Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35385
Docket No. MW-33725
01-3-97-3-184

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 or otherwise allowed outside forces (Knox Kershaw, Inc.) to perform mechanic work (repair and maintain the track cleaner operated by R. Wilson) in the Springfield Yards from October 24 until November 7, 1994 (System File B-2012-2/MWC 94-12-14AB SLF).

(2) As a consequence of the violation referred to in Part (1) above, Mechanic J. S. Williams shall be compensated eighty-eight (88) hours' pay at his straight time rate and fourteen (14) hours' pay at his time and one-half rate."

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 record on property indicates that the Carrier provided notice to the Organization on February 7, 1994 that it would continue its contracting with Knox Kershaw, Inc. for the lease of four yard cleaners to include an assisting technician. Each machine would be operated by a qualified BMWE employee.

Claim was filed by the Organization on November 29, 1994 asserting that the Carrier used a Knox Kershaw Company mechanic on the track cleaner, in violation of the March 1, 1951, May 17, 1968, February 18, 1963, and December 11, 1981 Agreements. It requested pay for 88 straight time hours and 14 overtime hours. The Carrier denied that the Agreement provisions cited were proved violated and contested damages as speculative. Beyond this exchange there is a dearth of on-property exchange.

However, when this matter was submitted to the Board, the Submissions were extensive. The Organization raised all sorts of new Rules issues, including Scope. It asserted among its new arguments, with underlined emphasis that this work was "customarily and traditionally performed by the employes." Similarly, the Carrier's Submission raised issues of exclusivity. Also, the Carrier took issue with the Organization's on-property evidence. Absent argument properly made while the dispute was on the property it is new argument which the Board must ignore.

What is in the on-property handling among the scarcity of this dispute is the following. The Organization made an allegation that was denied. It stipulated Rules violations that were not disputed. Absence of a Rule is raised for the first time in Submission by the Carrier. Nowhere on the property was there evidence of confusion, lack of knowledge about the contentions of the Organization or any substantive dispute that suggested any reason to now challenge the issue based upon uninformed or altered contentions (Third Division Awards 20183, 20121). Clearly, the dispute was well understood by both parties.

The Organization was required to make a prima facie case of a violation. In doing so, it presented argument of a violation. The Carrier's notice stated an outside contractor would provide "a technician to assist with the operation and maintenance of the machine." The Organization alleged violation in that an employee with seniority as a Mechanic was denied the right to do Mechanic's work on the track cleaner. After

denial of any violation by the Carrier, the Organization introduced a letter signed by four employees. The letter stated a rejection of the Carrier's position that "mechanics do not work on leased machines. . . ." It listed equipment leased and stated that "only our mechanics worked on them." Specific to the instant claim, and probative evidence it stated:

> "This yard cleaner was on our territory with a mechanic during this last year. It was written up by J. S. Curtis and J. S. Williams and they both collected claims respectively."

Both employees identified above were among the four Mechanics signing the submitted letter.

The Board reviewed this letter carefully as the Organization gives it great weight. We note that there was no rebuttal by the Carrier on the property. The Carrier's arguments in its Submission come too late and therefore have not been considered. Our review indicates that the letter fails to provide substantial probative evidence to support this claim. The letter begins by arguing that Mechanics work on leased machines. It covers numerous contractors and types of machines, but does not list Knox Kershaw or the track cleaner. It continues to point out that Mechanics worked and made repairs to all the machines and billed payroll for work on leased equipment. Only in the last two sentences, supra, does it mention the yard cleaner. The notice indicated that each machine would have "a technician to assist with the operation and maintenance of the machine" although operated by a BMWE employee. It is speculative as to what was "written up" or what was meant by "with a mechanic" in the above statement.

In order to sustain its claim, the Organization is required to put forth sufficient evidence to demonstrate a violation. In the whole of this case, it has not met its burden and the claim must fail.

## 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.