as this. With Scope-Rule cases, the Organization must demonstrate that there has been system-wide, exclusive performance of the work by its members. In this case, the Carrier has shown that for environmental-related work, the Carrier has subcontracted that work on numerous occasions.

With respect to the balance of the work, it is an established principle that a Carrier is not required to piecemeal a large project in order to provide some portion of the work to the Organization-represented employees. Since this case involved environmental remediation of contaminated soil, the Board finds that it was not work that normally accrued to the employees represented by the Organization. Moreover, the Board finds that the Carrier did not have the responsibility to piecemeal the work in order to assign a portion of it to the BMWE-represented employees. This work involved some OSHA training, which the Carrier employees had not received.

For all of the above reasons, 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.