Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34216
Docket No. MW-34261
00-3-97-3-840

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

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(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 to perform Maintenance of Way work (cleared, removed and/or buried trees, ties, concrete chunks, and other debris) next to the Jordan Creek and within the Springfield Yard on April 11 through May 22, 1995. (System File B-1419-1/MWC 950627AC SLF.)

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants A. Piene, J. Webb, J. Chaffin, J. Bowers, G. Carlisle, and G. Taylor shall each be allowed two hundred seventy (270) hours' pay at their respective straight-time rates and all other hours worked by the outside forces at the appropriate rates of pay."

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.

The Carrier had leased a piece of property located near the Springfield, Missouri, yard to Cesco Property Management, which subsequently vacated the premises without restoring it to its original condition, leaving the area like a dump with possible hazardous materials.

The Carrier then hired an outside contractor to perform the work of cleaning up the site for the period April 11 through May 22, 1995.

On May 26, 1995, the Organization filed the instant claim arguing that the Carrier violated the May 17, 1968; February 18, 1963; December 11, 1981; March 1, 1951; and Rule 99 of the August 1, 1975, Agreements. 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. The Organization maintains 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 also 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 contends that the Carrier failed to make a good-faith effort to reduce the incidence of subcontracting and increase the use of Organization employees to the extent practicable, including the procurement of rental equipment if need be. In addition, the Organization argues that the Carrier failed to prove that there existed hazardous material on the site at issue. The Organization maintains that if such material existed, it and it alone should have been removed and the remainder of the work assigned to Organization employees. The Organization also maintains that the property involved was no longer leased and the Organization employees were in the position to perform the work required.

The Carrier denied the claim contending that the land that was cleared was leased property and that there were barrels of hazardous materials that only a qualified contractor could handle. The Carrier argues that the Scope Rule is general and did not specifically reserve the work in question to the Organization employees. The Carrier argues that the Organization failed to show that there exists a system-wide exclusive practice that the Organization employees have a contractual right to the performance of the work in question, nor has the Organization cited what specific provisions of its many cited Agreements were violated. The Carrier further contends that it contracted with outside forces to perform the work of removing the hazardous material because it is required to do so by OSHA. The Carrier argues that OSHA requires that individuals performing this type of work must have 40 hours of special training to qualify them, and the Claimants did not possess such training. The Carrier contends that it cannot violate federal statutes and instruct its employees to violate the law. The Carrier contends that it contracted to have the work performed because environmental remediation work is not work that is within the Scope of the parties' Agreement and the Carrier had no responsibility to assign it to the Organization employees. The Carrier also argues that it is not required to piecemeal the work at issue in order to assign a portion of it to the Organization employees. 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 reviewed the extensive record in this case, and we find that the Carrier violated the Agreement when it failed to furnish the General Chairman with advance written notice of its intention to contract out the work involved in this case. Hence, the claim must be sustained.

Rule 99 of the Agreement states the following:

> "(a) In the event the Carrier plans to contract out work within the scope of the applicable schedule agreement, the Carrier shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

(b) If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier shall promptly meet with him for that purpose. Said Carrier and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Carrier may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith."

It is clear from this record that the Carrier failed to notify the General Chairman of its plan to contract out the work involved here. In December of 1981, the Organization was assured by the Carrier that it would "assert good-faith efforts to reduce the incidence of subcontracting" and that part of that would be advance notice so that the parties could discuss the effects of any subcontracting and see if in fact it could be avoided.

In this case, the Carrier did not even give the Organization the opportunity to discuss the matter. It simply hired outside forces to perform the work.

With respect to the remedy, the Board finds that the Claimants are entitled to the remedy requested. The Carrier has offered no proof that the work in question could not have been performed on overtime, nor has the Carrier proven that the Claimants did not suffer any monetary loss as a result of this improper action. Numerous Boards have held that where the Carrier fails to provide advance written notice and precludes a good-faith discussion at a conference, a violation occurs and the Claimants are entitled to be paid for the work.

## AWARD

Claim sustained.

## 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.