Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34214
Docket No. MW-33816
00-3-97-3-302

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 when the Carrier assigned outside forces to widen the shoulders of the roadbed and clean drainage ditches between Mile Post 227 and Mile Post 232 near Carey, Texas, on November 27, 1995, through December 29, 1995. (System File F-96-03/MWD 960424AA FWD.)

(2) As a consequence of the aforestated violation, Group 2 Operators C. D. Sherman, R. S. Collins, E. D. Baker, D. R. Hancock, B. D. Diggs, G. A. Cody, R. D. Lewis, W. J. McGee, J. E. Rowland, J. G. Thweatt, M. R. Higgins, D. G. Roberts, and E. D. Matejko shall now be '. . . compensated an equal and proportionate share of all straight and overtime man hours worked by contractor's employes commencing on November 27, 1995, and continuing through when the contractor finished on December 2, 1995.'"

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 November 14, 1995, the Carrier notified the Organization of its plan to utilize outside forces to assist in repair work as a result of having lost a large portion of its roadbed due to floods between Mile Posts 136 and 241 near Carey, Texas. The Carrier notified the Organization that Carrier forces were involved in the repair of the flood damage but that the magnitude of the work involved was beyond the capacity of the Carrier forces to complete all of the work before more inclement weather arrived and, as a result, outside forces were required to aid in the completion of the repair work. The Gilbert Texas Corporation performed work for the period November 27 through December 29, 1995.

On January 19, 1996, the Organization filed the instant claim arguing that the Carrier violated the Fort Worth and Denver Railway Agreement Rules 1, 2, 3, 4, 21, and Article IV of the National Agreement of May 17, 1968, and the National Agreement of December 11, 1981. 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 the Organization employees and that the Claimants were fully qualified, available, and willing to perform the work in question. The Organization contends that the Carrier failed to make a good-faith effort to reduce the incidence of subcontracting and increase the use of the Organization employees. The Organization also argues that the Claimants had the skills to perform the work in question and that the Carrier already had most of the necessary equipment and could have leased the remainder. The Organization maintains that the Carrier could have scheduled the work to be assigned to the Claimants to enable them to perform said work during the period involved in this case and the Carrier could have scheduled the work to be performed prior to the period in question, preceding or following the regular scheduled work day and/or on rest days, on an overtime basis. The Organization contends that the locations worked by the contractor were not an emergency and had not been materially changed by the rains the Carrier sustained and that most of the contractor's employees were engaged in routine track maintenance. The Organization argues that the work involved consisted of widening the edges of the fills and dumping rip rap, which is not a major earth moving and excavation project. In addition, the Organization argues that there was no threat of a rainy season since the site of the project was entering its dry season and, therefore, the Carrier had ample time to perform the work before the next rainy season and arrange for the Claimants to perform the work.

The Carrier denied the claim contending that the Scope Rule is general and did not specifically reserve the work in question to Organization employees. 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. The Carrier contends that major earth moving projects and excavation projects such as the one performed in this situation are projects that have customarily been performed by contractors. The Carrier contends that it does not own the equipment necessary to perform such large projects, nor does the Carrier have an adequate supply of trained employees able to operate the machinery. The Carrier also argues that the repairs required were time sensitive and the Carrier could not have put off the required work and wait until Organization employees became available. The Carrier argues that the Claimants would not have been able to perform the service in question before the beginning of the rainy season. The Carrier also argues that all of the Claimants were fully employed during the claim period and, in fact, many already worked a lot of overtime. In addition, the Carrier maintains that all of the Claimants, except for Higgins and Cody, were on vacation for at least a portion of the claim period and were not available for service under any circumstances. Furthermore, the Carrier contends that the Claimants were fully employed during the claim period and suffered no loss.

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

The Board has thoroughly reviewed the record in this case, and we find that there is sufficient evidence that the Carrier violated the Agreement when it assigned outside forces to widen the shoulders of the roadbed and clean drainage ditches between Mile Post 227 and Mile Post 232 near Carey, Texas, from November 27, 1995, through December 29, 1995.

The record reveals that the work involved has customarily and historically been performed by the Carrier's machine operators. The Organization provided written statements from long-term employees that made it clear that they had regularly performed this type of work when it arose in the past.

The Carrier simply did not dispute that the Claimants have historically and customarily performed the work involved or that it was covered by the Scope of the Agreement. The Carrier merely contends that it needed to have outside contractors get this particular job done for a variety of reasons set forth above in the summary of its arguments. However, a review of the arguments of the Carrier and the record makes it clear that the

Carrier failed to make a good-faith effort to reduce the incidence of contracting out as it had agreed to in the December 11, 1981 Letter of Agreement. The Carrier failed to show that it was unable to obtain rental equipment or that its employees could not perform the work and operate the equipment to perform the work involved in this case.

Although the Organization has met its burden of proof of showing that the Carrier failed to comply with the good-faith provisions of the December 11, 1981 Letter of Agreement by assigning the outside forces to perform the basic work involved here, we must also find that the Organization has failed to meet its burden of proof that any of the Claimants were entitled to a monetary award. The Carrier had assigned the Claimants to work elsewhere on the claim dates and, consequently, they were fully employed during the course of this work. Numerous Awards have held that employees who are fully employed at the time of the Agreement violation are not entitled to a monetary remedy. (See Third Division Awards 29431 and 30263.) That may change if the Carrier's wrongful actions are proven to have been continually recurring. However, that has not been shown to be the case here. Since the Claimants in this case were either on vacation or not available to perform the work involved, they were gainfully employed during the claim period and lost no earnings and are, therefore, not entitled to any monetary award.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of August, 2000.