Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34215
Docket No. MW-33984
00-3-97-3-508

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 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 (Charles Curless) to perform Maintenance of Way work (dig out and/or haul away dirt and concrete from the Tennessee Yards) at Memphis, Tennessee on January 15, 16, 17, 18, 19, and April 8, 9, 10, 11, and 12, 1996. (System Files B-1635-39/MWC 96-04-08AB and B-1635-41/MWC 96-05-10AB SLF).

(2) As a consequence of the violations referred to in Part (1) above, C. E. Green, R. R. Ray, L. A. Taylor, E. L. Irby, E. J. Ousley, and F. L. Hampton shall each be allowed one hundred (100) hours' pay at their respective rates."

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 March 9, 1995, and December 19, 1995, the Carrier notified the Organization of its plans to construct a new permanent fuel facility at Memphis, Tennessee, and of its intention to contract with outside forces for the performance of the work.

The Carrier hired an outside contractor, Charles Curless Company, to dig out stockpiled contaminated dirt and concrete from the fuel track in the Tennessee Yard and to haul off the dirt and concrete.

On February 13 and April 22, 1996, the Organization filed claims arguing that the Carrier violated the parties' Agreements dated March 1, 1951, Rules 1 and 3; and August 1, 1975, Rules 1, 5, and 99. The Organization contends that the Carrier allowed an outside force which is not covered under the parties' Agreements 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 argues that the Carrier did not give notice of the work and violated the Claimants' seniority. 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 Agreements. The Organization also 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 maintains that the contractor's forces did not wear special equipment or garments and that the material being hauled off was uncovered, which violated the regulations in the proper handling of hazardous material. Because of this, the Organization argues that the material was not hazardous and the Claimants could have performed the work. The Organization also contends that work of a class belongs to those for whose benefit the contract was made, i.e., the Organization's employees, and that delegation of such work to others not covered is a violation of the Agreement.

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 also argues that the Scope Rule is general and did not specifically reserve the work in question to Organization employees. The Carrier argues that outside forces were used in the digging and removal of the dirt and concrete involved because the dirt had been saturated with diesel fuel and was considered to be hazardous material. The Carrier maintains that individuals

performing this type of work are required to have 40 hours of special training to qualify them, and the Claimants did not possess such training. The Carrier argues that it contracted to have the work performed because environmental remediation work is not work that is within the Scope of the parties' Agreements and the Carrier had no responsibility to assign it to the Organization employees. The Carrier further 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 argues that the removal of hazardous materials from Carrier property is governed by OSHA, which has specific requirements for the handling of hazardous materials which the Claimants did not meet. The Carrier contends that it cannot violate federal statutes and instruct its employees to violate the law. Furthermore, the Carrier argues that the claim lacks specificity and is excessive in that the Claimants were fully employed during the claim period and lost no earnings. In addition, the Carrier claims that Claimant Taylor was not available for service on January 15 and 17, Claimant Irby was on vacation during the entire January claim period, and Claimant Hampton was on vacation and not available for service on April 11 and 12 and, therefore, cannot be considered proper Claimants.

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 the Organization has not met its burden of proof that the Carrier violated the Agreement when it assigned a subcontractor to perform the work of digging out and hauling away dirt and concrete from the Tennessee Yards at Memphis, Tennessee, in January and April of 1996.

The record reveals that this work involved hazardous materials which had to be cleaned up using trained people and specialized equipment. The Carrier was required to be in compliance with a variety of federal and state statutes. In addition, the Carrier was required to have people performing the work who had the experience, expertise, and qualifications to perform the various tasks covered by the OSHA regulations. There was no showing by the Organization that its members had the expertise or abilities to perform this environmental-related work that had to be done. In other words, the Carrier was correct that their own employees were not qualified to perform the required work.

The Organization was correct that the Carrier's employees had performed similar work of cleaning up sites. However, there was no showing that the Organization-represented employees had performed work with the environmental and hazardous aspects to it that this work contained. There was no showing that the Organization-represented employees had cleaned up oil-soaked soils exclusively for the Carrier.

The Organization has failed to meet its burden of proof of showing that its employees had previously performed this type of work or even had the expertise to perform the work. Moreover, the Carrier has pointed out that the Organization-represented employees have not had the necessary training to be able to perform the work and comply with the various statutes governing environmental remediation.

Since the Organization bears the burden of proof in cases of this kind and it has failed to meet that burden, the Board has no choice but to deny the claim.

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.