

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 34226  
Docket No. MS-34850  
00-3-98-3-542**

**The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.**

**(Jimmy G. McCallum**  
**PARTIES TO DISPUTE: (**  
**(Burlington Northern and Santa Fe Railway Company**  
**( former St. Louis - San Francisco Railroad Company)**

**STATEMENT OF CLAIM:**

**“Claim of J. G. McCallum that:**

- (1) The Agreement was violated when the Carrier assigned outside forces (Machelle Excavating) to perform Maintenance of Way work, consisting of clearing and de grubbing four acres of land between milepost 238.0 and milepost 239.0 at Blytheville, Arkansas to construct a 4800 foot track off the Mainline. Work began on or about August 28, 1996 and ran through September 13, 1996 (File # B-1439-4/MWC 96-12-19AA).**
- (2) As a consequence of the violation referred to in part (1) above, Special Equipment Operator J. G. McCallum shall be compensated at the applicable Special Equipment Operator’s rate of pay for one operator between August 28, 1996 and September 13, 1996.”**

**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.

Claimant J. G. McCallum contends that the Burlington Northern Santa Fe violated the Agreement by using outside forces to perform Maintenance of Way work between August 28 and September 13, 1996 in order to construct a 4800-foot track off the mainline in Blytheville, Arkansas. He seeks compensation at the Special Equipment Operator's rate of pay for himself, for Maintenance of Way work he asserts should have accrued to him rather than to a contractor.

It is Mr. McCallum's position that the clearing and degrubbing of land done at Blytheville, Arkansas during the dates in question, which was completed by the Carrier contractor, was work that has been done on a regular basis and continues to be done by Maintenance of Way employees. Mr. McCallum contends that the Maintenance of Way employees frequently complete this type of work, which includes road crossings that have to be at grade to drain correctly and have the proper amount of rock beneath the ties.

In the case at hand, Mr. McCallum asserted that Machele Excavating spread and compacted the fines, "work Maintenance of Way employees do all the time." Further, he contends that the contractor "did not complete any work that could not have been completed by the Maintenance of Way workers who were ready and able to do the job, and to whom the profit from the job rightfully belonged." Additionally, McCallum contends that he had the expertise through licensing and experience to complete this work. The evidence he offers for his qualifications is a seniority roster dated March 1, 1998, which states he is qualified for the following:

"Rail Layers - Burros, American/Ohio Locomotive Cranes, Rubber Tired/Crawler Cranes, Speed Swing, Crawler Loaders, Rubber Tired Front End Loaders, Weed Mowers, Backhoes and Dozers."

In addition, he includes records from a personal diary with notes indicating he performed dozer work on the following days in 1996:

"February 12, May 1, 2, June 27, July 22, 23 and August 5, 26. . . ."

The Carrier asserts that the work in question has not been performed exclusively by Carrier forces, and that it has been done by outside forces in the past. Further, the Carrier contends that its forces did not possess the requisite compaction skills to perform the dirt work portion of the project. The Carrier asserts that it is not obliged to piecemeal

projects such as the one completed in Blytheville, Arkansas. Additionally, the Carrier contends that McCallum's claim is procedurally improper, since the Claimant has listed a different claim before the Board than the one handled on the property, and has not cited a Rule that the Claimant believed the Carrier violated. Lastly, the Carrier asserts that the Claimant did not suffer any damages thus he is not entitled to any compensation for the alleged violation of the Agreement as he was fully employed at the time in question.

With respect to the Carrier's procedural objection, we do not find that the irregularity is sufficiently serious to warrant a finding that the claim before the Board was void *ab initio*. Key to the merits of the case at hand is whether or not the Carrier violated the Agreement by using a contractor to perform earth work rather than utilizing a Maintenance of Way employee for the same task. While the record does contain documentation that the Claimant may possess the qualifications to perform the work in question, and that similar work may have been performed by the Claimant and other Maintenance of Way employees in the past, there is no persuasive evidence that the work accrues solely to the covered employees. Also, there is no evidence in the record that refutes the Carrier's assertion that the contracting out of this type of work is a common practice. Accordingly, we find that the Claimant has not met the necessary burden of persuasion.

**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.**