

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36021
Docket No. MW-34515
02-3-98-3-156**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe Railway (former Fort Worth
(and Denver 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 (Verna Shinn, Inc.) to perform Maintenance of Way work (drive sheet piling) at the ends of a bridge at Mile Post 43 near Decatur, Texas on December 9, 10, 11, 16, 19, 20 and 23, 1996 (System File FP-97-01/MWD 970424AA FWD).**
- (2) As a consequence of the violations referred to in Part (1) above, Messrs. B. R. McKinney, W. J. Chelf, P. H. Smith and F. Rodrigues shall each be compensated for an equal proportionate share of the one hundred fifty-three (153) 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.

At the time of the incidents in question, Claimants B. R. McKinney, W. J. Chelf, P. H. Smith and F. Rodrigues established and held seniority in the B&B and Road Equipment Subdepartments of the Maintenance of Way and Structures Department. On the dates that the instant dispute arose, they were regularly assigned to positions within their designated classifications.

On December 9, 10, 11, 16, 19, 20 and 23, 1996, the Carrier assigned outside forces (Verna Shinn, Inc.) to perform work driving sheet piling at the bridge located at Mile Post 43 near Decatur, Texas. Three contractors' employees performed the work of positioning and driving sheet piling at the ends of a bridge at Mile Post 43 for ten hours each workday, December 9, 10, 11, 16, 20, and 23, 1996. The outside forces worked three hours on December 19, 1996. Thus, a total of 153 man-hours were expended performing the above-described work. The Carrier notified the General Chairman in writing of its plans to contract out the work involved here. A meeting was held to discuss the Carrier's plans to contract out said work. However, the parties were unable to resolve the matter. These facts do not appear to be in dispute.

The Organization takes the position that the Carrier violated the Agreement in this case. First, it claims that its work forces, particularly the Claimants, have historically, traditionally and customarily performed all of the subject work involved in this matter. According to the Organization, the Claimants were fully qualified, willing and available to perform all of the work involved in this dispute and would have done so if the Carrier had assigned them thereto. Further, although the Carrier alleges that it did not possess the proper equipment to complete the work, the record on the property did not support such position. Further, Smith identified at least one piece of Carrier equipment, a 40-ton crane which was capable of completing the work in question. Even if the equipment had not been available to the Carrier, according to the "Good-Faith" paragraph of the December 11, 1981 letter, the Carrier had an obligation to procure the equipment by lease. However, the Organization claims that no such efforts were made. Last, the Organization claims that the Carrier made no effort to explain why it never considered using any of its own on-track heavy cranes to accomplish this work.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. First, the Carrier contends that the work involved has not been traditionally and historically performed by the Organization's employees and the work in question is therefore not reserved to the Organization. Further, the Carrier does not possess the equipment necessary to complete the required work, a 50-ton crawler crane. While the Organization asserts that the Carrier possesses equipment capable of completing the necessary work, the Carrier contends that this is only an assertion and not substantiated. Finally, while

the Organization claims a violation of the December 11, 1981 side letter, there is nothing in the on-property record to support such consideration.

After a review of the evidence, the Board finds that the Organization has not been able to sustain its burden of proof in this matter. It is clear that the burden of proof is on the Organization to show persuasive evidence of traditional and historical performance of the work claimed. Numerous arbitrators have sustained this position. For example, in Third Division Award 30780 the Board held:

"The Organization alleges a violation of the Scope Rule, which is 'general' in nature in that it does not specifically describe and reserve work to employees in the listed classification, in this case, Roadway Equipment Operators. It is too well settled to require citation that under such contract language the Organization has the evidentiary burden of proving reservation of the claimed work by a custom, practice, or tradition of exclusive performance.

The Organization was unable to shoulder its burden with regard to exclusivity/past practice on this record."

See also Third Division Awards 31829 and 30515.

In this case, the Organization claims that its employees have historically and traditionally been engaged in the work of driving piling. Specifically, in support of this position, the Organization points to the letter of Patrick H. Smith, the Local Chairman of Lodge 1082 which states:

"You will see by the attached pictures that our people have the equipment and know how to do this work. The pictures of the yellow crane were taken in about 1988. The pile driver operator was claimant Chelf and two of the other claimants Smith and Rodrigues were also on this job north of Amarillo, Texas. The other pictures showing the red crane marked contractors were taken at M.P. near Decatur in December 1996. You may also notice that the Burlington Northern Equipment is in better shape and I feel our people are better trained."

While this statement by Smith is some evidence to show that the Organization has historically been involved in this work, it is not sufficient to meet its burden of proof. There must be more evidence to show that the Organization has historically and customarily engaged in the work. The photographs, taken eight years apart show the Claimants working on similar equipment. However, these four photos, in and of themselves, do not show a pattern which indicates that the Organization has historically and customarily performed this work.

This Board identified the standard for how much evidence must be presented in order for the Organization to sustain its burden of proof in prior Awards. In Third Division Award 31017 we noted:

“It is the opinion of the Board that the Organization has failed to sustain their burden. Other than mere assertion, the only evidence produced by them to show they have historically done the work, is documentation that Carrier forces did a one-time minor repair project on a specific class of trailer that lasted a relatively short period of time. The evidence falls far short of establishing a history and custom of repairing trailers. While the Organization need not show an exclusive practice, the ‘historically and customary’ standard requires sufficient evidence to convince the Board that repair by Carrier forces was the usual and ordinary course of action.”

See also Third Division Awards 31829 and 29332.

Thus, the Organization has neither identified clear Agreement language reserving the work to the Organization nor has it proved with specific evidence that said work was traditionally performed by these forces. Because the Organization has not met its burden of proof, 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 21st day of May, 2002.