

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34217
Docket No. MW-34883
00-3-98-3-597**

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

(Brotherhood of Maintenance of Way Employees)
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 (Neosho Construction Company) to perform Maintenance of Way work (dirt work for new switches and main line realignment) at Double Track Enid between Mile Post 542.8 and Mile Post 543.1 at Enid, Oklahoma, on August 12 through September 6, 1996. (System File B-2367-16/MWC 96-12-03AD SLF.)**
- (2) As a consequence of the violation referred to in Part (1) above, Messrs. T. G. Spicer, E. A. Sconyers, G. D. Wakefield, W. R. Bowman, L. W. Trekell, R. J. Thatcher, H. D. Bennett, R. E. Perkins, W. L. Lewis, D. W. Posey, W. L. Grider and J. D. Parks shall each be compensated at their respective rates of pay for an equal proportionate share of the eight hundred sixty-six (866) man-hours expended by the outside forces in the performance of the work in question.”**

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 April 22, 1996, the Carrier notified the Organization of its plans concerning the construction of track changes and the elimination of three crossing diamonds near Enid, Oklahoma, and of its intention to contract with outside forces for the performance of the work.

Beginning August 12, 1996, through September 6, 1996, the Carrier hired an outside contractor, Neosho Construction Company, to perform the work of operating two scrapers, a motor grader, backhoe, trackhoe, dozer, packer, and water truck to build subgrade dirt work for the purpose of creating a dirt foundation for the installation of new switches and main track realignment at Double Track Enid switch at Mile Post 542.8 and Mile Post 543.1 at Enid, Oklahoma, on the Arvard Subdivision.

On October 7, 1996, 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 argues that the Claimants involved were qualified to operate all of the equipment used by the contractor's forces, most of which were already in the Carrier's inventory, readily available, and easily obtained. The Organization maintains that the work in question is contractually reserved to Organization employees in accordance with Rules 1 (Scope Rule) and 5 of the parties' Agreement. The Organization also contends 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 argues 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 further contends that the Carrier's action of hiring an outside contractor is a violation of the Claimants' seniority rights. In addition, the Organization maintains that the Carrier violated the Grading Gang Agreement between the parties dated June 13, 1974, which the Organization argues applies in the Carrier's assignment of grading work to

Organization employees. The Organization also contends that the work of building railroads and maintaining them has been performed by Organization employees for over one hundred years and for the Carrier to take the position that Organization employees are not qualified to perform the work in question is incorrect.

The Carrier denied the claim contending that the work in question required specialized equipment and expert compaction skills which the Carrier and the Claimants did not possess. The Carrier also argues 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. Therefore, the Carrier argues, no notice violation occurred. The Carrier argues that the Organization's contention of the Carrier's alleged agreement violations as cited in its October 7, 1996, letter lacks specificity. The Carrier also contends that there is no Rule in the Agreement that indicates the Carrier is responsible for assigning all dirt work in conjunction with the realignment of tracks or the placing of new tracks to Organization employees. The Carrier maintains that the Organization failed to show, with probative evidence, that the work they are claiming has been performed by the Organization employees to the exclusion of all others and that there exists a system-wide exclusive past practice of the work being performed by the Organization employees. The Carrier also contends that the Grading Gang Agreement dated June 13, 1974, does not serve as evidence that all grading work belongs to Organization employees and the Carrier has had contractors perform grading work on many occasions since that Agreement went into effect. The Carrier also maintains that the work at issue is just a small portion of a larger overall project and the Carrier is not obligated to piecemeal projects to the Organization members. The Carrier argues that the Claimants were fully employed at the time the work was performed and lost no compensation. In addition, the Carrier maintains that the Organization's claim is excessive in that each of the Claimants is listed in other claims covering the same period of time and, therefore, could not have been performing all of the work claimed for at the same time and cannot be considered proper Claimants in the instant case.

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 Carrier gave the Organization proper notice concerning the type of work that was to be subcontracted. In addition, the Board finds that the Carrier is not required to piecemeal

a job and, further, that the Organization has not proven that it had the needed compaction skills to perform the work involved.

It is fundamental that the Organization bears the burden of proof in cases of this kind. It has not met that burden here. Therefore, 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.