

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35386
Docket No. MW-33831
01-3-97-3-323**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railway (former St. Louis-
(San Francisco Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Herzog Co.) and junior foreman B. R. Winchester to pick up used ties between Mile Posts 603 and 651 on June 29 through July 31, 1995 (System File B-966-2/MWC 95-09-22AB SLF).**
- (2) The Agreement was violated when the Carrier assigned outside forces (Herzog Co.) and junior foreman B. R. Winchester to pick up used ties between Madill and Irving, Texas on August 16 through 31, 1995 (System File B-966-4/MWC 95-10-05AA).**
- (3) As a consequence of the violation referred to in Part (1) above, Foreman L. M. McGarry and Special Equipment Operator M. W. Carter shall each be compensated for one hundred sixty (160) hours' pay at their respective straight time rates and sixty-nine (69) hours' pay at their respective time and one-half rates.**
- (4) As a consequence of the violation referred to in Part (2) above, Foreman L. M. McGarry and Special Equipment Operator M. W. Carter shall each be compensated for ninety-six (96) hours' pay at their respective straight time rates and thirty-seven and one-half (37 ½) hours' pay at their respective time and one-half 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.

The Claimants in this instant case are a Special Equipment Operator and a Foreman whom the Organization alleges were not utilized in violation of the Scope Rule. It points to the March 1, 1951 Agreement noting that the Carrier contracted the pick up of used ties with an outside contracting firm of Herzog Company. The claim as developed on-property is that the Carrier should have used Special Equipment Operator Carter, who was qualified on a backhoe, instead of the outside contractor, and further, that the use of junior Foreman Winchester working with the outside contractor, when a senior Foreman (Claimant McGarry) should have been used, violated the Agreement.

The Carrier denied that the Claimants should have performed the work in dispute. It argued that on the dates of August 16 through 31, 1995, it had properly given notice to contract out the work of loading ties into hopper cars. The Carrier denied any Agreement violation. It maintained that the work in question was not within the Scope Rule and was not protected. It argued that the equipment utilized was special equipment; that the contractor had never been willing to allow anyone other than its own employees to operate the equipment; and that the employees on this property had never operated the machines.

The Board finds no probative evidence that the work is Scope covered. There is no proof in this record to substantiate argument that Foreman McGarry should have been used in preference to the junior Foreman. We find no probative evidence to dispute the Carrier's arguments that the contractor utilized special equipment, was

unwilling to use BMW-represented employees and that the work of loading ties into hopper cars was not reserved to the employees.

What we do find is that this is not a new issue. A review of past decisions finds them almost identical and certainly on point with this instant dispute. Past Awards have found that the use of the special equipment from Herzog is not violative of the Agreement and that there is nothing within the 1995 time frame of this dispute that would reserve this work to the Organization (Public Law Board No. 3460, Award 63; Public Law Board No. 4768, Award 47). Additionally, Third Division Awards 31615 and 32153, involving the same parties and covering near identical situations, found that the use of a Special Equipment Operator is unnecessary and that the contracting out of this work to Herzog was customary. There is nothing in this record to find that the Carrier by its instant actions violated the Agreement.

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 20th day of March, 2001.