

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35384  
Docket No. MW-33718  
01-3-97-3-185**

**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 (former Burlington**  
**( Northern 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 (Shipley Construction Company) to perform Maintenance of Way and Structures Department work (installation of a new sewer system) at the West Burlington Shops, Burlington, Iowa on April 18, 1994 and continuing (System File C-94-C100-75/MWA 94-8-17AF BNR).**
- (2) The Agreement was further violated when the Carrier failed to make a good-faith effort to reduce the incidence of subcontracting and increase the use of the Maintenance of Way forces as required by Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. L. Friend, L. H. Baker, D. L. Foutch, D. O. Horn, M. S. Douglas, D. E. Brackett and B. D. Lahart shall each be compensated at their respective straight time and /or overtime rates of pay for an equal proportionate share of the total number of man-hours expended by the outside forces in the performance of the work in question beginning April 18, 1994 and continuing until the violation ceased.”**

**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 claim at bar involves a situation where there was clear notice given to the Organization on September 1, 1993 to contract out work. The parties apparently could not reach an agreement in their discussion on October 21, 1993. Thereafter, beginning on April 18, 1994, Shipley Construction Company began installation of a new sewer system. It is alleged by the Organization that this work had been historically performed by the employees. The Organization alleges that the sewer work could have been separated out from the project and given to the employees. It points out that the contractor actually subcontracted out this specific work from the overall building construction. Accordingly, while the Carrier is not required to "piecemeal" out a project, in this case, the work belonged to the employees by historical performance and should have been performed by them.**

**The Carrier defends its actions throughout the on-property record by insisting that what was involved was a large construction project. Details provided indicate the building at the West Burlington Shops in Burlington, Iowa, of a 53,000 square foot cold storage warehouse with foundation, utility tunnel, storm water line and other necessary work. The Carrier maintained that it had historically contracted out such projects in whole, and the work herein disputed was incidental to the project. It argued that given the history, magnitude of the project and that the employees lacked "special skills" as per the Note to Rule 55, its actions were in compliance with the Agreement.**

**The Board studied the Organization's strongly argued position that this was work customarily belonging to the employees. Our review finds no evidentiary support.**

The Carrier's letter dated February 10, 1997 suggests otherwise and is not rebutted. Further, not only does said letter indicate a history of contracting out large projects, but also rebuts the Organization's allegation that this work could have been easily separated out as it had been subcontracted by the main contractor. The Carrier points to the fact that the work had to be co-ordinated by the contractor and the Carrier could not have had employees available at the "whim of the contractor."

A full review of all the arguments presented by the Organization does not lead to the conclusion that the instant work of sewer construction could have been cleanly separated apart from the overall building work. We are aware that Awards have held that where there is evidence work can be efficiently separated out or where the Carrier has maintained control, the Carrier has been held to have violated the Agreement (Public Law Board No. 4768, Award 25; Third Division Award 35169 with Members' Dissent). There is no evidence in this record that the disputed work is distinct and could be segregated from the overall building project. Nor does a review of evidence prove that this work has been customarily and traditionally performed by the employees. We conclude that the full record leads to the conclusion that such contracting out of large construction projects has been historically permitted to the Carrier and that the Carrier in this record is not required to piecemeal this instant work from the major project of building the cold storage warehouse for locomotive components.

**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.